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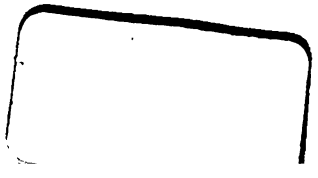
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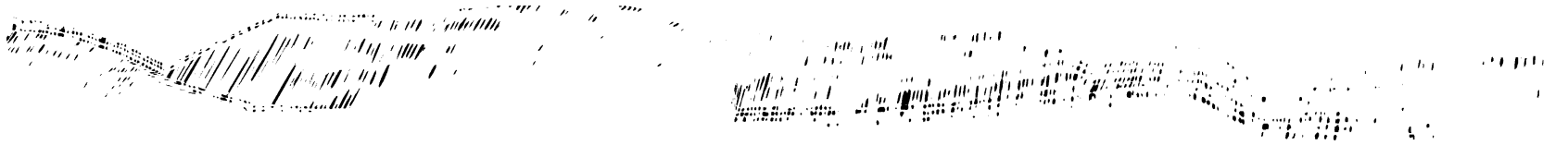
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A TREATISE

ON

NEW TRIAL AND APPEAL

BY

ROBERT Y. HAYNE,
Of the San Francisco Bar

REVISED AND RE-EDITED

BY

J. R. PRINGLE
Of the San Francisco Bar

AND

W. H. HYATT
Of the Los Angeles Bar

PRESENTING AND ILLUSTRATING THE LAWS AND RULES OF PRACTICE IN CALIFORNIA, ARIZONA, COLORADO, IDAHO, MONTANA, NEVADA, NEW MEXICO, NORTH DAKOTA, OKLAHOMA, OREGON, SOUTH DAKOTA, UTAH, WASHINGTON, WYOMING

IN TWO VOLUMES

VOLUME I

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PREFACE TO FIRST EDITION.

The purpose of this treatise is to give an account of the modes in which the proceedings of courts of justice may be reviewed, and the practice in relation thereto. The ordinary proceedings for review are motions for new trial in the court which rendered the decision, and appeals to a higher court; and accordingly the main portion of the work is devoted to these two modes, viz., new trial and appeal. In addition to these it has been deemed advisable to give an account (much less extended) of what may be termed the extraordinary modes of review; viz., writs of *certiorari*, prohibition, and *habeas corpus*, and actions in equity for relief against judgments. And to these have been added a chapter on the writ of *mandamus*, and a chapter on motions for relief against judgments by default.

The book is intended for use in every-day practice, and this purpose has determined several features of its plan.

1. Its scope has been limited (except as stated below) to the practice in California. The systems of procedure of the various states are very different, and depend to a great degree upon statutory provisions, which have been frequently changed in the past, and are subject to as frequent change in the future. And it would be impracticable to trace out in detail the varying enactments of so many states. But to attempt to give the practice of other states without giving an accurate account of their statutory enactments would be to make either a book of mere generalities, or one entirely misleading. Accordingly, the work has been limited to the practice in California. But with reference to this it has been attempted to give a history of the variations of the law from the foundation of the state to the date of publication.

In two particulars the limit above mentioned has been overstepped. In treating the first three subdivisions of the section in relation to the grounds upon which a new trial may be granted,—viz., irregularity of the court, jury, or adverse party, misconduct of

the jury, and accident or surprise, etc.,—the decisions of other states have been resorted to. This was done for the reason that these subjects are common to almost all systems, and because the California decisions in relation to them are few. And in treating the four writs and actions for relief in equity, the decisions of the U. S. supreme court have been made use of. The purpose has been, however, to illustrate the practice prevailing in the courts of California, and not to give the practice of other courts in its full extent.

2. It has been sought to give the law as it is, and as it has been, avoiding disquisitions as to what it ought to be. Such disquisitions might possibly be of use to legislators, but would be entirely irrelevant to the needs of daily practice. Accordingly, while the writer has attempted, as far as possible, to harmonize the cases, and to extract the true principle from conflicting decisions, he has not thought it worth while to criticise established rules, except in the few instances in which they seemed to be radically unsound, and likely to be overturned; and even in such instances care has been taken to point out what the existing rules are.

3. The aim has been not merely to state the law, but to *show* it. A mere statement of rules followed by a citation of cases looks very neat and concise; but it throws the entire burden of examining the citations upon the person who consults the book, who may not have at hand the reports of the cases referred to. And while the practitioner will always examine the citations to some extent, yet he may be saved a great deal of labor if he has before him not merely the conclusions of the writer, but also the materials from which such conclusions are drawn.

Such are the main features of the work. With the hope that it may be found useful, it is submitted to the profession.

ROBERT Y. HAYNE.

COLORADO SPRINGS, May 1, 1883.

PREFACE TO REVISED EDITION.

The destruction by fire in 1906 of the publisher's plates of Robert Y. Hayne's Treatise on New Trial and Appeal led the writer, with the desire to keep green the memory of one much loved and admired by him, to undertake this revising and re-editing of Judge Hayne's book. It was soon discovered that one in active practice at the Bar could not complete the task in time to meet the demands of the profession or the publishers, and so, for more than two years and a half, Mr. W. H. Hyatt has given to this work his undivided attention. Volumes 61 to 159, inclusive, of the California Reports, and Volumes 1 to 15, inclusive, of the California Appellate Reports, together with all the reports of the remaining Western States, have been examined and cited where applicable, references being made to the latest revision of the laws of all states where the text has a direct bearing on same. Mr. Hyatt is entitled to full credit for his insistent labor and scholarly investigation, and I take great pleasure in expressing my appreciation to him for doing truly the major portion of this work.

JANUARY, 1912.

J. R. PRINGLE.

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§ 282. A party will not be heard on an appeal from a judgment or order to which he consented in the court below.
§ 283. The appellate court is confined to the record before it, which it has no power to change.
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§ 285. Presumption is in favor of the action of the court below—The party alleging error must make it affirmatively appear.
§ 286. A judgment or order will not be reversed for an error that was not injurious to the appellant.
§ 287. Where error is shown injury will be presumed unless the contrary affirmatively appears.
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PART I.

NEW TRIAL.

(1)



NEW TRIAL.

CHAPTER I.

INTRODUCTORY.

§ 1. Definition.
§ 2. Proceedings are collateral to main action—Appeal from order independent of appeal from judgment.
§ 3. Pendency of motion does not stay execution.
§ 4. Parties who may make motion.
§ 5. Proceedings of which new trial may be had.
§ 6. Courts which may entertain motion.
§ 7. Code provisions are exclusive—Apply alike to cases at law and in equity.
§ 8. Apply to referees.
§ 9. When motion should be made and when application for relief under section 473, Code of Civil Procedure.
§ 9a. Effect of change of law pending proceedings.
§ 10. New trial by court *sua sponte*.
§ 11. Steps necessary to be taken—Division of subject.

§ 1. Definition.—The several Codes of Civil Procedure define a new trial as follows:[1] "A new trial is a re-examination of an issue of fact in the same court after a trial and decision by a jury or court, or by referees."[1a] This has been the

[1] *Arizona:* New trial not defined by statute.
California: Section 656, Code of Civil Procedure.
Colorado: Section 216, Mills' Annotated Code.
Idaho: Section 4438, Revised Codes.
Montana: Section 6793, Revised Codes; section 1170, Code of Civil Procedure.
Nevada: Section 3289, Cutting's Compiled Laws; section 194, Civil Practice Act.
New Mexico: New trial not defined by statute.
North Dakota: Section 7062, Revised Codes.
Oklahoma: Section 5825, Compiled Laws of 1909.
Oregon: Section 173, Lord's Oregon Laws.
South Dakota: Section 300, Code of Civil Procedure.
Utah: Section 3291, Compiled Laws.
Washington: Section 398, Rem. & Bal. Code; section 5070, Bal. Code.
Wyoming: Section 4601, Compiled Statutes.

[1a] This is [illegible] language of the codes of Cali[illegible] Idaho, Montana, Nevada, Nor[illegible]ota, and South Dakota. It [illegible]lightly in the other states, b[illegible]ubstantially the same in all.

In Arizona, as heretofore noted, although provision is made for new trials, the legislature has not seen fit to define the proceeding.

Section 198 of the Colorado code of 1877 was a copy of the California section quoted. It was afterward amended in two minor points by strik-

statutory definition ever since 1851.[2] It consists of several elements.

1. The first element is, that a new trial is a re-examination of *an issue of fact.*[2a] It is not a re-examination of a conclusion of

ing out "a" before "trial," and changing "referees" to the singular form.

The above remark as to Arizona applies with equal force to New Mexico.

Section 5825, Compiled Laws of Oklahoma, is as follows: "A new trial is a re-examination, in the same court, of an issue of fact, after a verdict by a jury, report of a referee, or a decision by the court. "

Section 173, Lord's Oregon Laws, is as follows: "A new trial is a re-examination of an issue of fact in the same court after a trial and decision or verdict by a court or jury."

Section 3291, Compiled Laws of Utah, is as follows: "A new trial is a re-examination of an issue of fact in the same court after a trial and decision by a jury, court, judicial officer, or referees."

Section 398, Rem. & Bal. Code of Washington (section 5070, Bal. Code), is the same as the section quoted in the text, except that the words "of fact" are omitted, inadvertently, no doubt, as suggested by the compilers of the Rem. & Bal. Code.

Section 4601, Compiled Statutes of Wyoming, is as follows: "A new trial is a re-examination in the same court of an issue of fact, after a verdict by a jury, a report of a referee or master, or a decision by the court;"

[2] *California:* Laws of 1851, page 81, section 192.

Colorado: Section 198, Code of 1877. (Adopted from California.)

Idaho: Section 410, Code of Civil Procedure of 1881; section 4438, Revised Statutes of 1887. (Adopted from California.)

Montana: Section 232, Civil Practice Act of 1872. (Adopted from California.)

Nevada: Section 194, Civil Practice Act of 1861. (Adopted from California.)

North Dakota: Section 285, Code of Civil Procedure of 1877; section 5472, Revised Codes of 1899. (Adopted from California.)

Oklahoma: Section 4196, Statutes of 1893.

Oregon: Laws of 1862; section 231, Deady's Digest; section 234, Hill's Code; section 173, B. & C. Comp.; Laws of 1907, chapter 102, page 311, section 1.

South Dakota: Section 285, Code of Civil Procedure of 1877; section 5087, Compiled Laws of 1899. (Adopted from California.)

Utah: Section 3399, Compiled Laws of 1888; section 3291, Revised Codes of 1898. (Adopted from California.)

Washington: Section 215, Laws of 1854, page 170; section 275, Code of 1881; section 399, 2 Hill's Code. (Adopted from California.)

Wyoming: Section 2652, Revised Statutes of 1887. (Adopted from California.)

[2a] A motion which does not ask for a decision on an issue of fact arising on the pleadings is not the subject of a new trial. Harper v. Hildreth, 99 Cal. 265, 33 Pac. 1103; Beach v. Water Co., 21 Mont. 7, 52 Pac. 560. "If no issue of fact, there can be no new trial." People v. George, 3 Idaho, 108, 27 Pac. 680.

The code (see section 588, California Code of Civil Procedure; section 4365, Revised Codes of Idaho; section 6720, Revised Codes of Montana; section 1030, Code of Civil Procedure; section 3248, Cutting's Compiled Laws of Nevada; section 153, Civil Practice; section 2685, subsection 107, Compiled Laws of New Mexico; section 7004, Revised Codes of North Dakota; section 109, Lord's Oregon Laws; section 239, Code of Civil Procedure of South Dakota; section 309, Rem. & Bal. Code of Washington; section 4962, Bal. Code; section 4450, Compiled Statutes of Wyoming) defines an *issue* to be the maintenance of a fact or conclusion of law by one party and its controversion by the other. It also (see note 1, *supra*) defines a new trial to

law.[3] Upon this ground it has been held that where the court erred in deducing its conclusions of law from the facts found, the error could not be corrected on motion for new trial;[4] for the substitution of different conclusions of law upon the same facts would not be "a re-examination of an issue of fact."[4a] So, making use of slightly different phraseology for practically the same question, it has been held that erroneous conclusions of law

be the re-examination of an issue of fact, after a trial and decision by a jury or court or referees. Also (see section 23, *post*), it provides that a new trial may be granted for specified causes materially affecting the rights of the party. Therefore, a motion for a new trial is authorized at law, in equity, or in a special proceeding, whenever an issue of fact has been presented for determination. People v. Bank of San Luis Obispo, 152 Cal. 261, 92 Pac. 481.

Prior to the adoption of the existing code the Oklahoma practice was regulated by provisions adopted bodily from the Indiana code. The latter permits a new trial in all cases, as a matter of right, where the ownership of real property is the subject of the controversy, and the rule was thus expressed in Hammer v. Rogers, 21 Okl. 367, 96 Pac. 611: "The new trial must be limited, however, to the controversy between these parties, and to the issues affecting the ownership, the right to the possession of the land, and the value of the use thereof from the time the defendant trust company took possession. It is not important that issues other than the title and the right to the possession of the land are involved in this action, for upon all issues not affecting such title or right to the possession the former judgment is final and conclusive."

[3] Error in law occurring at the trial is ground for a motion for new trial. Code of Civil Procedure, sec. 657. But that is because such errors in law result in erroneous decisions of fact. Martin v. Matfield, 49 Cal. 42. See, also, section 99, *post*. And the same may be said of the various other grounds prescribed in section 657 of the California Code of Civil Procedure.

[4] Jenkins v. Frink, 30 Cal. 586, 89 Am. Dec. 134; Shepard v. McNeil, 38 Cal. 72. See, also, section 99, *post*. The contrary was stated by McKee, J., in Simmons v. Hamilton, 56 Cal. 493; but only one justice concurred in the opinion. Ross, J., dissented, and Sharpstein, McKinstry, and Myrick, JJ., placed their concurrence upon the ground that an error in law had occurred at the trial. Wheeler v. Bolton, 92 Cal. 159, 28 Pac. 558; Pacific etc. Co. v. Fisher, 106 Cal. 224, 39 Pac. 758; Owen v. Pomona L. & W. Co., 131 Cal. 530, 63 Pac. 850, 64 Pac. 253; Rose v. Mesmer, 142 Cal. 322; Mentone Irr. Co. v. Redlands etc. Co., 155 Cal. 323, 100 Pac. 1082, 22 L. R. A., N. S., 382, 17 Ann. Cas. 1222.

[4a] But the court has power at any time before judgment to substitute different conclusions of law. Condee v. Barton, 62 Cal. 1; and see section 247, *post*. This, however, is by way of amendment of the findings. The conclusions of law, in the modern practice, have come to be regarded as of so little consequence as to be susceptible of repeated amendment, or reformation; and to bear so formal a relationship to the findings upon the one hand, and the judgment, on the other, that their ancient functions have undergone practical elimination. In Roberts v. Hall, 147 Cal. 434, 82 Pac. 66, the court said: "When judgment is given by the court, it is itself the real conclusion of law, and supersedes any conclusion of law embraced in the decision." Again, in the recent case of Mentone Irr. Co. v. Redlands etc. Co., 155 Cal. 323, 100 Pac. 1082, 22 L. R. A., N. S., 382, 17 Ann. Cas. 1222, citing the case of Roberts v. Hall, *supra*, the court said: "The conclusions of law are always merged in and superseded by the judgment."

from the facts as found,[4b] or alleged insufficiency of the findings of fact to sustain the conclusions of law,[4c] could not be considered on a motion for a new trial. Again, insufficiency of the findings to authorize the judgment,[4d] or insufficiency of the conclusions of law to support the judgment,[4e] also varying forms of essentially identical judicial questions, have no place in the determination of motions for new trials. Nor can the insufficiency of the verdict to support the judgment be so considered.[4f]

But if some of the issues of fact are left unfound, a re-examination of such issues is necessary, and consequently a motion for a new trial is proper.[5] The omitted fact being essential to the judgment, a new trial for the purpose of determining the issue is the appropriate remedy.[5a] So, it is said that if the findings are hope-

[4b] See Mentone Irr. Co. v. Redlands etc. Co., 155 Cal. 323, 100 Pac. 1082, 22 L. R. A., N. S., 382, 17 Ann. Cas. 1222, and other cases cited in note 4, *ante*.

[4c] Petaluma Paving Co. v. Singley, 136 Cal. 616, 69 Pac. 426; Sharp v. Bowie, 142 Cal. 462, 76 Pac. 62; Swift v. Occidental etc. Co., 141 Cal. 161, 74 Pac. 700.

[4d] Wheeler v. Bolton, 92 Cal. 159, 28 Pac. 558; Kirman v. Hunnewill, 93 Cal. 519, 29 Pac. 124; Brison v. Brison, 90 Cal. 327, 27 Pac. 186; Riverside etc. Co. v. Gage, 108 Cal. 240, 41 Pac. 299; Rauer v. Fay, 128 Cal. 523, 61 Pac. 90; Schroeder v. Pissis, 128 Cal. 209, 60 Pac. 758; Fogarty v. Fogarty, 129 Cal. 46, 61 Pac. 570; Reclamation District v. Thisby, 131 Cal. 572, 63 Pac. 918; Moore v. Douglas, 132 Cal. 399, 64 Pac. 705; Hunter v. Milam, 133 Cal. 601, 65 Pac. 1079; White v. Costigan, 138 Cal. 564, 72 Pac. 178; Simon Newman Co. v. Lassing, 141 Cal. 174, 74 Pac. 761; Coburn v. California etc. Co., 144 Cal. 81, 77 Pac. 771; Brownlee v. Reiner, 147 Cal. 641, 82 Pac. 324; Bell v. Staacke, 151 Cal. 544, 91 Pac. 322; Great Western Gold M. Co. v. Chambers, 153 Cal. 307, 95 Pac. 151; Crescent etc. Co. v. United Upholsterers, 153 Cal. 433, 95 Pac. 871; Black v. Harrison Home Co., 155 Cal. 121, 99 Pac. 494; Younger v. Moore, 155 Cal. 767, 103 Pac. 221. Also Burns v. Schoenfeld, 1 Cal. App. 121, 81 Pac. 713.

[4e] Pierce v. Willis, 103 Cal. 91, 63 Pac. 1080; Williams v. Hawley, 144 Cal. 97, 77 Pac. 762; Brownlee v. Reiner, 147 Cal. 641, 82 Pac. 324.

[4f] Morse v. Wilson, 138 Cal. 558, 71 Pac. 801.

[5] Knight v. Roche, 56 Cal. 15; Soto v. Irvine, 60 Cal. 436; Brown v. Burbank, 59 Cal. 535; Spotts v. Hanley, 85 Cal. 155, 24 Pac. 738; Langan v. Langan, 89 Cal. 186, 26 Pac. 764; Nuttall v. Lovejoy, 90 Cal. 163, 27 Pac. 69; Adams v. Helbing, 107 Cal. 298, 40 Pac. 422; Haight v. Tryon, 112 Cal. 4, 44 Pac. 318; Kaiser v. Dalto, 140 Cal. 167, 73 Pac. 828; Swift v. Occidental etc. Co., 141 Cal. 161, 74 Pac. 700; Great Western G. M. Co. v. Chambers, 153 Cal. 307, 95 Pac. 151; Lyden v. Spohn-Patrick Co., 155 Cal. 182, 100 Pac. 236. And see note 5a.

[5a] In some cases the supreme court appeared to have a doubt as to this being a proper application of principle. In Thompson v. Los Angeles, 125 Cal. 271, 57 Pac. 1015, the court seemed to say that failure to find upon a material issue was reviewable only on an appeal from the judgment, inasmuch as it was an error at law appearing on the face of the judgment-roll, and appearing there only, citing in support of this view, In re Westerfield, 96 Cal. 113, 30 Pac. 1104, Wheeler v. Bolton, 92 Cal. 159, 28 Pac. 558, and Brison v. Brison, 90 Cal. 323, 27 Pac. 186. In Churchill v. Flournoy, 127 Cal. 355, 59 Pac.

lessly conflicting, or so directly contradictory as to nullify each other, the situation is practically the same as if there had really been a failure to find altogether; in which event, a new trial would be necessary for the purpose of determining the issue.[5b] The question as to the sufficiency or insufficiency of the evidence to justify the findings raises a plain issue of fact, and is properly determined on a new trial motion.[5c] It is otherwise, however, as to the insufficiency of the evidence to justify the judgment.[5d]

Upon the same principle,—viz., that a new trial is a re-examination of an issue of fact,—it has been held that errors in rulings upon demurrers to pleadings cannot be reviewed on motion for new trial.[6] It is manifest that this is a correct application of the

791, the court stated positively that "the failure to find upon a material issue is no ground for granting a new trial." In Kaiser v. Dalto, 140 Cal. 167, 73 Pac. 828, the point appeared to be conceded grudgingly. It was there held that it must be specified that the failure to find was a decision "against law," and that such specification must be accompanied by a showing that evidence was introduced thereon.

The point was cleared up by the court in the case of Swift v. Occidental etc. Co., 141 Cal. 161, 74 Pac. 700, the opinion in which was written by the learned chief justice: "Decisions against law are of two kinds. As to one kind, a new trial is always an effective, and often the only, means of correcting the error. As to the other kind, a new trial would be a vain and useless proceeding. In the first class of cases the motion is properly made, and error in overruling it is reviewable on appeal from the order. In the second class of cases, since a new trial would afford no relief, and since other and effective means of relief are expressly provided in the Code of Civil Procedure (sections 663 and 663½), the motion for a new trial is necessarily overruled by the trial court and the order affirmed here. An example of the first class is where the trial court has failed to make any finding upon some material issue. The omitted fact being essential to the judgment, a new trial for the purpose of determining the issue is the appropriate remedy, and the refusal to grant it is reviewable on appeal from the order. See Knight v. Roche, 56 Cal. 15; Spotts v. Hanley, 85 Cal. 155, 24 Pac. 738; Haight v. Tryon, 112 Cal. 4, 44 Pac. 318. An example of the second class is where the findings are full and complete as to all the issues, and fully sustained by the evidence, but the conclusions of law are erroneous or misapplied in framing the judgment. In such a case it is plain that a new trial—a re-examination in the same court of the issues of fact, or some of them (Code of Civil Procedure, sec. 656)—would accomplish nothing, whereas a motion in pursuance of section 663 to vacate or correct the judgment would secure the appropriate relief in the trial court, or, if relief was denied there, it could be secured by an appeal from the judgment." See cases cited in note 5, *ante*. Also see section 99, *post*.

[5b] See Kirman v. Hunnewill, 93 Cal. 519, 29 Pac. 124; Black v. Harrison Home Co., 155 Cal. 121, 99 Pac. 494.

[5c] Brison v. Brison, 90 Cal. 323, 27 Pac. 186; Riverside etc. Co. v. Gage, 108 Cal. 240, 41 Pac. 299; Robinson v. Eberhart, 148 Cal. 495, 83 Pac. 452.

[5d] Curtis v. Walling, 2 Idaho, 383 (416), 18 Pac. 54.

[6] Mason v. Austin, 46 Cal. 385; Jacks v. Buell, 47 Cal. 162; and look at Jenkins v. Frink, 30 Cal. 586, 89 Am. Dec. 134; and Spanagel v. Dellinger, 38 Cal. 278. See, also, Heilbron v. Irrigation Co., 76 Cal. 8, 17 Pac. 932; Wheeler v. Kassabaum,

principle. For if final judgment is given upon the demurrer for either plaintiff or defendant, there would be no issues of fact in the case. And if after the ruling upon the demurrer issues of fact be joined, and a trial and decision had, a reversal with directions to sustain the demurrer would result, not in a re-examination of the issues of fact tried, but in the formation of different issues of fact, or in the determination of the case upon issues of law. For similar reasons the principle has been applied to all questions arising out of or affecting the pleadings of an action, or the judgment. Thus it has been held that the sufficiency of the pleadings,[6a] or of the complaint,[6b] to support the judgment, or the sufficiency of the complaint to state a cause of action,[6c] do not form a proper subject of review under a new trial motion. So

76 Cal. 90, 18 Pac. 119; Brison v. Brison, 90 Cal. 323, 27 Pac. 186; Evans v. Paige, 102 Cal. 132, 36 Pac. 406; Byxbee v. Dewey, 128 Cal. 325, 60 Pac. 847; Jones v. Chalfant, 128 Cal. 334, 60 Pac. 852; Holmes v. Warren, 145 Cal. 457, 78 Pac. 954; Great Western Gold M. Co. v. Chambers, 153 Cal. 307, 95 Pac. 151; Crescent etc. Co. v. United Upholsterers, 153 Cal. 433, 95 Pac. 871; Bone v. Hayes, 154 Cal. 759, 99 Pac. 172; Arroyo etc. Co. v. Baldwin, 155 Cal. 280, 100 Pac. 874; Fortain v. Smith, 114 Cal. 494, 46 Pac. 381; Lambert v. Marcuse, 137 Cal. 44, 69 Pac. 620. Also Perkins v. McDowell, 3 Wyo. 328, 23 Pac. 271.

The complement of this rule is also true. That is, no question in controversy which should properly be raised by a demurrer, but is not, can be raised by motion for a new trial. "A party desiring to take advantage of a defect of or misjoinder or excess of parties plaintiff, must promptly interpose an objection in the manner provided by law. Failing so to do, it will not be permitted to speculate upon a favorable verdict, and then, if disappointed by an adverse finding of a jury, be allowed to raise such questions, either in its motion for a new trial or in the appellate court." Choctaw etc. Co. v. Burgess, 21 Okl. 653, 97 Pac. 271; and also Young v. Stickney, 46 Or. 101, 79 Pac. 345.

[6a] Fortain v. Smith, 114 Cal. 494, 46 Pac. 381; In re Redfield, 116 Cal. 637, 48 Pac. 794; Tompkins v. Montgomery, 123 Cal. 219, 55 Pac. 997; Bode v. Lee, 102 Cal. 583, 36 Pac. 936; Southern Pacific Co. v. Superior Court, 105 Cal. 84, 38 Pac. 627; Morse v. Wilson, 138 Cal. 558, 71 Pac. 801; Sharp v. Bowie, 142 Cal. 463, 76 Pac. 62; Cummings v. Kearney, 141 Cal. 156, 74 Pac. 759; Simon Newman Co. v. Lassing, 141 Cal. 174, 74 Pac. 761; Green v. Duvergey, 146 Cal. 384, 80 Pac. 234; Younger v. Moore, 155 Cal. 767, 103 Pac. 221.

[6b] Reclamation District v. Thisby, 131 Cal. 572, 63 Pac. 918; Sutter Co. v. Tisdale, 136 Cal. 474, 69 Pac. 141; White v. Costigan, 138 Cal. 564, 72 Pac. 178; Swift v. Occidental etc. Co., 141 Cal. 161, 74 Pac. 700; Swett v. Gray, 141 Cal. 63, 74 Pac. 439; Coburn v. California etc. Co., 144 Cal. 81, 77 Pac. 771; Williams v. Hawley, 144 Cal. 97, 77 Pac. 762; Frey v. Vignier, 145 Cal. 251, 78 Pac. 733; County Bank v. Jack, 148 Cal. 437, 113 Am. St. Rep. 285, 83 Pac. 705; Great Western Gold M. Co. v. Chambers, 153 Cal. 307, 95 Pac. 151; Jenson v. Will & Finck, 150 Cal. 398, 89 Pac. 113; Crescent etc. Co. v. United Upholsterers, 153 Cal. 433, 95 Pac. 871; Arroyo etc. Co. v. Baldwin, 155 Cal. 280, 100 Pac. 874.

[6c] Onderdonk v. San Francisco, 75 Cal. 534, 17 Pac. 678; Wheeler v. Kassabaum, 76 Cal. 90, 18 Pac. 119; Evans v. Paige, 102 Cal. 132, 36 Pac. 406; Bode v. Lee, 102 Cal. 583, 36 Pac. 936; Lambert v. Marcuse, 137 Cal. 44, 69 Pac. 620; Petaluma Pav. Co. v. Singley, 136 Cal. 616, 69 Pac.

objections to the form of the judgment,[6d] whether the judgment rendered is the proper one,[6e] laches in asking for judgment after submission,[6f] the form of the conclusions of law, which, according to the modern view, are merged in the judgment,[6g] and the correctness of the judgment,[6h] cannot be so reviewed. So findings outside the issues raised by the pleadings is not a ground for new trial.[6k]

But errors *occurring at the trial,* and having an indirect relation to the pleadings, may be ground for a new trial. So at the trial a party may test the question whether his adversary's pleading states a cause of action or defense by objecting to the introduction of any evidence under it, and the ruling upon such objection may be reviewed on motion for new trial.[7] So, an irregularity in the proceedings of the court whereby either party was prevented from having a fair trial, thus to that extent affecting the issues of fact involved, is a recognized ground for a new trial.[7a] And the same may be said of the various other statutory grounds for new trial, in each of which is to be found a clearly defined interference with the right to a fair and impartial determination of all issues of fact involved in every cause of action which may be litigated.[7b]

426. Also, Ross v. Wait, 2 S. D. 638, 51 N. W. 866; Krantz v. Rio Grande etc. Co., 13 Utah, 1, 43 Pac. 623.

Upon this point it was held in Consolidated Canal Co. v. Peters, 5 Ariz. 80, 46 Pac. 74, that the sufficiency of the complaint might be reviewed on a motion for a new trial, but this decision is not in accord with accepted rules or with decisions in other jurisdictions.

[6d] Williams v. Long, 139 Cal. 186, 72 Pac. 911; Davis v. Butler, 154 Cal. 623, 98 Pac. 1047.

[6e] Brownlee v. Reiner, 147 Cal. 641, 82 Pac. 324.

[6f] Kepfler v. Kepfler, 134 Cal. 205, 66 Pac. 208.

[6g] Rose v. Mesmer, 142 Cal. 322, 75 Pac. 905; Sharp v. Bowie, 142 Cal. 462, 76 Pac. 62. And see section 99a, *post.*

[6h] Durfee v. Seale, 139 Cal. 603, 73 Pac. 435.

[6k] Power v. Fairbanks, 146 Cal. 611, 80 Pac. 1075. "The fact that the trial court has made a finding outside the issues does not warrant the granting of a motion for a new trial. Such an objection is available only upon an appeal from the judgment. A new trial is simply a re-examination of an issue of fact, and where there is no issue of fact there is nothing to retry."

[7] Waugenheim v. Graham, 39 Cal. 169. Compare Moore v. Bates, 46 Cal. 29. See, also, Bode v. Lee, 102 Cal. 583, 36 Pac. 936; Southern Pacific Co. v. Superior Court, 105 Cal. 84, 38 Pac. 627; Lambert v. Marcuse, 137 Cal. 44, 69 Pac. 620; Bashore v. Parker, 146 Cal. 525, 80 Pac. 707; Bone v. Hayes, 154 Cal. 759, 99 Pac. 172. 178/140.

[7a] This applies only to civil cases. It was said in People v. Sansome, 98 Cal. 239, that the misconduct of the district attorney was a ground for a new trial, but this is believed to have been inadvertently so decided. In People v. Amer, 151 Cal. 303, 90 Pac. 698, Mr. Justice Angellotti, who wrote the opinion, very clearly showed that only those grounds specifically recognized in section 1181 of the Penal Code as grounds for new trial in criminal cases could be so recognized by the courts. This is in accordance with the well-established principle of the law, both in civil and criminal procedure. See note 7b, below.

[7b] In the consideration of the statutory definition of a new trial, the im-

Upon the same principle,—viz., that a new trial is a re-examination of an issue of fact,—it was, prior to the amendment of 1907 of the code,[7c] held that proceedings for new trial might be commenced as soon as the issues of fact had been determined, and before the entry of judgment thereon.[8] And this was said to be true, not only of the entry of judgment by the clerk, but also of the order for judgment by the judge; for where all the issues of fact were disposed of by a special verdict (at least in a common-law case), the time to give notice of intention began to run from the rendition of the verdict, and not from the determination of the judge as to what judgment should be entered thereon.[9] The amendment referred to has not only changed the time to give notice of intention, so that it now begins to run from reception of notice of the entry of judgment, instead of rendition thereof, but it has also eliminated the distinction which formerly prevailed in the code in the case of verdicts, decisions and reports of referees; but it is believed the change does not affect the application of the principle which formerly obtained[9a] that the notice of intention must be directed at the verdict, or other decision of fact, and not at the judgment.[10]

So, upon the same principle,—viz., that a new trial is a re-examination of an issue of fact,—it has been held that where there is no issue, or conflict as to the facts, as in the case of an agreed statement of facts,[10a] and in the case of a default, where the averments

portant fact must not be lost sight of that neither upon the hearing of the original motion by the trial court, nor the review of the order made thereon by the appellate court, is the consideration of any ground properly involved which is not specifically enumerated by the codes. In section 657, Code of Civil Procedure, are to be found the various grounds for new trial in civil cases; and in section 1181, Penal Code of California (and corresponding sections of the codes of other states, see note 1, *supra*), is set out a list of such grounds in criminal cases.

"Where a complete scheme of procedure is provided by the statute from the commencement of the action to the entry of the judgment and expressly provides for an appeal and makes no provision for a new trial, the latter remedy is not available. People v. San Luis Obispo, 152 Cal. 261, 92 Pac. 481.

[7c] See California Statutes of 1907, p. 717. Instead of requiring the notice of intention to be served and filed within ten days after verdict, or notice of decision, the amendment provides for such notice to be filed and served within ten days after notice of entry of judgment.

[8] See section 16, *post;* and look at section 2, *post.*

[9] See section 18, *post.*

[9a] See Johnson v. Phenix Ins. Co., 152 Cal. 199, 92 Pac. 182, where it was said that it was no doubt true that the motion for new trial attacked the verdict rather than the judgment.

[10] Martin v. Matfield, 49 Cal. 42; and see Fabian v. Callahan, 56 Cal. 159; also Sawyer v. Sargent, 65 Cal. 259, 3 Pac. 872; Boston Tunnel Co. v. McKenzie, 67 Cal. 485, 8 Pac. 22.

[10a] Gregory v. Gregory, 102 Cal. 50, 36 Pac. 364; Quist v. Sandman, 154 Cal. 748, 99 Pac. 204.

of the complaint are not controverted,[10b] there can be no new trial.[10c]

Appellate courts do not decide issues of fact; hence, new trials are out of place there. Even in original proceedings, as in *mandamus, habeas corpus,* and other supervisory writs out of the higher courts, issues of fact are to be determined by reference to another jurisdiction, where issues of fact may properly be tried.[10d]

2. The next element of the definition is, that the re-examination of the issues of fact must be *in the same court.* This requires proceedings for new trial to be instituted in the same court. No other court has authority to entertain the motion. Thus where an application for *mandamus* was made to the supreme court, and the issues of fact raised by the answer were sent to a district court for trial, and a verdict was had in the latter court and transmitted to the supreme court, it was held that proceedings for new trial should have been instituted in the supreme court, and that having been instituted in the district court, they were of no avail.[11]

[10b] Savings etc. Soc. v. Meeks, 66 Cal. 371, 5 Pac. 624; and a divorce proceeding is no exception. See Foley v. Foley, 120 Cal. 33, 65 Am. St. Rep. 147, 52 Pac. 122; Younger v. Moore, 8 Cal. App. 237, 96 Pac. 1093. (Where a will contest was dismissed for contestant's failure to appear, and no issue of fact was ever tried, a new trial is not proper.) In re Dean's Estate, 149 Cal. 487, 87 Pac. 13. And see section 343, note 1a, *post.*

[10c] Errors which cannot be reviewed on motion for new trial can be reviewed on appeal from the judgment, unless the error be in making an order which is itself appealable. See section 195, *post.* In this regard, in Thompson v. Patterson, 54 Cal. 542, McKee, J., said: "It is only upon an appeal from the judgment that the court can consider errors apparent upon the judgment-roll." But this language is too broad; for where a judgment-roll contains defective findings, a motion for new trial is proper. Knight v. Roche, 56 Cal. 15; Soto v. Irvine, 60 Cal. 436; Brown v. Burbank, 59 Cal. 535. See section 186, *post,* as to what may be reviewed on appeal from the judgment.

[10d] See section 292, *post.* If a reference is made for the purpose of determining issues of fact in relation to applications for such writs, a new trial would be proper; but the new trial would have to be made in the court where the original trial was had. People v. George, 3 Idaho, 108, 27 Pac. 680.

[11] People v. Holloway, 41 Cal. 409; and look at People v. Coon, 25 Cal. 635, 652, 653. But the rule of People v. Holloway (so far as the particular proceeding is concerned) has been since changed by statute. Section 1092, California Code of Civil Procedure, is as follows: "The motion for a new trial must be made in the court in which the issue of fact is tried." The same or similar language, in effect, is made use of in the statutes of Colorado, Idaho, Montana, Nevada, North Dakota, Oklahoma, Oregon, South Dakota, Utah, Washington, and Wyoming. In Arizona and New Mexico no statutory definitions are to be found of new trial, and it is not specifically required that the new trial shall be in the same court. But the inference is very clear that such is the requirement. Section 1479, Revised Statutes of Arizona (section 270, Practice Act), provides that motions for new trial must be determined at the term of the court when made, and the previous section (1478) practically requires a new trial mo-

3. The remaining element of the definition is, that the re-examination of the issues of fact must take place *after a trial and decision*. It is therefore proper to consider what is a trial and what is a decision within the meaning of the definition. In a general sense, the hearing of a motion on affidavits may be said to be a trial.[11a] But orders made on such motions have never been reviewable on motion for new trial.[12] The word "trial" as used in the definition under consideration refers to an investigation of the issues of fact raised by the pleadings. The investigation of collateral matters not put in issue by the pleadings is not a "trial." Thus where a matter of accounts not put in issue by the pleadings was sent to a referee for determination, it was held that the proceeding before him was not a trial within the meaning of the definition.[13] So, where the proceedings were limited to a motion for the entry of a judgment pursuant to a stipulation that either party might cause judgment to be entered corresponding to the judgment that might be entered in another action then pending, the supreme court held that there had been no trial, and that a motion for a new trial was, therefore, irregular.[13a] So, upon the same principle, where there is no trial at all of the issues of fact involved in the action, dismissal having been ordered without such trial "for failure of the appellants to appear," there can be no new trial.[13b]

And in order to constitute a trial, all the issues raised by the pleadings must be actually or ostensibly disposed of. There must

tion to be made at the term when the trial is had. Similar provisions are to be found in the New Mexico practice. Section 2685, subsection 132, provides for a new trial motion immediately after the rendition of the verdict, unless notice of delay is given, and the following section requires the motion to be made, argued, submitted and decided at the same term of court in which the trial occurred.

11a The word was used in this sense in Tregambo v. Comanche M. & M. Co., 57 Cal. 501. See, also, Finn v. Spagnoli, 67 Cal. 330, 7 Pac. 746. In Redington v. Cornwell, 90 Cal. 49, 27 Pac. 40, it was held that the word "trial" as used in section 650, Code of Civil Procedure, refers to the trial of an issue of law as well as an issue of fact.

12 See Laws of 1851, p. 104, sec. 333; section 936, California Code of Civil Procedure. Similar provisions are to be found in the codes of the other states.

13 Harris v. S. F. S. R. Co., 41 Cal. 393, 404, 405. But as to trials before referees, see section 6, *post*.

13a Gillmore v. American C. I. Co., 65 Cal. 63, 2 Pac. 882. The party is entitled to judgment, if at all, on the stipulation, and not upon a trial.

13b Estate of Dean, 149 Cal. 487, 87 Pac. 13. As shown above (see note 10b), there can be no new trial where the judgment is by default, and this is true whether the default occurs in a divorce proceeding in which, under the provisions of section 130 of the Civil Code, proof of the facts alleged is required, or in an ordinary proceeding where judgment is entered after default in the usual manner. See section 307, note 1a, *post*.

be such proceedings, after joinder of issue upon the facts, as are so far determinative of the issues that final judgment is the appropriate judicial conclusion thereof. Thus, where only a part of the issues were disposed of, and the rest were reserved, it was held that there was no trial.[14] But where the court intended to dispose of all the issues, but has in fact omitted some of them, a motion for a new trial is proper.[15] Under our practice a party may move for a new trial as to a part of the issues,[15a] as well as generally, or upon all the issues. If the motion be for a new trial as to the entire action, the court may grant it in part and deny it in part, leaving its former determination upon a portion of the issues to remain.[15b] When the case reaches the appellate court, that court may also order a new trial as to a part of the issues, leaving the decision in force as to the remainder.[15c] And when the case is returned to the trial court with directions to find upon an omitted issue, or to find upon an issue erroneously or improperly decided in the original trial, it becomes the duty of the lower court to follow explicitly the directions of the higher,[15d] even upon the point as to the introduction of evidence upon the issue a finding upon which is required.[15e]

It is not necessary to a trial that evidence be actually introduced. Thus where, when the case was called for trial, the court upon motion of the defendant made an order excluding all evidence on the part of the plaintiff, upon the ground that he had failed to furnish a bill of particulars upon demand therefor, it was held that there had been a "trial," and that therefore a motion for a new trial was proper.[16] On the other hand, there may be no trial even though evidence be introduced, as where, upon a default in an action

[14] Crowther v. Rowlandson, 27 Cal. 376; Bates v. Gage, 49 Cal. 126; Hinds v. Gage, 56 Cal. 486. Also Duff v. Duff, 71 Cal. 513, 12 Pac. 570.

[15] See note 5, above. The issue of once in jeopardy is not such a separate and distinct proceeding as that a final judgment may be entered thereon; but it is so far independent of the issue raised by the plea of not guilty as that failure to find thereon is not ground for a new trial upon the issue of not guilty. People v. Majors, 65 Cal. 100, 3 Pac. 401; People v. Smith, 121 Cal. 355, 53 Pac. 802.

[15a] San Diego etc. Co. v. Neale, 78 Cal. 63, 20 Pac. 372, 3 L. R. A. 83.

[15b] Duff v. Duff, 101 Cal. 1, 35 Pac. 437; Fallbrook etc. Dist. v. Abila, 106 Cal. 365, 39 Pac. 793; Mountain Tunnel Co. v. Bryan, 111 Cal. 36, 43 Pac. 410; Robinson v. Muir, 151 Cal. 118, 90 Pac. 521; Emerson v. Yosemite etc. Co., 149 Cal. 50, 85 Pac. 122; Pearsall v. Henry, 153 Cal. 314, 95 Pac. 154, 159.

[15c] Flinn v. Mowry, 131 Cal. 481, 63 Pac. 724, 1006. Also cases cited in note 15b.

[15d] Chandler v. People's Savings Bank, 73 Cal. 317, 2 Am. St. Rep. 812, 11 Pac. 791, 14 Pac. 864.

[15e] See cases above cited.

[16] Moore v. Bates, 46 Cal. 23.

for divorce, evidence is introduced in support of the allegations of the complaint, in accordance with the requirements of the code.[16a]

There must not only have been a trial but also a *decision*. In a case where no verdict was rendered for or against *one* of the defendants, it was held that an order granting a new trial as to him was erroneous, the court saying: "A new trial is a re-examination of an issue of fact in the same court after a trial and *decision* by a jury or court, or by referees. (Code Civ. Proc. 656.) It may be that there was a mistrial, or no trial, as to defendant Morgan, and that the court below may hereafter proceed to try the case as to him; but there was no cause for a motion for *new* trial, or for an application to *vacate* the former decision. (Code Civ. Proc. 657.)"[17]

The word "decision" may mean different things under different systems of findings. This is explained in another part of this treatise.[18]

§ 2. Proceedings for a New Trial are Collateral to the Proceedings in the Action—Appeal from Order on the Motion Independent of Appeal from the Judgment.—In Spanagel v. Dellinger,[1] it was held that proceedings for new trial under our system, unlike proceedings for new trial at common law, are independent of and collateral to the judgment, and are not affected by an adjournment of the term. The principle was well expressed by Sawyer, C. J., in his concurring opinion upon a subsequent appeal of the same case.[2] The learned chief justice said: "Under our system, from the entry of the verdict or filing of the findings of the court, a motion for a new trial is a kind of episode, or in a certain sense a collateral proceeding—a proceeding not in the direct line of the judgment; for the judgment may be at once entered, and even executed, while a motion for a new trial is pending in an independent line of proceeding, which ends in an order reviewable on an independent appeal. The motion may be heard and decided, and an appeal taken on its own independent record; while the proceedings on and subsequent to the judgment may be still regularly going on, and even an independent appeal taken in that line."[2a] As stated

[16a] See note 10b, above, and note 1a, section 343, *post*.

[17] Benjamin v. Stewart, 61 Cal. 605.

[18] See section 19, subdivision 1; and see chapter on Findings.

[1] 34 Cal. 476.

[2] 38 Cal. 278.

[2a] See Holmes v. Warren, 145 Cal. 457, 78 Pac. 954, where it was said: "The motion for a new trial is an issue of a distinct proceeding, and is to be heard upon an independent record, distinct from the record upon which the judgment depends."

in the foregoing extract, an appeal from an order on motion for new trial is independent of an appeal from the judgment. The losing party may appeal from the judgment, or from the order, or from both.[3] "A litigant's right to appeal from the judgment, and his right to appeal from the order refusing him a new trial are distinct and separate rights. He may waive either and rely upon the other."[3a] As was said by Sawyer, J., delivering the opinion in Carpentier v. Williamson:[4] "An error of law in admitting or rejecting testimony is subject to be reviewed on appeal from the judgment, when the ruling is made a part of the record by a bill of exceptions, or by a statement on appeal. It is true that the same error may also be reviewed on appeal from an order denying a new trial; but the two modes are independent of each other. The appeal from the judgment does not depend upon the motion for new trial. The latter proceeding is subsequent to the judgment. An appeal from the judgment may be taken without waiting for the determination of a motion for new trial, or the two appeals may be, and usually are, presented together.[4a] As to those errors which may be reviewed on either appeal, the remedy is concurrent, and the party may pursue either appeal and abandon the other." The appeal from the judgment may go on after the appeal from the order has been dismissed;[5] and *vice versa*.[5a] An appeal from the judgment does not devest the trial court of the power to hear and determine the motion.[5b] So an appeal from the order may be taken before the judgment is entered.[5c] And an appeal may be taken from the order after the appeal from the judgment has been adversely disposed of.[5d] So an affirmance of an order denying a new trial does not prevent the hearing of an appeal by the same party

[3] Marziou v. Pioche, 8 Cal. 522.

[3a] Vinson v. Los Angeles Pacific Ry. Co., 141 Cal. 151, 74 Pac. 757.

[4] 25 Cal. 154.

[4a] Rule II, Rules of the Supreme Court of California, provides "that when a party appealing from a judgment has given notice of motion for a new trial before perfecting said appeal, the time for filing and serving the printed transcript shall not begin to run until the motion for a new trial has been decided or the proceeding dismissed for want of prosecution; and the appeal from the judgment and from an order denying a new trial of the issue may in all cases be presented upon the same transcript." Without considering the effect upon the practical application of this rule of the new and alternative method of appeal, it is manifest that this rule gives to the appellant an option as to the simultaneous prosecution of the two appeals.

[5] Towdy v. Ellis, 22 Cal. 650.

[5a] Schroeder v. Schmidt, 71 Cal. 399, 12 Pac. 302.

[5b] Naglee v. Spencer, 60 Cal. 10; Rayner v. Jones, 90 Cal. 78, 27 Pac. 24; Knowles v. Thompson, 133 Cal. 245, 65 Pac. 468.

[5c] Schroeder v. Schmidt, 71 Cal. 399, 12 Pac. 302.

[5d] Schnittger v. Rose, 139 Cal. 656, 73 Pac. 449.

from the judgment.[6] So an affirmance of the judgment in direct appeal therefrom does not prevent the court below from setting aside the verdict or findings (and the judgment based thereon), if it should be satisfied that a motion for new trial should be granted.[7] So an affirmance of the judgment on an appeal by one party does not prevent the reversal of an order on motion for new trial on an appeal taken by a different party.[8] So the dismissal of an appeal from the judgment is no bar to an appeal by the same party from an order denying his motion for a new trial.[9] So the pendency of an appeal from the order does not extend the time for taking an appeal from the judgment.[10]

But an order *granting* a new trial has the effect of vacating the judgment, and a party cannot *thereafter* take an appeal from the judgment,[11] unless an appeal is taken from the order granting a new trial; in which event the appeal from the order suspends its operation, and leaves the judgment subsisting for the purpose of an appeal therefrom.[11a] If, in such a case, the order is affirmed, the judgment falls, and the appeal therefrom should be dismissed.[11b] If the order is reversed, the judgment is left standing,[12] subject, of course, to affirmance or reversal.

The final satisfaction of record of the judgment is said to be the last act and the end of the proceeding.[13] There can be no new trial after such satisfaction, even though the order denying a motion therefor has been reversed on appeal.[14] After such satisfaction the cause has passed beyond review by any proceeding.[15]

[6] Carpentier v. Williamson, 25 Cal. 154, 167, 168.

[7] McDonald v. McConkey, 57 Cal. 325. This is what was actually done in the case of Sharon v. Sharon, 79 Cal. 633, and a delicate question as to the law of the case raised. See section 291, *post*. See, also, Brison v. Brison, 90 Cal. 323, 27 Pac. 186; Riverside Water Co. v. Gage, 108 Cal. 240, 41 Pac. 299; Houser etc. Co. v. Hargrove, 129 Cal. 90, 61 Pac. 660.

[8] Donner v. Palmer, 45 Cal. 180.

[9] Fulton v. Cox, 40 Cal. 101.

[10] Bornheimer v. Baldwin, 42 Cal. 27.

[11] Kower v. Gluck, 33 Cal. 401; Bronner v. Wetzlar, 55 Cal. 419, and look at Thompson v. Smith, 28 Cal. 527. See, also, Wheeler v. Kassabaum, 76 Cal. 90, 18 Pac. 119; Pierce v. Birkholm, 110 Cal. 669, 43 Pac. 205; Sharon v. Sharon, 79 Cal. 633, 22 Pac. 26, 131; Knowles v. Thompson, 133 Cal. 245, 65 Pac. 468.

[11a] Pierce v. Birkholm, 110 Cal. 669, 43 Pac. 205; Henry v. Merguire, 111 Cal. 2, 43 Pac. 387; Mountain Tunnel Co. v. Bryan, 111 Cal. 36, 43 Pac. 410; Etchas v. Orena, 121 Cal. 270, 53 Pac. 798.

[11b] San Jose Bank of Savings v. Bank of Madera, 121 Cal. 543, 54 Pac. 85.

[12] Pierce v. Birkholm, 110 Cal. 669, 43 Pac. 205. And see section 299, *post*.

[13] Morton v. Superior Court, 65 Cal. 496, 4 Pac. 489.

[14] People v. Burns, 78 Cal. 645, 21 Pac. 540.

[15] It is established that a party cannot avail himself of a judgment in his favor, enjoy its fruits, enforce

§ 3. The Pendency of a Motion for New Trial Does not Operate as a Stay of Execution.—At common law, the motion for new trial had to be made before final judgment was signed.[1] And it would seem that after a motion for new trial had been properly made, judgment would not be signed until the motion had been disposed of.[2] Execution could not issue until after final judgment was signed.[3] It was probably from this practice that our early judges derived the notion that a motion for new trial under our system operated as a stay of execution. That notion at one time prevailed. Thus in Lurvey v. Wells,[4] Murray, C. J., delivering the opinion, said: "A motion filed within the time allowed by law *must necessarily stay the operation of the judgment.*" In the subsequent case of Ortman v. Dixon,[5] it was held that the pendency of a motion for new trial did not suspend the operation of a perpetual injunction ordered by the judgment, but Lurvey v. Wells was not mentioned. In the subsequent case of The Copper Hill Co. v. Spencer,[6] the point decided was that the pendency of a motion for new trial did not prevent the court below from granting a motion for the discharge of a receiver. But the supreme court seemed to suppose that in the absence of such action by the court below the proceedings would have been suspended, and Sawyer, J., delivering the opinion, said: "The motion for new trial doubtless suspended the operation of the judgment of nonsuit so far as to prevent it from operating of its own vigor as a discharge of the receiver, and preserved the rights of the plaintiff acquired under the order appointing the receiver until the order was directly acted on by the court." And the court did not deny the proposition advanced by counsel that the pendency of the motion operated as a stay, but replied that, "admitting the proceedings were stayed generally by the motion," it did not follow that the court could not discharge the receiver by order to that effect.

satisfaction, and then seek its reversal. People v. Burns, 78 Cal. 645, 21 Pac. 540; In re Baby, 87 Cal. 200, 22 Am. St. Rep. 239, 25 Pac. 405; Estate of Shaver, 131 Cal. 219, 63 Pac. 340. On the other hand, the defeated party cannot be deprived of his right of appeal by a compulsory satisfaction of the judgment against him (Kenny v. Parks, 120 Cal. 22, 52 Pac. 40; Vermont Marble Co. v. Black, 123 Cal. 21, 55 Pac. 599); but if he voluntarily complies with the judgment and obtains its satisfaction, his subsequent appeal will be nugatory. Morton v. Superior Court, 65 Cal. 496, 4 Pac. 489.

1 Tidd's Practice, pp. 903, 904, 912, 930. And see Spanagel v. Dellinger, 34 Cal. 476.

2 Tidd's Practice, p. 930.

3 Tidd's Practice, p. 994.

4 4 Cal. 106.

5 9 Cal. 23.

6 25 Cal. 11.

The doctrine that the pendency of a motion for new trial under our practice operated as a stay of proceedings was overturned in People v. Loucks.[7] That was an application for a writ of *mandamus* to compel the clerk of the fifteenth district court to issue a writ of execution. The clerk answered that proceedings for a new trial were pending. The supreme court awarded the *mandamus*, and Sanderson, C. J., delivering the opinion, said:

"It is unnecessary to determine whether the respondent's motion for new trial was in time or not. If in time, it did not *per se* operate as a stay of proceedings, and the relator was entitled to final process upon his judgment notwithstanding. The notion which has prevailed hitherto that a motion or notice of motion for new trial of itself stays all proceedings upon the judgment until such motion has been determined is without foundation. The Practice Act contains no such provision; on the contrary, the reverse is at least implied. The one hundred and eightieth and one hundred and ninetieth sections provide when judgment shall be entered; and the two hundred and ninth[8] provides that 'the party in whose favor judgment is given may at any time within five years after the entry thereof issue a writ of execution for its enforcement.' Upon this provision the act contains no limitation whatever, and it must necessarily follow that the party in whose favor the judgment is entered is entitled to his execution immediately, as therein provided, and he cannot be deprived of his right, or delayed in its execution, by any mere act of the opposite party. Doubtless this question might be regulated by a rule of court; but in the absence of such a rule, a party desiring a stay of proceedings pending his motion for a new trial must obtain an order to that effect from the court, as in the case of a stay of the entry of judgment as provided in section one hundred and ninety-seven. Upon such application the court can grant the order unconditionally or upon terms according to the circumstances of the case. If a stay would be likely to jeopardize the judgment, an execution and levy might be allowed, and further proceedings thereafter stayed, or security for the payment of the judgment might be required. We think

[7] 28 Cal. 68; see, also, Jones v. Spears, 56 Cal. 163.

[8] Sections 180, 190, and 209 of the old Practice Act correspond respectively to sections 633, 648, and 681 of the Code of Civil Procedure. See sections 243, 249 and 258, *post*.

this question has been wisely left by the Practice Act to the sound discretion of the court."

Ever since this decision the practice has been for the trial court, on motion, to order a stay of proceedings on the judgment until the determination of the motion for new trial; but it is questionable whether the court has power to make any such order. The suggestion to that effect in the foregoing extract is merely a *dictum*, as no such question was involved in the case. It is not to be doubted that before the entry of judgment, and while the proceedings are *in fieri*, the court may order a stay.[9] But after the judgment has been entered, the successful party is entitled to his execution. The code has provided that thereafter the proceedings may be stayed by an appeal with a bond of a certain character with sufficient sureties. It is doubtful whether the trial court can dispense with this security, or provide a different one. The point has not yet been decided by the supreme court.[10]

Whatever may be said of a stay of proceedings by reason of the mere pendency of a proceeding for a new trial in the lower court, it is now the settled law in this state that proceedings on the judgment can be, and are, stayed by the filing of a sufficient undertaking on appeal from an order denying a new trial. The point first arose with respect to an appeal fron a new trial order, in a case where the appeal from the judgment had been dismissed, and the court held that the filing of an effective stay bond on an appeal from the order operated to stay proceedings under the judgment.[11] The stay bond was one given under section 349 of the Practice Act, and is presumed, therefore, to have been for the purpose of staying execution of a judgment for the payment of money. This ruling was subsequently approved and followed

[9] Section 664, California Code of Civil Procedure; section 197, old Practice Act. See section 183, *post*.

[10] Look at Livermore v. Hodgkins, 54 Cal. 637. And see People v. Bank of San Luis Obispo, 159 Cal. 65, 112 Pac. 866. In Barnett v. Bohannon (Okl.), 112 Pac. 987, it was held that (quoting from Church v. Goodin, 22 Kan. 527), "The pendency of a motion for a new trial does not necessarily stay proceedings upon a judgment rendered in a civil case. After a return of the verdict of a jury, the court has the power, however, to reserve the case for future argument or consideration, and either stay or arrest all process until the motion for a new trial is disposed of." The court further said: "If this motion were to be granted, necessarily the judgment which was the basis for the writ should be set aside and held for naught, and the court had the power in the exercise of its discretion to withhold the execution of this judgment until it could consider the motion for a new trial and determine whether the judgment should stand."

[11] Fulton v. Hanna, 40 Cal. 278.

in a similar case,[12] and in the later case of Owen v. Pomona Land Co.[13] the principle was applied to a case where no stay bond was required, and proceedings were stayed by the ordinary three hundred dollar undertaking on appeal from the new trial order. It would therefore appear that any undertaking which may be sufficient to stay proceedings on appeal from the judgment also operates with equal efficacy to stay proceedings where the appeal is from the new trial order.[14]

The theory upon which this doctrine rests is, that "a reversal of an order denying a new trial has the same effect as an order granting a new trial, which is to vacate the judgment. A reversal of the judgment upon a direct appeal has precisely the same effect, and no more; it vacates the judgment."

As to the effect of new trial proceedings upon the judgment as evidence in another cause, see section 224, *post*.

§ 4. Parties Who may Move for a New Trial.—Section 657 of the Code of Civil Procedure, which is identical with section 193 of the act of 1851,[1] provides that "the party aggrieved" may move for a new trial. "Any party aggrieved" is the phraseology made use of in section 938 of the same code with reference to those who may appeal from judgments and orders of the lower courts. The meaning of the phrase is practically identical in the two sections, and rules that are applicable to the determination of parties who may appeal are applicable with equal force to the determination of parties who may move for new trials. It is said that in order to be entitled to take an appeal under section 938, a person must be a "party" to the proceedings, and he must be "aggrieved";[1a] that only parties to the record can appeal.[1b] In like manner, with respect to those who may move for a new trial, the party must, as a matter of course, be a party to the action or proceeding. For it is a general rule that a stranger to the cause cannot make a motion therein;[2] and it is difficult to see how one not a party to a cause can, in a legal sense, be aggrieved or affected by a decision or judgment therein.[2a]

[12] Tompkins v. Montgomery, 116 Cal. 120, 47 Pac. 1006.

[13] 124 Cal. 331, 57 Pac. 71.

[14] See cases cited in note 7, section 215, *post*. Also see Weldon v. Rogers, 154 Cal. 632, 98 Pac. 1070.

[1] Laws of 1851, p. 81.

[1a] See section 203, *post*.

[1b] See section 203, note 10b, *post*, and cases cited.

[2] Estate of Aveline, 53 Cal. 259. And see section 203, *post*, particularly notes 10b, 17a, 17b, 17c, and 17d, and cases there cited.

[2a] On an appeal from a new trial order only the record itself can be

The question as to who is "aggrieved" by a "verdict or other decision," within the meaning of the section as to new trials, is not so readily answered. A party *against* whom the verdict or decision runs is, of course, "aggrieved" thereby. But a party to the cause may be "aggrieved" by a verdict in his favor, if it be for too small a sum.[3] So, if the findings of fact be against him, but the conclusions of law and judgment be (erroneously) in his favor, it was said that he not only might but should move for a new trial. For, as was suggested, the supreme court, upon an appeal from the judgment, might reverse it and direct that final judgment be entered in accordance with the findings of fact, in which case, if notice of decision had been given, and the ten days thereafter run, it would be too late to institute proceedings for a new trial.[4]

While a party may be "aggrieved," within the meaning of section 657, Code of Civil Procedure, by a decision or verdict nominally in his favor, and so be entitled by a new trial to be relieved from such verdict or decision, equally as from an adverse one, yet one who asks or consents to the making of a verdict or decision, whether favorable or adverse, is not aggrieved thereby, and cannot ask for a new trial.[4a]

Parties having a common interest in the subject matter in controversy, or who are aggrieved in the same way in the same proceeding may prosecute a joint or several appeal from the judgment;[4b] and, for the same reason, it is to be presumed that they may jointly or severally prosecute proceedings for a new

examined for the purpose of determining who are the proper *adverse* parties to such appeal. See cases cited in notes 10e and 10f of section 210, *post*. In so far as the principle involved is concerned, it is applicable with equal force to "aggrieved" and to "adverse" parties, to appellants and respondents; and so, in determining who are the proper parties to move for a new trial in the lower court, the same rules govern as in determining who are the proper parties on appeal.

[3] Mariani v. Dougherty, 46 Cal. 26.

[4] See Brady v. Feisel, 54 Cal. 180. Sections 663 and 663a, California Code of Civil Procedure, now provide the necessary relief in cases where the conclusions of law are erroneous. But until the enactment of the two sections referred to, no such opportunity was afforded. See section 99a, *post*.

[4a] See In re Radovich, 74 Cal. 536, 5 Am. St. Rep. 466, 16 Pac. 321. When a case has been tried by the court on an agreed statement of facts, and a motion for a new trial has been denied, an appeal from the order of denial will not be dismissed, but the order of denial will be, of course, affirmed. The remedy of the aggrieved party is by appeal from the judgment on the ground that the decision was against law. Quist v. Michael, 153 Cal. 365, 95 Pac. 658; Quist v. Sandman, 154 Cal. 748, 99 Pac. 204.

[4b] See Estate of Sutro, 152 Cal. 249, 92 Pac. 486, 1027. Also Downing v. Rademacher, 136 Cal. 673, 69 Pac. 415.

trial. An aggrieved party may have a new trial although a co-plaintiff or codefendant, who is not aggrieved, joins in the motion. The joining of the party who is not aggrieved, and who, therefore, is not entitled to a new trial, is a harmless error, and will be disregarded under the authority of section 475 of the Code of Civil Procedure.[4c]

If the time to give notice of intention has not run, it would seem (since the appeal from the judgment is an independent remedy)[5] that a party may have his motion for new trial, even though final judgment has been directed by the supreme court upon the findings. The difficulty about this, however, would be that the party would be held to have had notice of the decision,[6] and therefore his motion would come too late, unless there was a stipulation extending the time to move until the appeal from the judgment was determined.

As to who is a party aggrieved with reference to appeals, see section 203, *post*.

§ 5. Proceedings of Which a New Trial may be Had.—Besides ordinary actions at law and suits in equity, a new trial may be had of an action for partition of real property,[1] of a proceeding in insolvency,[2] of an action to foreclose a mechanic's lien,[3]

[4c] Boehmer v. Big Rock Co., 117 Cal. 19, 48 Pac. 908.

[5] See section 2, *ante*.

[6] The time to give notice of intention formerly ran from notice of decision. Sawyer v. San Francisco, 50 Cal. 375; Estate of Richards, 154 Cal. 478, 98 Pac. 528. But, under the cases, knowledge seems to have been considered notice. See cases in section 19, subdivision 3, *post*. Under the provision of section 659, California Code of Civil Procedure, as amended in 1907, however, the time to give notice runs from notice of entry of judgment. The question as to whether the old rule as to knowledge and implied waiver will control will be considered later. See section 19, *post*. The provisions of the practice acts of other states are thus far unchanged.

[1] Tormey v. Allen, 45 Cal. 119; Regan v. McMahon, 43 Cal. 625. Also Emeric v. Alvarado, 64 Cal. 529.

[2] People v. Rosborough, 29 Cal. 417; and see subdivision 3 of section 67 of the old Insolvent Act. See, also, Sullivan v. Washburn etc. Co., 139 Cal. 257, 72 Pac. 992, and section 54 of the act of 1895 (Statutes of 1895, page 149), which provides that the trial of proceedings for discharge shall be according to the practice provided in civil actions. A similar provision is to be found in section 12 of the act with respect to the trial of the issue of insolvency upon a creditor's petition in involuntary insolvency; and in section 71 it is provided that an appeal may be taken to the supreme court from an order granting or overruling a motion for a new trial.

[3] Section 1199, California Code of Civil Procedure. Similar provisions are to be found in the statutes of other states. See section 2914, Revised Statutes of Arizona (section 34 of chapter on Liens); section 5135, Revised Codes of Idaho; section 7297, Revised Codes of Montana (section 2137, Code of Civil Procedure); section 6155, Compiled Laws of Oklahoma; section 7424, Lord's Oregon Laws; section 3805,

of actions of forcible entry and unlawful detainer,[4] of proceedings for writs of mandate and prohibition,[5] of a proceeding

Compiled Statutes of Wyoming. Even without a specific provision on the subject, there would seem to be no reason for making an exception of an action on a mechanic's lien, in the absence of affirmative prohibition, or a procedure inconsistent with new trial principles.

Section 1390, Compiled Laws of Utah, provides for enforcement by an ordinary civil action, within a year, and this is presumably sufficient to include new trial; but section 1391 makes provision for a summary proceeding.

[4] Section 1178, California Code of Civil Procedure. Similar provisions are to be found in the procedure of other states. See section 2678, Revised Statutes of Arizona (section 11, chapter on Forcible Entry and Detainer); section 5109, Revised Codes of Idaho; section 7287, Revised Codes of Montana (section 2098, Code of Civil Procedure); section 3834, Cutting's Compiled Laws of Nevada; section 7570, Lord's Oregon Laws; section 3587, Compiled Laws of Utah; section 829, Rem. & Bal. Washington Codes. In some states original jurisdiction in forcible entry and detainer is limited to justice's court, the higher *nisi prius* courts having appellate jurisdiction only; but usually in such cases provision is made for a trial *de novo*, and when this is the case no distinction is to be made between these and other cases. See article 16, Justice's Code of South Dakota. Section 114 of the Justice's Code of South Dakota provides that only those "provisions of the Code of Civil Procedure which are in their nature applicable to the organization, powers, and course of proceedings of justice's courts, or which have been made applicable by special provisions of this chapter, are applicable to justice's courts and the proceedings therein." See section 6, *post*. Section 6271, Compiled Laws of Oklahoma, gives the justice's court exclusive jurisdiction, but section 6374 makes general provision for new trials.

[5] Section 1110, California Code of Civil Procedure. Rehearing and not new trial is the proper procedure in all remedies of the character of prohibition, where a second hearing is desired before the supreme court in an original proceeding. Granger's Bank v. San Francisco, 101 Cal. 198, 35 Pac. 642; In re Philbrook, 108 Cal. 14, 40 Pac. 1061. Also In re Tyler, 71 Cal. 353, 12 Pac. 289, 13 Pac. 169. In other words, if the application for *mandamus* is made to the supreme court, there can be no new trial. The contrary view was at one time entertained, but the supreme court specifically overturned that doctrine in the cases cited. The trial of an issue of fact in an application for *mandamus* is specifically provided for in Arizona, section 3079, Revised Statutes (section 6, chapter on Mandamus); Colorado, section 312, Mills' Annotated Code of Civil Procedure; Idaho, section 4982, Revised Codes; Montana, section 7219, Revised Codes (section 1966, Code of Civil Procedure); Nevada, section 3547, Cutting's Compiled Laws (section 452, Civil Practice); North Dakota, section 7827, Revised Codes; South Dakota, section 769, Code of Civil Procedure; Washington, section 1019, Rem. & Bal. Codes. In Arizona (section 3080, Revised Statutes, section 7, chapter on Mandamus), it is provided that, "if either party be dissatisfied with the verdict of the jury, he may move for a new trial." In the other states mentioned, the right to have a new trial is referred to in terms, but is not specifically expressed. Thus in the Idaho statute (section 4984, Revised Codes) it is said: "The motion for a new trial must be made in the court in which the issue of fact is tried." See, also, section 314, Mills' Annotated Code of Civil Procedure of Colorado; section 7221, Revised Codes (section 1968, Code of Civil Procedure) of Montana; section 3549, Cutting's Compiled Laws of Nevada (section 454, Civil Practice); section 7829, Revised Codes of North Dakota; section 771, Code of Civil Procedure of South Dakota; section 1021, Rem. & Bal. Codes of Washington. In addition to these provisions, specifically limited to proceedings in *mandamus*, in some of the above states, sections in language similar in import to that of section 1110 of the California Code of Civil Procedure, and

to condemn land,[6] of a case tried by a referee,[7] of contests of wills and probate proceedings. The provisions of the code in relation to probate proceedings is as follows: "The provisions of Part Two of this code, relative to new trials and appeals,—except in so far as they are inconsistent with the provisions of this title,—apply to the proceedings mentioned in this title."[8]

applicable to *certiorari*, or review, and prohibition, as well as *mandamus*, are to be found: Section 5006, Revised Codes of Idaho; section 7233, Revised Codes of Montana (section 2001, Code of Civil Procedure); section 7841, Revised Codes of North Dakota; section 783, Code of Civil Procedure of South Dakota. In other states, the object is effected by the use of other forms of expression. In Oregon, section 620, Lord's Oregon Laws, provides that, after the issues joined have been tried, "the further proceedings thereon (shall be) had in like manner and with like effect, as in an action." Obviously, if there are issues of fact, the new trial of such issues would be clearly implied. This provision applies solely to *mandamus*, and not to *certiorari*. No statutory provision is made for prohibition. So, in Wyoming, section 5065, Compiled Statutes, provides that issues of fact in an application for *mandamus* may be tried, and "further proceedings therein had, as in civil actions." Neither review nor prohibition is provided for, *eo nomine*, though the remedy of the first is specifically retained (section 5130, Compiled Statutes), and the functions of the other is perhaps, to some extent, performed by the writ of injunction, for which specific provision is made (section 4897 et seq., Compiled Statutes). The provision of section 1110, Code of Civil Procedure of California, has no corresponding provision in the Washington statutes. It appears to have been purposely omitted, since other parts of the California statute covering the three writs of review, *mandamus* and prohibition, have been closely followed, and section 1032, Rem. & Bal. Codes, is almost identical with section 1109 of the California code. Sections 1019 and 1021, Rem. & Bal. Codes, above cited, providing for new trials of issues of fact in proceedings for *mandamus*, have been made applicable to prohibition, however (section 1030, Rem. & Bal. Codes), thus partially supplying the omission.

In some of the above states, the right to have more than one new trial is specifically withheld. See section 3081, Revised Statutes of Arizona (section 8, chapter on Mandamus; section 314, Mills' Annotated Code of Civil Procedure of Colorado; and section 3549, Cutting's Compiled Laws of Nevada (section 454, Civil Practice).

In Oklahoma, section 6232, Compiled Laws, proceedings in *mandamus* are governed by the rules that governed civil actions in general. Neither prohibition, nor *certiorari* is recognized by statute.

In Utah, section 3648, Compiled Laws, by implication, provides for new trial, as above noted in other states. Section 3657 makes the above section applicable to prohibition. So, also, does section 3659. And section 3660 makes the general provisions in new trial procedure applicable to both writs.

[6] Section 1257, California Code of Civil Procedure. This section changed the old law on the subject. As to which see C. P. R. R. v. Pearson, 35 Cal. 247; W. P. R. R. v. Read, 35 Cal. 621. It has itself been repeatedly amended, the last time in 1903. Similar provisions are to be found in the statutes of other states. See section 2468, Revised Statutes of Arizona (section 25, chapter on Eminent Domain); section 5228, Revised Codes of Idaho; section 7351, Revised Codes of Montana (section 2231, Code of Civil Procedure); section 3929, Cutting's Compiled Laws of Nevada (section 12, Condemnation Act); section 7603, Revised Codes of North Dakota; section 6860, Lord's Oregon Laws; section 3606, Compiled Laws of Utah; section 3852, Compiled Statutes of Wyoming.

[7] See section 8, *post*.

[8] See section 1934, Revised Statutes of Arizona (section 726, Civil Practice); section 1714, Code of Civil Pro-

As already shown, the "provisions of Part Two of this code" do not apply to orders made on ordinary motion heard on affidavits.[8a] Consequently such determinations in probate proceedings as amount merely to orders on motions cannot be reviewed on motion for new trial. It may sometimes be difficult to decide what determinations in probate proceedings amount to orders merely and what to decisions which are subject to re-examination on motion for new trial. In the Estate of Crosby,[9] it was held that whenever "issues of fact" are tried in probate proceedings findings are proper. It was at one time thought that whenever findings were proper, a motion for a new trial might be made.[10] This is not, however, a test quite sufficient in its scope for unvarying application. In the case of Leach v. Pierce,[10a] which was

cedure of California; section 5665, Revised Codes of Idaho; section 7712, Revised Codes of Montana (section 2921, Code of Civil Procedure); section 3067, Cutting's Compiled Laws of Nevada (section 281, Estates of Deceased Persons); section 5446, Compiled Laws of Oklahoma; sections 3778 and 4041, Compiled Laws of Utah; section 5467, Compiled Statutes of Wyoming.

No provision is made in the North Dakota practice for new trials in probate cases. Article 8 of the Probate Code, comprising sections 7959, 7960, 7961, 7962 and 7963 of the Revised Codes, makes provisions for "rehearings" upon the following grounds: "1. Mistake, inadvertence, surprise or excusable neglect of the party making the application. 2. Any irregularity in the service of process or any fraud or misconduct of the prevailing party or his attorney or agent, or any abuse of discretion on the part of the court, which prevented the applicant from appearing or maintaining a material issue on his part at the former hearing. 3. Newly discovered evidence," etc.; and "4. The nonexistence of any fact necessary to jurisdiction."

Section 1135 of Lord's Oregon Laws provides: "The mode of proceeding (in probate litigation) is that of a suit in equity, as distinguished from an action at law." This leaves the question open as to the propriety of allowing new trials, and no specific provision relative to the point has been adopted.

Section 9, article 1, chapter 1, title 1, of the Probate Code of South Dakota, makes specific provision for new trials in probate cases.

In State v. Court, 28 Mont. 227, 72 Pac. 613, the supreme court said: ". . . . There is, therefore, no authority in the code for a motion for a new trial of a motion. In such case, if a rehearing in the same court of the matters involved in the motion is desired, the proper practice is to apply for leave to renew the motion. If the purpose is to have it reviewed on appeal, it is sufficient to present to the supreme court the order, with a bill of exceptions incorporating the rulings of which complaint is made. Therefore, a motion which does not ask for a decision of an issue of fact arising upon formal pleadings is not the subject of a motion for a new trial. These are the views of the supreme court of California upon identical provisions touching new trials. Harper v. Hildreth, 99 Cal. 265, 33 Pac. 1103."

[8a] See section 1, subdivision 3, note 11a, *ante*.

[9] 55 Cal. 574. But see In re Arguello, 85 Cal. 151, 24 Pac. 641.

[10] If a party wishes to have orders which are appealable reviewed, he should appeal directly to the supreme court, and not move in the lower court to have such orders set aside, and then appeal from the order denying the motion. See section 199, *post*.

[10a] 93 Cal. 614, 29 Pac. 235; S. C., 93 Cal. 624, 29 Pac. 238; also Shipman

an application for a writ of mandate to settle a bill of exceptions on a proposed new trial in a probate proceeding arising under a widow's application for a family allowance, the lower court had made and filed findings of fact and conclusions of law. The supreme court denied the application on the ground that no new trial was authorized in such proceedings, saying: "Prior to the adoption of the code, issues of fact were authorized in nearly every probate proceeding, and there was a general provision that either party might move for a new trial on account of any error committed by the probate court in settling or determining issues of fact. It is now provided that only those provisions of the code relative to new trials and appeals which are consistent with the provisions of the probate act shall apply to probate proceedings. It was evidently the intention of those who framed and adopted the provisions of the code relative to probate proceedings to curtail dilatory proceedings in the settlement of estates. (Code Civ. Proc., sec. 1714.) There is no provision for the framing of issues with respect to the matter of family allowance. It is made the duty of the court, with or without petition, to set apart sufficient property for the support of the widow and children. 'A new trial is a re-examination of an issue of fact after a *trial and decision,* by a jury or court, or by referees.' (Code Civ. Proc., sec. 656.) 'Issues arise upon the pleadings when a fact or conclusion is maintained by one party and is controverted by the other.' (Code Civ. Proc., sec. 588.) 'The former verdict or other decision may be vacated and a new trial granted, on the application of the party aggrieved, for any of the following causes,' etc. (Code Civ. Proc., sec. 657.) These provisions clearly do not apply to every order which may be made *ex parte,* or by the court on its own motion, simply because the court has permitted written objections to be filed. In In re Moore, 72 Cal. 335, 13 Pac. 880, it was suggested that the operation of these sections should be confined 'to those cases in which the code expressly authorized issues of fact to be framed.' (See, also, Estate of Herteman, 73 Cal. 545, 15 Pac. 121.)"

As an illustration of a case in which a new trial is proper, see Estate of Bauquier.[10b] This was an appeal from an order deny-

v. Unangst, 150 Cal. 425, 88 Pac. 1090; Estate of Heywood, 154 Cal. 312, 97 Pac. 825.

[10b] 88 Cal. 302, 26 Pac. 178, 532. See, also, the following cases for a discussion of the question involved: In re

ing a new trial upon the question of the competency of an administratrix. The court, in holding that a new trial was proper, and that the order denying the same would be reviewed on appeal, said: "It would be impracticable to enumerate the cases in which a motion for a new trial is appropriate in probate proceedings; but it may be stated generally that whenever the action of the court which is invoked is dependent upon the existence of certain extrinsic facts which are presented to it for determination in the form of pleadings, and are to be decided by it in conformity with the preponderance of the evidence offered thereon, an issue of fact arises which, after a decision, may be re-examined by the court upon a motion for a new trial."

The code provides in express terms for the framing of issues of fact in certain probate proceedings, as, for example, in proceedings to determine heirship under the provisions of section 1664, Code of Civil Procedure.[10c] In all such cases it is well settled that new trials are proper.

In Estate of Spencer,[10d] it was held that where there is a regular contest over the probate of a will, a new trial is an appropriate proceeding. In all such cases there must necessarily be a trial of the issues of fact joined.

But the provisions of the code in relation to new trials do not apply to election contests. In the chapter of the Code of Civil Procedure in relation to election contests there is no provision empowering the court below to grant a new trial. The provision is, that "either party aggrieved by the judgment of the court may appeal to the supreme court, as in other cases of appeal thereto from the superior court."[11] Upon well-settled principles

Moore, 72 Cal. 335, 13 Pac. 880; In re Herteman, 73 Cal. 545, 15 Pac. 121; In re Sanderson, 74 Cal. 199, 15 Pac. 753; Leach v. Pierce, 93 Cal. 614, 29 Pac. 235, 93 Cal. 628, 29 Pac. 239; In re Westerfield, 96 Cal. 113, 30 Pac. 1104; In re Heldt, 98 Cal. 553, 33 Pac. 549; Estate of Franklin, 133 Cal. 584, 65 Pac. 1081; Hartmann v. Smith, 140 Cal. 461, 74 Pac. 7; Estate of Sutro, 152 Cal. 249, 92 Pac. 486, 1027; Shipman v. Unangst, 150 Cal. 425, 88 Pac. 1090; Estate of Heywood, 154 Cal. 312, 97 Pac. 825.

[10c] See, also, sections 1714 to 1717, California Code of Civil Procedure. See note 8, *supra*.

[10d] 96 Cal. 448, 31 Pac. 453. See, also, Hartmann v. Smith, 140 Cal. 461, 74 Pac. 7. In Re Antonieli's Estate, 42 Mont. 219, 111 Pac. 1033, it was held that a motion for new trial in probate proceedings did not lie in the absence of formal pleadings raising an issue of fact. This was upon *ex parte* applications for letters of administration, and no issue was joined. Cases cited.

[11] See section 1126, California Code of Civil Procedure; section 5050, Revised Codes of Idaho; section 7248, Revised Codes of Montana (section 2024, Code of Civil Procedure); section 1736, Compiled Laws of New Mexico;

the mention of this mode of review is an exclusion of all other modes. We are not left to stand upon this reason alone, however. The provisions of the code in relation to election contests are not different in this regard from the provisions of the previous statutes; and the previous statutes have received construction from the supreme court. In Dickinson v. Van Horn,[12] it was held that the court below could grant a new trial of an election contest. But this case was overruled in Dorsey v. Barry.[13] The decision in the latter case was placed upon the ground that election contests were intended to be summary, and that the statute did not contemplate the delay which would be occasioned by a motion for a new trial in the court below. Dorsey v. Barry was approved and followed in Cosgrove v. Howland,[14] and was explained in San Francisco etc. Co. v. Mahoney,[15] and People v. Rosborough,[16] which, however, were not election contests. The decision in Dorsey v. Barry has never been disturbed,[17] and it may therefore be taken to be the settled rule that there can be no motion for new trial of an election contest.

A motion for a new trial has been held to be a proper proceeding in actions under section 803, Code of Civil Procedure, for the usurpation of public offices[18] and franchises.[19] Also, new trials

section 2270, Compiled Statutes of Wyoming.

Section 2431, Revised Statutes of Arizona (section 160, Elections) makes specific provision for both new trials and appeals as in civil actions.

In Lynip v. Buckner, 22 Nev. 426, 41 Pac. 762, 30 L. R. A. 354, it was held that the procedure in election contests as to new trials and appeals was regulated by the Civil Practice Act. In other words, that new trials might be had in such cases as in ordinary actions.

Section 696, Revised Codes of North Dakota (Political Code), provides that appeals may be taken without first moving for a new trial, and section 699 provides that, except when otherwise provided, the provision of the Code of Civil Procedure is applicable in election contests.

In Colorado the usual method of testing the right of a claimant to a public office is by *quo warranto* against the incumbent. There is no special form of action by statute, as in California and other states. It is at least doubtful that a new trial would be proper in such a proceeding. In Oklahoma the common-law *quo warranto* has been abolished, but the statutes recognize a civil action with the functions of the former. No specific provision is made in either state for contesting elections.

Section 927, Compiled Laws of Utah, provides for the prosecution of appeals from actions to contest elections, and, under the rule, this would seem to dispense with review by new trial.

12 9 Cal. 207.

13 24 Cal. 449.

14 24 Cal. 457.

15 29 Cal. 112.

16 29 Cal. 415.

17 It has, on the contrary, been approved in at least one comparatively recent decision: Packard v. Craig, 114 Cal. 95, 45 Pac. 1033. See, also, Lord v. Dunster, 79 Cal. 477, 21 Pac. 865.

18 People v. Rodgers, 118 Cal. 393, 46 Pac. 740, 50 Pac. 668.

19 People v. Sutter Street Ry., 117 Cal. 604, 49 Pac. 736; People v. Oakland, 123 Cal. 145, 55 Pac. 772.

have been upheld in actions against the state for bounties alleged to be due under the coyote bounty act,[20] and in cases tried *de novo* in the superior courts, on appeal from justices' courts.[21]

New trials have no place in disbarment proceedings; for such a proceeding is a special one, and no provision is made therein for findings.[22]

A motion for a new trial does not lie in a proceeding to settle the accounts of a receiver and to fix his compensation.[23]

§ 6. Courts Which may Entertain Motions for New Trial.—It was at one time believed that the supreme court might grant motions for new trial in such proceedings as came within its original jurisdiction,[1] and also, that in such proceedings motions for a rehearing were inappropriate.[1a] The first case in the reports bearing on the subject is People v. Coon.[1b] In that case, upon a petition for a rehearing in an original application for a writ of mandate, the court said: "The course prescribed by statute has not been followed in this case, and therefore the petition filed cannot be entertained."

Athough the court did not say specifically that new trial was the proper proceeding, it intimated as much, referring to the fact that the case was one under the original jurisdiction, to which the practice with respect to rehearings did not apply. It is true, the same language might have been used had there been any fatal irregularity in the preliminary steps, as, for example, the want of a notice of intention, or a statement on motion for new trial.

The second case, People v. Holloway,[1c] was also an original application for mandate. There were issues of fact, however, requiring disposition, and the cause was referred to a district court for a trial of such issues. Subsequently a motion for a new trial was made in the lower court, pending which judgment was entered in the supreme court. In explanation of its action, the latter tribunal merely held that the new trial motion should have

[20] San Francisco etc. Co. v. California, 141 Cal. 354, 74 Pac. 1074.

[21] Curtis v. Superior Court, 63 Cal. 435. See, also, People v. Freelon, 8 Cal. 517.

[22] See In re Danford, 157 Cal. 425, 108 Pac. 322. See, also, section 6, *post*. Also In re Tyler, 71 Cal. 353, 12 Pac. 289, 13 Pac. 169, and In re Philbrook, 108 Cal. 14, 40 Pac. 1061.

[23] State v. Court, 28 Mont. 227, 72 Pac. 613.

[1] People v. Holloway, 41 Cal. 409.

[1a] People v. Coon, 25 Cal. 635.

[1b] 25 Cal. 635.

[1c] 41 Cal. 409.

been presented there. The point as to whether a rehearing was, or was not, proper in such a case, was not touched upon. The next case, where the question might have been decided, but was not, was Nevada Bank v. Steinmitz.[14] In that case both methods of procedure were made use of; first, an application for a rehearing, which was denied; and then, a motion for a new trial, which was also denied. The point did not appear to have been raised. It certainly was not decided.

In the Tyler disbarment case,[15] an original proceeding in the supreme court, that court, for the first time, without, however, setting forth its reasons, held that "the motion for a new trial is not the proper remedy in this cause. Considered as a *petition for a rehearing*, we see no reason to grant it."

In Granger's Bank of California v. Superior Court,[16] following the Tyler case with approval, the supreme court said: "It may be further said that the present constitution provides that the judgment of a department of this court shall be final in thirty days, unless before that time ordered into bank; and that there has been a rule in this court ever since its origin that a judgment of the court in bank shall be final in thirty days, unless before that time a rehearing shall have been granted. Neither the constitution nor the rule make any distinction between cases of appellate jurisdiction and cases of original jurisdiction; and indeed most of the cases here which are in form original are, like the case at bar, in their nature appellate. Therefore, to apply to this court those parts of the Code of Civil Procedure about new trials, etc., which are evidently intended to regulate procedure in the superior courts would be to overturn the constitutional provision above mentioned, as well as the ancient rule and uniform practice of the court. A motion for a new trial, with its attendant consequences and delays, would suspend a judgment rendered here beyond the time fixed by the constitution and the rule. Many of the provisions of the code about procedure have reference to appeals, and were intended as means for the perfection of records in the superior courts upon which cases might be reviewed in the appellate court; but in an original proceeding here this court has its own record."

[14] 65 Cal. 219, 3 Pac. 808.

[15] In re Tyler, 71 Cal. 353, 12 Pac. 289, 13 Pac. 169.

[16] 101 Cal. 198, 35 Pac. 642.

In the Philbrook case,[1a] the cases here referred to were reviewed, and the court upheld the decision above quoted.

It thus appears that none of the appellate courts have the power of granting new trials. Apparently the supreme court once had it in matters of original jurisdiction. The district courts (not of appeals) had the power; the probate courts had it,[2] and also the county courts.[3] The superior courts are the successors of the district, probate, and county courts,[4] and undoubtedly have the power to grant new trials. Only the question as to whether the power to grant new trials exists in the justices' courts, and the police and recorder's courts, which are, in almost every respect, *quasi* justices' courts, remains for consideration.

The San Francisco justice's court was originally empowered to grant new trials when sitting in bank.[5] Other justice courts of the state might grant new trials, upon certain specified grounds, without any such restriction.[5a] Upon the adoption of the code, however, all reference to the subject was omitted, and section 925 declared that, inasmuch as justice courts were "of peculiar and limited jurisdiction," only those provisions of the code in their nature applicable thereto, or made so by specific enactment, could be held to apply to such courts.

The provisions of the code in relation to new trials have not been made applicable to justices' courts by any special provision; and it is thought that such provisions are not in their nature applicable to such courts.[5b] For the losing party in an action before a justice may at any time within thirty days appeal to the superior court upon questions of law and fact.[6] Within five days thereafter the justice must transmit all the papers in the case to the superior court.[7] The case is then tried anew in the superior court,[8] and the judgment there rendered is treated in all respects

[1a] 108 Cal. 14, 40 Pac. 1061.

[2] Section 1714, California Code of Civil Procedure. See note 8, section 5, *ante*.

[3] Cummings v. Irwin, 40 Cal. 354; Yenawine v. Richter, 43 Cal. 312; People v. Rosborough, 29 Cal. 415; California Code of Civil Procedure, sec. 1178.

[4] Article 6, sections 5, 6, Constitution of 1879; section 79, California Code of Civil Procedure; People v. Colby, 54 Cal. 184; People v. Gallagher, 55 Cal. 462; and see Ex parte Toland, 54 Cal. 344.

[5] Laws of 1865–66; and Laws of 1871–72, p. 758. Also O'Conner v. Blake, 29 Cal. 312; Winter v. Fitzpatrick, 35 Cal. 265; and cases cited in note 5b, below.

[5a] Section 622, Practice Act.

[5b] Weimmer v. Sutherland, 74 Cal. 341, 15 Pac. 849; Jones v. Justice's Court, 97 Cal. 523, 32 Pac. 575; Simon v. Justice's Court, 127 Cal. 45, 59 Pac. 296.

[6] Section 974, California Code of Civil Procedure.

[7] Section 977, California Code of Civil Procedure.

[8] Section 976, California Code of Civil Procedure.

as any other judgment in the superior court.[9] The record is never returned to the justice. Within six days, therefore, from the rendition of the judgment the justice may lose the record. Assuming that the justice does not lose jurisdiction of the cause when he loses the record, how can he pass upon questions raised on motion for new trial without such record before him? Also the case is, as we have seen, to be tried anew in the superior court. That court may render judgment in favor of one party and award him execution. The justice may grant a new trial and proceed to retry the case, and render judgment in favor of the other party. Moreover, no right of appeal is given from an order of a justice granting or refusing a new trial.

§ 7. The Provisions of the Code of Civil Procedure are Exclusive, and Apply Alike to Cases at Law and Cases in Equity.— That the system of procedure established by the code was intended to be complete in itself, and exclusive of other systems, ought to be apparent to anyone who reads the act attentively. It has been declared to be so by the supreme court. In Humiston v. Smith[1] it was held that the writ of *scire facias* was unknown to our practice; and Cope, J., delivering the opinion, said: "The intention was to adopt a uniform and complete system, and it is impossible to give effect to that intention if parties are at liberty to disregard the course of proceeding pointed out. The system, if it be a system at all, is necessarily exclusive, and the introduction of other remedies would destroy its uniformity and defeat the purposes of the act." So in Levy v. Getleson,[2] Shafter, J., delivering the opinion, said: "The district court cannot be called upon to review a case upon the testimony, nor upon an allegation of errors at law occurring at the trial, except in the way pointed out in the Practice Act. That method is simple and straightforward, and in our judgment was intended to exclude all others." If this principle had always been kept in mind it would have prevented much doubt and difficulty. As was said by Sawyer, J., delivering the opinion in Wetherbee v. Carroll:[3] "If we could only persuade ourselves to forget old terms and old

[9] Section 980, Code of Civil Procedure of California. Similar provisions are to be found in the statutes of the other states.

[1] 21 Cal. 129.
[2] 27 Cal. 685.
[3] 33 Cal. 549, 552, 553.

modes of procedure, which under our system have become obsolete, and confine our attention to the Practice Act itself, it does seem as though we should encounter less difficulty. The abandonment of obsolete terms, which suggest obsolete modes of procedure, and the adoption of the nomenclature of the Practice Act, would doubtless in some degree tend to induce correct views of its provisions."

The system being exclusive, and containing but one set of provisions in relation to new trials and appeals, which provisions contain no reference to any difference between legal and equitable proceedings, it follows that there can be no such difference. It would be strange indeed if the framers of the code, having adopted a new system of pleadings applicable equally in law and in equity, and having abolished the old method of trial in equity, and substituted therefor the common-law method, had nevertheless intended that there should be a difference in the methods of reviewing decisions in the two classes of cases, yet have failed to give any expression to such intention. Nevertheless, the earlier judges could not free their minds from the thraldom of the notion that there must be some inherent difference between the mode of reviewing decisions in equity cases and the mode prescribed by the Practice Act for reviewing decisions in other cases. Thus in Grayson v. Guild,[4] Murray, C. J., delivering the opinion, said: "We conceive that when a case in chancery is once before us, we have full power and jurisdiction for the purposes of equity to correct the errors of the court below, in whatever shape and by whatever party the appeal is brought up." So in Walker v. Sedgwick,[5] it was held that findings were not conclusive in an equity case, the court saying: "In chancery cases this court has to examine the facts, and is not concluded by the findings of the chancellor." So in Gray v. Eaton,[6] it was held that a motion for a new trial, after a special verdict in an equity case, was "supererogatory," because the verdict was merely advisory and the judge had not "decreed upon the verdict." So in Dewey v. Bowman,[7] it was held that in an equity case the supreme court could consider the question whether the evidence was sufficient to sustain the decision without a motion for a new trial. So in Still v. Saunders,[8] in which the last two cases were cited with approval, it was

[4] 4 Cal. 122.
[5] 5 Cal. 192.
[6] 5 Cal. 448.
[7] 8 Cal. 145.
[8] 8 Cal. 281.

held that a special verdict in an equity case was merely advisory to the chancellor, and that, therefore, errors in instructions to the jury would not be revised.

The rule that a special verdict in an equity case is merely advisory still obtains,[8a] although the principle on which it rests has long been overturned. Not long after the last-mentioned case the incongruity of the doctrine of the above decisions seems to have dawned upon the minds of the judges. Thus in Riddle v. Baker,[9] Baldwin, J., referring probably to some unreported case, said: "For convenience and uniformity we have held that the Practice Act, regulating proceedings in civil cases, applies as a general rule as well to equity as common-law suits." So in Duff v. Fisher,[10] it was held, overruling Gray v. Eaton, that when a verdict in an equity case was received without objection it was conclusive, and that the question whether the evidence was sufficient to sustain it could only be presented on a motion for new trial; and Field, C. J., delivering the opinion, said: "The Practice Act applies as well to equitable as to legal actions, so far as its provisions are consistent with the rights and remedies administered in courts of equity." So in Gagliardo v. Hoberlin,[11] it was held, approving Duff v. Fisher, that the supreme court could not consider the question whether the chancellor's findings were sustained by the evidence, except through the instrumentality of a motion for new trial; and Cope, J., delivering the opinion, said: "The legislature intended that the rules of practice should have a uniform operation, and that intention is so expressed as to leave no room for misapprehension. It is the duty of courts to administer these rules in accordance with the designs of the legislature, and any inquiry into the nature of the action is irrelevant and inadmissible. All actions are placed upon the same footing, and the courts have no authority to create distinctions not recognized by the statute. The case at bar is eminently a proper one to place ourselves right upon this subject."[12] So in Doe v. Vallejo,[13] it was held that the rule that the supreme court would not disturb the findings of the court below if the evidence was conflicting applied to equity cases; and Sawyer, J., delivering the opinion, said: "We had supposed that the court

[8a] See section 234, *post*.
[9] 13 Cal. 295.
[10] 15 Cal. 375.
[11] 18 Cal. 394.
[12] See, also, Allen v. Fennon, 27 Cal. 68; Green v. Butler, 26 Cal. 595; Hihn v. Peck, 30 Cal. 280.
[13] 29 Cal. 385.

had so often declined to make any distinction in the practice between cases at law and cases in equity, that the question might be considered settled. Our system does not contemplate any distinction in this respect, and there is no propriety in making any under it." So in Harris v. S. F. S. R. Co.,[14] in which the proper mode of reviewing the report of a referee to take an account was considered, Temple, J., delivering the opinion, said: "It is thoroughly settled in this state, that the mode of reviewing the action of the court upon an issue of fact is the same whether the case is at law or in equity,—there must be a motion for a new trial."

In 1861 the legislature passed an act which provided, among other things, that "no distinction as to the mode of taking or perfecting appeals, or as to the effect of them, shall be made between cases at law and cases in equity; but the provisions of the Practice Act shall apply in the same manner to all cases of appeal."[15] This act undoubtedly applied to appeals from orders on motion for new trial as well as to other appeals. It is not inconsistent with anything in the codes; and since the Code of Civil Procedure contains no express provision on the subject, the section above quoted is perhaps still in force.[16] But whether it is in force or not, the decisions above cited, which were decided without reference to the statute quoted, conclusively establish the proposition that the provisions of the code in relation to new trials apply alike to legal and equitable proceedings. The only remnant of the early notion which still obtains is the doctrine that a special verdict in an equity case is merely advisory to the judge, as to which doctrine see section 234 of this treatise.

§ 8. The Provisions of the Code in Relation to New Trials Apply to Cases Tried by Referees.—Before there was any statute on the subject it was the practice to refer cases to referees for trial.[1] The first statute in relation to the matter was that of April 22, 1850.[2] This act was short-lived, and was superseded by the act of 1851,[3] which contained the following provision:

"Sec. 187. The referees shall make their report within ten days after the testimony before them is closed. Their report upon the

[14] 41 Cal. 393.
[15] Laws of 1861, p. 589.
[16] See Whitaker v. Haynes, 49 Cal. 596, 597.
[1] Gunter v. Sanchez, 1 Cal. 45.
[2] Laws of 1850, p. 443, sec. 165; Walton v. Minturn, 1 Cal. 362, was decided under this act.
[3] Laws of 1851, p. 80.

whole issue shall stand as the decision of the court, and upon filing their report with the clerk of the court, judgment may be entered thereon in the same manner as if made by the court. When the reference is to report the facts, the report shall have the effect of a special verdict."

This section is not materially different from subsequent statutes. Its plain meaning would seem to be that trial by referee is a separate and independent mode of trial, and that the report when filed should take the place of and have the same force and effect as the verdict of a jury or the findings of a judge, and no more, and be reviewable in the same manner; and such was the construction which finally prevailed. But the construction given to the statute by the early judges was, that reports of referees were similar to and had the same effect as the awards of arbitrators, and could only be reviewed for errors apparent on the face of the report. This was somewhat remarkable, inasmuch as the court had only a short while before decided that a submission to arbitration operated as a discontinuance of the suit.[4] Nevertheless, the doctrine became firmly established. The case in which it was first definitely put forward is Tyson v. Wells.[5] In that case the supreme court reversed an order setting aside the report of a referee and granting a new trial upon the ground that the court below could not disturb the report of a referee unless error appeared on the face of the report. And Heydenfeldt, J., delivering the opinion, said: "It may be regarded as the settled rule that the court will not disturb the award of an arbitrator or report of a referee, unless the error which is complained of, whether it be of law or fact, appears on the face of the award; and in the case of a referee, our statute does not alter or interfere with the rule. It declares that the decision may be excepted to and reviewed in like manner as if tried by the court. The clear meaning of this is, that exceptions must be taken to the rulings of the referee during the progress of the trial in the same manner as they are taken before a court, and that then such exceptions must be embodied in the report of the referee, or made a part of his report by being properly certified by him." So in Headley v. Reed,[6] the same learned justice, delivering the opinion of the court, said: "We decided in Tyson v. Wells that the report of a referee under the statute had the same legal effect as the

[4] Gunter v. Sanchez, 1 Cal. 45.
[5] 2 Cal. 122.
[6] 2 Cal. 322.

award of an arbitrator. According to the rule settled in Muldrow v. Norris,[7] the decision of the referee can only be set aside on account of fraud or gross error of law or fact apparent upon its face." The foregoing were common-law cases, but there was no intimation in the opinions that the rule laid down would not apply to the report of a referee in an equity case. And the rule was applied in Grayson v. Guild,[8] which was an equity case, and in which the largest powers were claimed by the court as a court of chancery. In that case Murray, C. J., delivering the opinion, said, with reference to the argument of counsel that the discretion of the court below in granting a new trial should not be interfered with: "This is certainly correct when applied to cases tried by the judge, but has never been recognized for the purpose of setting aside the report of a referee or the award of an arbitrator, which in all essentials we hold to be the same in effect. On the contrary, we have invariably held the opposite doctrine." One consequence of this theory was, what indeed is perfectly true upon a correct construction of the statute; viz., that where the reference was to report the facts and a judgment, the judgment of the referee had to be entered as a matter of course, and the judge had no power to set it aside except on motion for new trial.[9] The error of the arbitration theory consisted in attributing too much force to the report, and in assum-

[7] This case was in relation to the award of an arbitrator. See 2 Cal. 74, 56 Am. Dec. 313.

[8] 4 Cal. 122.

[9] Headley v. Reed, 2 Cal. 322; Sloan v. Smith, 3 Cal. 406; Russell v. Elliott, 2 Cal. 245; but see Porter v. Barling, 2 Cal. 73. Where the reference was to report the facts without a judgment, the statute declared the report should have the effect of a special verdict, and upon the filing of the report, the judge had to direct what judgment should be entered thereon. See Peabody v. Phelps, 9 Cal. 213. It has been supposed that there is a third kind of reference, viz., where the referee is to report a judgment but not the facts. See Connor v. Morris, 23 Cal. 447; and see, also, Lucas v. San Francisco, 28 Cal. 591. Of this remarkable kind of a reference it may be said that under the system of implied findings, if no findings were requested, the report might have passed muster on the ground that findings would be presumed in support of the judgment. See Parker v. Page, 38 Cal. 522. But if findings should be requested, a difficulty would arise; for under the ruling in Connor v. Morris, the case in which this species of reference was discovered, it would be no part of the referee's duty to make findings; and the judge could not make them, for the evidence would not be before him; and if he could, he would be liable to make findings which would require a different judgment from the referee's judgment, which, however, the statute declares shall stand as the judgment of the court. Under the system of express findings it is sufficient to say that if they are shown not to have been waived, findings must appear in the record. As to references of matters not put in issue by the pleadings, see end of section 8.

ing that it could not be reviewed in the same manner as the verdict of a jury or the decision of a judge. The theory was repudiated, and the matter put upon a sound basis in Cappe v. Brizzolara,[10] in which case Cope, J., delivering the opinion, said: "The provisions of the Practice Act relating to new trials are general in their terms, and vest in the courts the same power in cases tried by a referee as in cases tried by the court itself, or by a jury. Every case is placed upon the same footing; and the grounds upon which a new trial may be granted are the same in all cases, irrespective of the manner in which the case was originally tried. The doctrine laid down in Tyson v. Wells, 2 Cal. 122, is in direct repugnance to the statute, and cannot be maintained."

With the overthrow of the arbitration theory and its doctrine that error must appear on the face of the report disappeared its corollary that it was proper for the referee to incorporate the evidence, rulings, and exceptions into his report. According to the early cases it was proper to incorporate the evidence, rulings, and exceptions in the report. It is true that it was considered that the report should contain the referee's findings of fact and conclusions of law,[11] and that the evidence was not a *necessary* part of the report;[12] but in pursuance of the rule that error must appear on the face of the report, it was held to be incumbent upon the losing party to see that his exceptions appeared therein.[13] At one time it was held that if error did not appear in the first report of the referee, he had no power to file "an additional or amended report," and that if one were filed by him it would be disregarded;[14] while later it seemed to be supposed that the evidence and exceptions could be embodied in something in the nature of a bill of exceptions.[15] The true doctrine and the one resulting from the principles laid down in Cappe v. Brizzolara is that the report of a referee is to be reviewed upon motion for new trial to be made upon a statement, bill of exceptions, or affidavits (according to the grounds of the motion), which are to be prepared precisely as upon any other motion for new trial.[16] The findings of the referee are to be the

[10] 19 Cal. 608.
[11] See Lambert v. Smith, 3 Cal. 408.
[12] Sloan v. Smith, 3 Cal. 406.
[13] Tyson v. Wells, 2 Cal. 122; Headley v. Reed, 2 Cal. 322; Goodrich v. Mayor of Marysville, 5 Cal. 430.
[14] Headley v. Reed, 2 Cal. 322.
[15] See opinion in Goodrich v. Mayor of Marysville, 5 Cal. 430.
[16] See Donahue v. Cromartie, 21 Cal. 80. And this applies with equal force to reports of arbitrators. In re Connor, 128 Cal. 279, 60 Pac. 862.

same as the findings of the judge,[17] and it is no more proper to place evidence in the one than in the other.[17a] Not very long after the decision in Cappe v. Brizzolara, the section in relation to the reports of referees above quoted was amended so as to leave out the word "report" (probably because too suggestive of the "report" of arbitrators), and to substitute therefor the language of the section in relation to the findings of judges, thus indicating still more clearly (if that were possible) that it was the intention to make the findings of referees correspond in every respect to the findings of judges. As then amended the section read as follows:

"Sec. 187. The referees or commissioners shall report their findings in writing to the court within ten days (or within such further time as may be allowed by the court) after the testimony shall have been closed, and the facts found and conclusions of law shall be separately stated therein. The finding of the referee or commissioner upon the whole issue shall stand as the finding of the court, and upon filing of the finding with the clerk of the court, judgment may be entered thereon in the same manner as if the action had been tried by the court. The findings of the referee or commissioner may be excepted to and reviewed in like manner as if made by the court. When the reference is to report the facts, the finding reported shall have the effect of a special verdict."[18]

[17] Protalongo v. Larco, 47 Cal. 378.

[17a] See Lee Sack Sam v. Gray, 104 Cal. 243, 38 Pac. 85. But provision is sometimes made in the practice acts for the incorporation of the evidence and exceptions in the report. See sections cited in note 18, below.

[18] Laws of 1865–66, p. 845. Compare section 180, in relation to findings of a judge, which section was as follows: "Upon the trial of an issue of fact by the court, its decision shall be given in writing, and filed with the clerk within ten days after the trial took place. In giving the decision the facts found and the conclusions of law shall be separately stated. Judgment upon the decision shall be entered accordingly." Laws of 1851, p. 78; and see, also, sections 632, 633, California Code of Civil Procedure. It is true that the doctrine of implied findings applied to the reports of referees. See Laws of 1865–66, p. 844; and Parker v. Page, 38 Cal. 522. But the adoption of the language of section 180 is significant.

Section 187, above quoted, corresponds to the following sections of the Code of Civil Procedure of California:

"Sec. 643. The referees or commissioner must report their findings in writing to the court within twenty days after the testimony is closed, and the facts found and conclusions of law must be separately stated therein."

"Sec. 644. The findings of the referee or commissioner upon the whole issue must stand as the finding of the court, and upon filing of the finding with the clerk of the court, judgment may be entered thereon in the same manner as if the action had been tried by the court."

It is to be noted that the limitation of time in which the report is to be filed has been held to be directory merely. Keller v. Sutrick, 22 Cal.

At the same time section 203 was amended so as expressly to provide that the findings of a referee should constitute part of the

471. The limitation of time in which the court is to file its findings has also been held to be directory. McQuillan v. Donahue, 49 Cal. 157; Broad v. Murray, 44 Cal. 228; Vermule v. Shaw, 4 Cal. 214.

Sections 209, 210 and 211, Mills' Annotated Code of Civil Procedure of Colorado, contain similar provisions; but section 214 provides specifically for a new trial.

See, also, sections 4419 and 4420, Revised Codes of Idaho, which are practically the same as the California sections, omitting the word "commissioner." Also sections 6780 and 6781, Revised Codes of Montana (sections 1139 and 1140, Code of Civil Procedure), which are also practically the same, except as to the word "commissioner," and as to the time, which is ten instead of twenty days. After "testimony is closed," insert "or such other time as the court may allow"; and omit "whole" before "issue" in section 6781.

Section 3284, Cutting's Compiled Laws of Nevada (section 189, Civil Practice), provides as follows: "The referees shall make their report within ten days after the testimony before them is closed. Their report upon the whole issue shall stand as the decision of the court, and upon filing the report with the clerk of the court, judgment may be entered thereon in the same manner as if the action had been tried by the court. The decision of the referees may be excepted to and reviewed in like manner as if made by the court. When the reference is to report the facts, the report shall have the effect of a special verdict."

Section 2685, subsection 153 et seq., Compiled Laws of New Mexico, requires the speedy report of a referee, and for either the hearing of exceptions, if any, by the court, or the entry of judgment as of course. If the exceptions are allowed, "the matter may again be referred with instructions, if necessary; but if the report is confirmed by the court, judgment shall be rendered thereon. The same effect shall be given to findings of fact by referees as was heretofore given by law to such findings by masters in chancery under the general reference of a cause." Subsection 156 provides that causes may be referred by consent, with directions that the referee may hear and determine both issues of law and fact, and the decision, when rendered, shall be final, and judgment entered without any necessity of confirmation by the court. "Such judgment shall be subject to review on appeal or error as in other cases."

Section 7051, Revised Codes of North Dakota, provides that "the trial by referee shall be conducted in the same manner as a trial by the court. He must state the facts found and the conclusions of law separately, and report his findings, together with all of the evidence taken by him and all exceptions taken on the hearing to the district court, and the district court may review such report and on motion enter judgment thereon, or set aside, alter or modify the same and enter judgment upon the same so altered or modified, and may require the referee to amend his report when necessary. The judgment so entered by the district court may be appealed from to the supreme court in like manner as from judgments in other cases."

Section 5812, Compiled Laws of Oklahoma, is practically the same as that of Wyoming, hereinafter quoted. So, also, is section 3177, Compiled Laws of Utah.

Section 165, Lord's Oregon Laws, provides: "Subject to the limitations and directions prescribed in the order of reference, the trial by referees shall be conducted in the same manner as a trial by the court." Section 166, as follows: "The report of the referees shall state the facts found, and when the order of reference includes an issue of law, it shall state the conclusions of law separately from the facts." Further provision is made for incorporating the evidence and the exceptions, etc. Sec-

judgment-roll.[19] It is therefore beyond a doubt that the findings of referees are intended to be in all respects similar to the findings of judges.[20] The question whether they sustain the judg-

tion 167 provides for the filing of the report with the clerk of the court, and for a hearing thereof with a view to its acceptance or rejection. Section 168 provides: "The court may affirm or set aside the report either in whole or in part. If it affirm the report it shall give judgment accordingly. If the report be set aside, either in whole or in part, the court may make another order of reference, as to all, or so much of the report as is set aside, to the original referees, or others, or it may find the facts or determine the law itself, and give judgment accordingly. Upon a motion to set aside a report, the conclusions thereof shall be deemed and considered as the verdict of the jury." Under the provisions of this section it has been held that while the court is authorized to set aside the findings of a referee, and order a new referenee, or find the facts and the law itself, it can only do so under the same circumstances in which it has authority to set aside the verdict of a jury. Merchants' National Bank v. Pope, 19 Or. 35, 26 Pac. 622; Liebe v. Nicolai, 30 Or. 364, 48 Pac. 172; Puffer v. American Ins. Co., 48 Or. 475, 87 Pac. 523. That is, by a motion for a new trial under the provisions of section 174, Oregon Laws.

Sections 287, 288 and 289, Compiled Laws of South Dakota, contain, along with others, provisions similar in effect to those of the California code above quoted, but section 290 makes specific provision that "a new trial may be had or an appeal taken to the supreme court in like manner as in other cases, and the report of the referee may be incorporated in the bill of exceptions."

Sections 374, 375, 376, and 377, Rem. & Bal. Codes of Washington, are practically identical with those of Oregon, above quoted.

Section 4523, Compiled Statutes of Wyoming, contains provisions similar to those of section 7051, Revised Codes of North Dakota, above quoted. It is, so far as applicable, as follows: "The trial by referees shall be conducted in the same manner as a trial by the court; they must state the facts found, and the conclusions of law separately, and their decision must be given, and may be excepted to and reviewed, in like manner; their report upon the whole issue shall stand as the decision of the court, and judgment may be entered thereon in the same manner as if the action had been tried by the court; when the reference is to report facts, the report shall have the effect of a special verdict;"

[19] Laws of 1865–66, p. 846. By the act of 1851 neither the report of a referee, nor the findings of a judge, nor the verdict of a jury were expressly made part of the judgment-roll. Laws of 1851, p. 82. The section only made "a copy of the judgment" part of the roll. Nevertheless it was held in Reynolds v. Harris, 8 Cal. 617, that the findings of the judge were part of the roll. In 1862 the section was amended so as to make the verdict of a jury, as well as the findings of the judge, part of the roll (Laws of 1862, p. 119); but the findings of a referee or commissioner were not mentioned. It is probable that if the question had been necessary to a decision, it would have been held that the findings of a referee were part of the roll. See Lucas v. San Francisco, 28 Cal. 591, 595, 596. In 1866, however, as above stated, the section was amended so as expressly to include the findings of a referee. The Code of Civil Procedure has a similar provision. Section 670, Code of Civil Procedure.

[20] See generally Plant v. Fleming, 20 Cal. 92.

The scope of the order of reference determines the question as to whether the report is to be deemed a special verdict, findings upon the facts, a general verdict of a jury, or such findings and conclusions as are sufficient to support a judgment, for the report of a referee may be equal in scope to any one of these. Thus

ment is to be presented on an appeal from the judgment.[21] And such findings are to be attacked on the ground that the evidence does not support them on motion for new trial.[22] But the change introduced into the practice by the Code of Civil Procedure, allowing questions of the insufficiency of the evidence to sustain the decision, to be reviewed on appeal from the judgment, if such appeal be taken within sixty days, applies to decisions of referees.[23]

What is here said of the findings of referees as having, under section 670, Code of Civil Procedure,[23a] a place in the judgment-roll, equally with findings of the court, applies only to findings upon the whole issue, as distinguished from ascertainments of single facts.[23b] It cannot be doubted that there may be findings of this as well as the other kind—findings of the whole issue, or of specific parts thereof. Where, therefore, the determination of a referee enters into the judgment as does the finding of the court, and is in all respects a finding as distinguished from the conclusions of law which accompany it, it has a place in the judgment-

in some codes it is specifically provided that when the reference is to report facts alone, the report shall be deemed a special verdict. Section 645, Code of Civil Procedure of California; section 4421, Revised Codes of Idaho; section 6782, Revised Codes of Montana (section 1141, Code of Civil Procedure); section 3284, Cutting's Compiled Laws of Nevada (section 189, Civil Practice); section 4523, Compiled Statutes of Wyoming.

Again, it is sometimes provided that upon a reference of the whole issue, the decision of the referee shall stand as that of the court, and "upon the filing of the finding with the clerk of the court, judgment may be entered thereon in the same manner as if the action had been tried by the court." And the same language is used with reference to the separate stating of findings of fact and conclusions of law as is used in outlining the duty of the court. See statutes cited in note 18, *supra*.

That the scope of the order determines the character of the report has been repeatedly determined. See Bradshaw v. Morse, 20 Mont. 214, 50 Pac. 554; Murphy v. Patterson, 24 Mont. 575, 63 Pac. 375; State v. Donlan, 32 Mont. 256, 80 Pac. 244.

[21] Thompson v. Patterson, 54 Cal. 542. The *dictum* to the contrary in the case of Calderwood v. Peyser, 31 Cal. 333, is in conflict with the principle that a new trial is a re-examination of an issue of fact, and not of a conclusion of law. See section 1, *ante*.

[22] Hihn v. Peck, 30 Cal. 280.

[23] See section 96, *post*.

[23a] Section 203, California Practice Act. See section 230, *post*.

[23b] See Faulkner v. Hendy, 103 Cal. 15, 36 Pac. 1021; Lee Sack Sam v. Gray, 104 Cal. 243, 38 Pac. 85. Also section 644, California Code of Civil Procedure; Bradshaw v. Morse, 20 Mont. 214, 50 Pac. 554; Murphy v. Patterson, 24 Mont. 575, 63 Pac. 375.

If the findings or verdict is not a part of the judgment-roll by statute prescribing what shall constitute it, as in Oregon (section 208, Laws) and Washington (section 442, Rem. & Bal. Codes), the referee's report would not be a part of the roll. See Osborn v. Graves, 11 Or. 526, 6 Pac. 227; Van Bibber v. Fields, 25 Or. 527, 36 Pac. 526; Trummer v. Konrad, 32 Or. 54, 51 Pac. 447. See note 23a, *ante*.

roll. Such a finding is the equivalent of the finding of the court, or the special verdict of a jury. Where, however, the determination in question is merely the ascertainment of some particular fact, a determination of which is necessary to enable the court to make *its* findings, requiring to be accepted and incorporated into such findings before it receives legal sanction, it has no separate place in the roll outside of and apart from the findings of the court.

Furthermore, the foregoing portion of this section does not apply to references of matters *not put in issue by the pleadings.* The report of a referee to whom such matters are referred is not binding until adopted or "confirmed" by the court;[24] and when adopted or "confirmed," it is to be treated as a part of the findings of the court. If the court be not satisfied with the referee's conclusions, it may examine the evidence sent in by him, and make findings of its own thereon, or may in its discretion refer the matter.[25]

The report of a referee in a suit in equity is advisory only, in this respect closely resembling the verdict of a jury.[25a] Hence, a new trial before the referee in such a case would not be proper.[25b]

The trial judge may, and often does, in probate proceedings more particularly, sit as a referee. In such cases, such judge is as much a referee, and his proceedings and report are governed as wholly by the rules as to referees in general, as though he were in fact a referee of the court, regularly appointed as such.[26]

§ 9. When a Motion for New Trial Should be Made, and When Relief Should be Applied for Under Section 473 of the Code. Section 473 of the Code of Civil Procedure[1] provides, among

[24] Harris v. S. F. S. R. Co., 41 Cal. 393; Johnston v. Dopkins, 6 Cal. 83, 84.

[25] McHenry v. Moore, 5 Cal. 90, 92, 93. References in divorce cases stand upon a special statute. See Baker v. Baker, 10 Cal. 527.

[25a] Bradshaw v. Morse, 20 Mont. 214, 50 Pac. 554; Field v. Romero, 7 N. M. 630, 41 Pac. 517; Prondzinski v. Garbutt, 8 N. D. 191, 77 N. W. 1012; Erisman v. Kerwin, 8 Okl. 92, 56 Pac. 858; Pratsch v. Aberdeen Packing Co., 7 Wash. 346, 35 Pac. 123; Fairhaven Lumber Co. v. Jordan, 5 Wash. 729, 32 Pac. 729; Horr v. Aberdeen Packing Co., 7 Wash. 354, 35 Pac. 125. See, also, Lovejoy v. Chapman, 23 Or. 571, 32 Pac. 687; Bruce v. Phoenix Ins. Co., 24 Or. 486, 34 Pac. 16; Wollenberg v. Minard, 37 Or. 621, 62 Pac. 532.

[25b] See section 7, *ante.*

[26] Lee Sack Sam v. Gray, 104 Cal. 243, 38 Pac. 85.

[1] This section corresponds to section 68 of the old California Practice Act. The application of this and corresponding statutes of other states is considered more thoroughly in chapter 52, *post.*

other things, that the court may, "upon such terms as may be just, relieve a party or his legal representative from a judgment, order, or other proceeding taken against him through his mistake, inadvertence, surprise, or excusable neglect; *provided*, that application therefor be made within a reasonable time, but in no case exceeding six months, after such judgment, order, or proceeding was taken." Section 657 of the code[2] provides, among other things, that the verdict or other decision of fact may be vacated and a new trial be granted for: "3. Accident or surprise, which ordinary prudence could not have guarded against." It is clear that since a new trial is a re-examination of an issue of fact,[3] a new trial could not be granted where no issues of fact had been joined, but judgment had gone by default; and in practice relief against judgments by default is always sought under section 473.[3a] But this is not the only purpose of section 473. Relief has been granted under it, although there has been a trial of issues of fact. In McKinley v. Tuttle,[4] there were many defendants; answers were put in for most of them and the case was tried, and judgment passed for the plaintiff. Three of the defendants, for whom answers had been put in by some mistake, were not represented at the trial. It was held that their application for relief under section 473 (section 68 of the old Practice Act) was proper, and the court said: "If we assume, as claimed by counsel for appellants, that Lee attended the trial as attorney for the respondents, and conducted the defense on their behalf, their remedy would undoubtedly have been by motion for new trial under section 195, and not by motion for relief from the judgment under section 68; but to so assume is to assume the principal point in controversy." This decision makes the question as to which remedy is proper turn, not upon whether there has been any trial of issues of fact, but upon whether, if such trial has taken place, the applicant was represented at it. Of the

[2] This section corresponds to section 195 of the old California Practice Act. See section 1, *ante*, and section 23, *post*.

[3] See section 1, *ante*.

[3a] See section 1, note 10b, *ante*, and section 343, note 1a, *post*. Section 3402, Compiled Laws of 1888 (section 3294, Compiled Laws of 1898), providing for a new trial upon a notice of motion made within ten (now five) days after verdict, applies only to a case where the aggrieved party was present at the trial, and does not apply to a judgment upon default or upon a trial in the absence of defendant. Thomas v. Morris, 8 Utah, 284, 31 Pac. 446. Such new trial would be under the authority of section 3256, Compiled Laws of 1888.

[4] 34 Cal. 235.

correctness of the *dictum* above quoted there can be no doubt; but the correctness of the decision may perhaps admit of some question. The decision, however, has not been disturbed. In the absence of further cases on the subject, the line of demarcation between the two sections cannot be clearly drawn.

§ 9a. **Effect of Change of Law upon Pending Proceedings.**—It is well settled that the legislature cannot, by any change in the law, impair vested rights. But a party has not a vested right in any particular remedy; and while the legislature cannot take away all the remedies by which a right may be enforced[1] (for that would be to destroy the right), it may substitute one remedy for another, and regulate all matters in relation to mere procedure. In the case of People v. Mortimer,[2] the supreme court quoted with approval the following passage from Cooley on Constitutional Limitations, viz.: "So far as mere procedure is concerned, a party has no more right in a criminal than in a civil action to insist that his case shall be disposed of under the law in force when the act to be investigated is charged to have taken place. Remedies must always be under the control of the legislature; and it would create endless confusion in legal proceedings if every case was to be conducted only in accordance with the rules of practice, and heard only by the courts in existence when the facts arose."

The principle laid down in the passage quoted has several times been affirmed in California;[3] but the power to change the remedy extends further than is above stated. The legislature may change not only the rules of procedure in force at the time the act was committed, or the occurrence in question took place, but also the rules in force at the time of the commencement of the proceedings. In other words, the change of remedy may apply to pending actions. Thus in People v. Mortimer, above cited, it was held that the provision of the Penal Code in relation to the right to open and close the argument to the jury applied on the trial of an

1 See Scarborough v. Dugan, 10 Cal. 305; Creighton v. Pragg, 21 Cal. 115; Smith v. Morse, 2 Cal. 524.

2 46 Cal. 114.

3 See Gilman v. Contra Costa County, 6 Cal. 676; People v. Senter, 28 Cal. 502; Higgins v. Bear River Co., 27 Cal. 153; Galland v. Lewis, 26 Cal. 46; Dentzel v. Waldie, 30 Cal. 138; Tuolumne Co. v. Sedgwick, 15 Cal. 515; Stafford v. Lick, 7 Cal. 479; Billings v. Hall, 7 Cal. 1, 3, 4; Cook v. McChristian, 4 Cal. 23; Moore v. Martin, 38 Cal. 428. See, also, Kennedy v. Board of Education, 82 Cal. 483, 22 Pac. 1042.

indictment found before the enactment of the code. So in Tulley v. Tranor,[4] it was held that the rule as to the measure of damages for a conversion of personal property, established by an amendment made after the commencement of the action, was to govern at the trial. So where the deposition of a party was admissible at the time it was taken, but before the trial the statute was amended so as to render the party incompetent to testify, it was held error to admit the deposition.[5] So where by the law in force when certain insolvency proceedings were commenced the answer of the petitioner to the opposition of a creditor was not required to be verified, but prior to the filing of the answer the legislature passed an act requiring it to be verified, it was held that the latter act governed, and that the answer should be verified.[6] So where a judgment was rendered March 1, 1862, and on March 5, 1862, an act took effect allowing the affidavits of jurors to be received to show that the verdict was arrived at by a resort to the determination of chance, it was held that affidavits of jurors on a motion for new trial made the following August should be received.[7] So in Bensley v. Ellis,[8] it was held that an amendment to section 68 of the Practice Act, by which it was provided that a party might in certain cases move for relief against a judgment within five months after the adjournment of the term, applied to a judgment of dismissal made before the amendment took effect.

The case of First National Bank v. Henderson[8a] deals with this question in such fashion as to entitle it to be regarded as a leading case thereon. Harrison, J., there said:

[4] 53 Cal. 274.

[5] Mitchell v. Haggenmeyer, 51 Cal. 108.

[6] Strueven v. His Creditors, 62 Cal. 45.

[7] Donner v. Palmer, 23 Cal. 40.

[8] 39 Cal. 309; look at Partridge v. San Francisco, 27 Cal. 415.

[8a] 101 Cal. 308, 35 Pac. 899. See, also, Spears v. Modoc Co., 101 Cal. 303, 35 Pac. 869, where plaintiff was convicted for the violation of a county ordinance forbidding the keeping of a drinking saloon, and sentenced to pay a fine. An appeal was taken to the superior court from the justice court where the judgment of conviction was rendered. In the superior court the judgment was affirmed; but, pending the appeal, and prior to the hearing thereof, the ordinance under which the judgment of conviction was rendered was repealed. Subsequent to the affirmance of the judgment in the higher court execution was issued out of the justice court against the property of the plaintiff to satisfy the fine. The case at bar was an injunction suit in the superior court to restrain the enforcement of the execution. A demurrer to the complaint was sustained, and plaintiff appealed. The supreme court reversed the judgment, holding, in the following language, that the repeal of the ordinance had the effect of wiping it as completely from the book of county ordinances as though it had never existed, except as to those prosecutions thereunder which had been entirely disposed of: "The judgment rendered in the justice's court was

"Ordinarily, it is the province of the appellate court to review the judgment of the inferior court as of the time when it was rendered, as ordinarily the judgment of a trial court is a determination of the rights of the parties as they existed at the commencement of the action. This rule is not, however, inflexible. Matters may arise subsequent to the commencement of the action which will affect the rights of the parties thereto, and the judgment to be rendered therein, and supplemental pleadings are authorized in order that these matters may be properly brought before the court. So, too, matters may arise subsequent to an appeal affecting the judgment appealed from, and although additional pleadings are not permitted in the appellate court, yet, upon proper suggestion and proof of such matters, they will be considered by it. When the jurisdiction of the appellate court depends upon a statute, the repeal of the statute takes away its jurisdiction. In actions of a penal character, depending upon a statute, the repeal of the statute pending the appeal will deprive the appellate court of any power to render a judgment by which this penalty may be enforced. Cooley, in his treatise on Constitutional Limitations, says, page 469: 'If a case is appealed, and, pending the appeal, the law is changed, the appellate court must dispose of the case under the law in force when its decision is rendered.' In United States v. Schooner Peggy, 1 Cranch (U. S.), 103, 2 L. ed. 49, a decree of condemnation had been made, from which an appeal was taken, and, pending the appeal, the United States entered into a treaty with France, by which the two nations mutually agreed to restore all property that had not been definitely condemned. To the argument that the court could only inquire whether the judgment of condemnation was erroneous when delivered, and that if it was then correct it could not be made otherwise by anything subsequent to its rendition, Chief Justice Marshall said: 'It is in general true that the province of an appellate court is only to inquire whether a judgment when rendered was erroneous or not, but, if subsequent to the judgment and before the decision of the appellate court, a law intervenes and positively changes the rule which governs, the law must be obeyed

the infliction of a penalty for the violation of a municipal ordinance, and not the determination of any rights of the parties arising out of contract or obligation; and the attempt to take the property of the plaintiff under an execution issued on that judgment is only the enforcement of the penalty which the county by its repeal of the ordinance has remitted." Attention is invited to the cases cited in this opinion.

or its obligation denied. In such a case the court must decide according to existing laws, and, if it be necessary to set aside a judgment, rightful when rendered, but which cannot be affirmed but in violation of law, the judgment must be set aside.' (Citing cases in support. Referring to Musgrove v. Vicksburg etc. Co., 50 Miss. 677.) In the latter case the court say: 'If there has been a change or alteration or repeal of the law applicable to the rights of the parties, after rendition of the original judgment, and pending the appeal, the case must be heard and decided in the appellate court according to the existing law. If, therefore, the judgment of the court of original jurisdiction was wrong on the law as it then stood, although there may have been error, if the law has been repealed the court will not reverse and remand, because the inferior court must recognize the repeal, and conform on the second trial to the law, as it then was, and not to the law as it may have been at the time of the first trial.' (Citing cases in illustration of the principle.)"

So far, therefore, as the mere remedy is concerned, a statute may, to some extent, operate retroactively.[9] Whether any particular statute was intended so to operate is a question of construction. And in this regard the rule is that a statute should not be construed to be retroactive, unless it clearly appears that such was the intention.[9a] This rule is embodied in section 3 of the Code of Civil Procedure, which provides that "no part of it is retroactive unless expressly so declared." In accordance with this provision, it was held in Foscalina v. Doyle[10] that the provisions of the code requiring written findings did not apply to actions tried before its passage. So in Caulfield v. Doe,[11] it was held that the provisions of the code in relation to bills of exceptions did not apply where the record on appeal from an order was made up and the appeal taken before the code went into effect. So where a motion for new trial was made and decided before the code went into effect, it was held that the provisions of the old Practice Act governed.[12] But the provision above

[9] As to the general rule, see Galland v. Lewis, 26 Cal. 46; Bensley v. Ellis, 39 Cal. 309; People v. Senter, 28 Cal. 502; People v. Mortimer, 46 Cal. 114; Dentzel v. Waldie, 30 Cal. 138.

[9a] Estate of Pico, 52 Cal. 84; Higgins v. Bear River Co., 27 Cal. 153; Mann v. McAtee, 37 Cal. 11, 14, 15; Thorne v. San Francisco, 4 Cal. 127; Gates v. Salmon, 28 Cal. 320.

[10] 48 Cal. 151.

[11] 45 Cal. 221.

[12] Hancock v. Thom, 46 Cal. 643; and see Macy v. Davila, 48 Cal. 646.

quoted does not mean that no part of the code applies to pending actions unless expressly so declared, but merely that they shall not apply to *prior proceedings* in pending actions, unless expressly so declared. Subsequent proceedings are to be governed by the provisions of the code. This is expressly stated in section 8, which provides that "no action or proceeding commenced before this code takes effect, and no right accrued, is affected by its provisions; *but the proceedings therein must conform to the requirements of this code as far as applicable.*" In accordance with this provision, it was held in Kelly v. Larkin [13] that where the notice of intention to move for new trial was given after the code went into effect, the motion should be made upon a bill of exceptions (as required by the code as it then stood), and that having been made upon a statement prepared under the provisions of the old Practice Act, the order granting a new trial must be reversed. A similar rule prevailed under the old Practice Act.[14] An amendment repeals and takes the place of the section amended.[15] It is a part of the code within the meaning of sections 3 and 8 above quoted, and therefore the construction given to those sections applies.[16]

A construction favorable to the remedy should be given, if possible.[17]

§ 10. The Court can in Some Cases Grant a New Trial of Its Own Motion.—In Duff v. Fisher,[1] Field, C. J., delivering the opinion of the court, said: "It may be and probably is true that the court, whether sitting in equity or in the trial of a common-law action, may, of its own motion, set aside the verdict of a jury when it is clearly and palpably against the evidence; but when the court is satisfied with the verdict, the parties can only question its correctness by following the course pointed out by the statute."

[13] 47 Cal. 58; look at Hodgdon v. Griffin, 56 Cal. 610; and Hemstreet v. Wassum, 49 Cal. 273.

[14] Partridge v. San Francisco, 27 Cal. 415.

[15] See article 4, section 24, Constitution of 1879; Billings v. Harvey, 6 Cal. 381; Bensley v. Ellis, 39 Cal. 309.

[16] See Sharp v. Blankenship, 59 Cal. 288.

[17] Wallace v. Moody, 26 Cal. 387; White v. The Mary Ann, 6 Cal. 462, 470, 471, 65 Am. Dec. 523.

[1] 15 Cal. 375.

The power was not given by statute in California, however, until 1874. By an amendment of the code, which took effect July 1, 1874, the power was given by the following section:[1a]

"Sec. 662. The verdict of a jury may also be vacated, and a new trial granted by the court in which the action is pending, on its own motion, without the application of either of the parties, when there has been such a plain disregard by the jury of the instructions of the court, or the evidence in the case, as to satisfy the court that the verdict was rendered under a misapprehension of such instructions, or under the influence of passion or prejudice. The order of court may be reviewed on appeal in the same manner as orders made on motion for new trial, and a statement, to be used on such appeal, may be prepared in the same manner as statements after a motion is heard upon the minutes of the court, as provided in section 661."

It will be observed of this section that it applies only to jury trials. The court is authorized of its own motion to set aside verdicts only. The fact that the power is expressly given as to verdicts only is sufficient to exclude it as to the decisions of judges and referees. And when the provisions of the section are considered, they will be seen to be inapplicable to the decisions of referees or judges. The judge is enabled properly to estimate the correctness of the verdict, because the evidence was given in his presence, and he has the same opportunity as the jury to observe the manner of the witnesses and determine their credibility. But he has not such opportunity with respect to the evidence given

[1a] Similar provisions are to be found in some, but not all, other states. Section 4444, Revised Codes of Idaho, is in the identical language of the California section as quoted in the text. Section 7066, Revised Codes of North Dakota, is as follows: "The verdict of a jury may also be vacated and a new trial granted by the court in which the action is pending on its own motion without the application of either of the parties, when there has been such plain disregard by the jury of the instructions of the court or the evidence in the case as to satisfy the court that the verdict was rendered under a misapprehension of such instructions or under the influence of passion or prejudice."

Section 304, Code of Civil Procedure of South Dakota, is couched in the same language; and the same may be said of section 3298, Compiled Laws of Utah.

The supreme court of Oklahoma, in Long v. Board of Commissioners, 5 Okl. 128, 47 Pac. 1063, held that there was no power in the trial court to grant a new trial on its own motion. Section 586 of the Code of Civil Procedure provided for the modification of judgments, orders, etc., under certain conditions, and this section does not give the power to do so without a motion. Referring to the North Dakota provision above quoted, the court said: ". . . . A statute in North Dakota (Compiled

before a referee, and, as has been shown, the findings of a referee are to be reviewed in the same manner as the findings of a court.[2] The grounds of the exercise of the power are such a disregard of the instructions of the court, or the evidence in the case, as to satisfy the court that the verdict was rendered under a misapprehension of the instructions, or under the influence of passion or prejudice. But it can hardly be supposed that the legislature intended that the judge should instruct himself,[3] or anticipated that if he did instruct himself he would misapprehend his instructions, or the evidence in the case, to such an extent as to amount to passion or prejudice. But aside from these considerations, as above remarked, the fact that the power is given with respect to verdicts only is sufficient to exclude it with respect to the decisions of judges and referees.

And with respect to verdicts the better opinion seems to be that the judge can grant a new trial of his own motion only at the time the verdict is rendered. No time is limited by the statute for the exercise of the power. It cannot be supposed that the legislature intended to leave the successful party at the mercy of the judge for an indefinite period, nor can it be said that the section means that the judge must act within the time limited for

Laws, section 5091) expressly authorizes the district court to vacate a verdict and grant a new trial on its own motion, and the supreme court of that state has said, 'In this state and in the late territory the instances of vacating verdicts and granting new trials without application of the parties have been exceedingly rare, and no such summary action should be taken except on cases falling clearly within the statute.' Gould v. Elevator Co., 2 N. D. 216, 50 N. W. 969. For the reasons stated, we are clearly of the opinion that the order of the court setting aside the judgment in this case, and continuing the cause to the next term for trial, was manifestly erroneous, and the order must be reversed."

[2] See section 8.

[3] In the case of Touchard v. Crow, 20 Cal. 150, 81 Am. Dec. 108, a serious-minded counsel supposed that it was proper for the judge to charge himself, and the judge, being something of a humorist, did so. With reference to this proceeding, Field, C. J., delivering the opinion, said: "The counsel for the appellants, impressed, it would seem, with this dual character, requested the court to charge itself as a jury, and handed in certain instructions for that purpose. The court thereupon formally charged that part of itself which was thus supposed to be separated and converted into a jury, commencing the charge with the usual address, 'Gentlemen of the jury,' and instructing that imaginary body that if they found certain facts they should find for the plaintiff, and otherwise for the defendants, and that they were not concluded by the statements of the court, but were at liberty to judge of the facts for themselves. The record does not inform us whether the jury thus addressed differed in their conclusions from those of the court. These proceedings have about them so ludicrous an air that we could not believe they were seriously taken but for the gravity with which counsel on the argument referred to them."

a motion by the losing party; for there is absolutely nothing in the statute fixing that limitation any more than another, and it would in a great measure do away with the restrictions and limitations which the statute has placed upon the power of judges to grant new trials upon the application of the losing party. It is submitted that the statute gives the power in those cases only in which the error of the jury is so gross as to be at once apparent, and requires the judge to exercise it as soon as the verdict is rendered.[4]

The two California cases dealing with the question are In re Cahill,[5] wherein the court intimated that the order must be made at the time of the rendition of the verdict, and Mizener v. Bradbury,[6] wherein the court said: "Appellant contends that to hold that the court may delay its action, as in this case, would authorize it to grant a new trial after the defeated party had lost the right under the statute to ask for a new trial, and that if the court may grant a new trial on its own motion one month after verdict, it may do so five, or any number of, months thereafter; and this, it is urged, cannot be the law; that the court must act immediately upon the coming in of the verdict. Respondent contends that the court may act at any time before judgment is entered upon the verdict. Appellant cites Hayne on New Trial and Appeal, sec. 10; Gould v. Duluth Co., 2 N. D. 216, 50 N. W. 969; Flugel v. Henshal, 6 N. D. 205, 69 N. W. 195; Clement v. Barnes, 6 S. D. 483, 61 N. W. 1126. The Dakota cases fully support appellant's contention and were decided under a statute identical with our section 662, and under general provisions regulating new trials in most cases similar to those in our code. Mr. Hayne, in his work, takes the same view. The question of practice is an interesting and important one, but it is not likely to often arise, and as its decision is not necessary to a proper disposition of the appeal we express no opinion on the point."

Clearly, the court should act without unnecessary delay. Nor is any necessity for delay apparent. The evidence is in, all the information needed for intelligent action is at hand, and, it would seem, that where a verdict is so palpably and grossly contrary to the evidence and the instructions as to justify the exercise of the power

[4] See, generally, Duff v. Fisher, 15 Cal. 375; Gagliardo v. Hoberlin, 18 Cal. 394. See Dakota cases cited in quotation from Mizener v. Bradbury in text.

[5] 74 Cal. 52, 15 Pac. 364.

[6] 128 Cal. 340, 60 Pac. 928.

here conferred, its defects would be apparent at once, upon the rendition thereof, and that no reflection would be required. Yet, delay would not ordinarily deprive the injured party of the protection afforded by the statute, for he may move for a new trial, on his own account, even though the court should wholly fail to act; and no reason suggests itself why the court, having, upon reflection, decided that the verdict ought not to stand, ought to be deprived, merely for delay in reaching such conclusion, of the right to set it aside. The rule ought to be that unless the successful party is prejudiced by the delay, the court should be allowed to act at any time prior to entry of judgment, and such is believed to have been the legislative intent.

The reasons which justify a court in exercising the power conferred by section 662 of the Code of Civil Procedure, and the distinction between relief granted by the court of its own volition, and that granted after notice served upon the adverse party, upon the grounds set out in section 657 of the same code, in accordance with the procedure in such cases, are recognized in Eades v. Trowbridge,[7] wherein Cooper, C., said:

"The trial court is authorized by section 662 of the Code of Civil Procedure to vacate the verdict of the jury and grant a new trial on its own motion 'when there has been such a plain disregard by the jury of the instructions of the court, or the evidence in the case, as to satisfy the court that the verdict was rendered under a misapprehension of such instructions, or under the influence of passion or prejudice.' The only power conferred upon the court to vacate and set aside a verdict of its own motion is that found in the above-quoted section. In all other cases it must be made upon notice served upon the adverse party within ten days after verdict. This notice must designate the grounds upon which the motion will be made, and whether the same will be made upon affidavits, the minutes of the court, a bill of exceptions, or a statement of the case. It may be made upon the grounds, among others, of misconduct of the jury, errors of law, or insufficiency of the evidence. If made upon affidavits, a bill of exceptions, or a statement of the case, the moving party must serve a copy of such affidavits, bill of exceptions, or statement upon the adverse party, who is allowed time to file counter-affidavits, or to propose amendments to the bill of exceptions or statement. If the motion is made upon the minutes of the court

[7] 143 Cal. 25, 76 Pac. 714.

where the ground is the insufficiency of the evidence to justify the verdict, the notice of motion must specify the particulars in which the evidence is alleged to be insufficient; or if the ground is errors of law, the notice must specify the particular error upon which the moving party will rely. (Code Civ. Proc., secs. 657–660.) Thus the ordinary and usual method of vacating the verdict of the jury and obtaining a new trial is upon motion and notice as contemplated by the sections last cited. The adverse party is given the right to be heard which involves the right to get the facts properly before the court, and to aid and assist the court by argument and authority on questions of law. The plan is to allow all parties to be heard before any adverse decision is given, to allow the court full opportunity for deliberation, so that no hasty or inadvertent ruling may be made. The regular machinery provided is designed to apply to each and every case, and furnishes a method whereby the motion may be heard upon its merits for the purpose of doing justice to all and injustice to none. After the above and last cited sections comes section 662, which contains the quoted clause hereinbefore given, and authorizes the verdict to be vacated by the court of its own motion. The section is an exception to the general plan contemplated by the preceding sections. Evidently there might arise cases in which the jury plainly disobeyed a positive instruction of the court as to certain issues, as to the amount which could be allowed to a plaintiff or a defendant, or as to a positive direction to find a certain way upon some issue or other matter. If the jury were properly instructed as to the law in regard to every theory of the case claimed by either plaintiff or defendant, and their verdict was the result of deliberation, such verdict was not plain disregard of the instructions, although the judge may have thought the verdict was wrong. In almost any case the judge might think the jury disregarded his instructions if the verdict did not comply with his own view. He might instruct fully as to the credibility of a witness, and the rules of law to be applied in weighing the testimony of such witness, and yet the jury may have believed the witness. The instruction disregarded must be as to some matter, or of such a nature that it is plain that the jury grossly disobeyed the judge. The same reasoning applies to the evidence. A plain disregard of the evidence must be made to appear. This does not mean that the court thinks the verdict not the cor-

rect conclusion from the evidence, but it means that the rule should apply only where the jury plainly, palpably, and grossly disregard the evidence. The rule is well stated and fully discussed in Townley v. Adams, 118 Cal. 382, 50 Pac. 550, which was approved and followed in Mizener v. Bradbury, 128 Cal. 340, 60 Pac. 928.'' [7a]

The court cannot, after setting aside the verdict under the authority of this section, proceed to make findings of its own, without granting a new trial. To do so would be to ignore the right of the parties to a trial by jury, if they so desire.[8]

Although this is an order essentially *sua sponte,* made without any suggestion on the part of the litigants before the court, yet there is authority for the practice of calling the court's attention to the propriety of making the order.[9]

Where an appeal is taken from an order setting aside a verdict under the provisions of section 662, Code of Civil Procedure, the judgment-roll, a copy of the order, and a statement prepared subsequently to the ruling appealed from, as in the case of a

[7a] In the case of Townley v. Adams, cited in the Eades v. Trowbridge case, the court say: "Where the court of its own motion sets aside the verdict of the jury, it must be made to appear that the jury plainly, palpably, grossly disregarded either the evidence or the instructions of the court"; and in Mizener v. Bradbury, it was held that where it did not appear that such plain, palpable and gross disregard existed, the order setting aside the verdict would be reversed. In Gallegos v. Sandoval (N. M.), 106 Pac. 373, it seems to have been held that the court might grant a new trial, *sua sponte,* at any time during the term.

[8] Montgomery v. Sayre, 91 Cal. 206, 27 Pac. 648. In this case the court says: "Section 662 of the Code of Civil Procedure provides that 'a verdict of a jury may be vacated and a new trial granted by the court in which the action is pending, on its own motion, when,' etc. In this case a jury was impaneled, and a verdict rendered as to certain issues, and it is unnecessary to closely scrutinize that verdict to ascertain whether it is defective or informal or complete and perfect. It was the verdict of a jury placed in the box to try the cause, and it cannot be disregarded until set aside and vacated by the court. And we have already seen the court made findings directly contrary to this verdict, and this action of the court was, in effect, to vacate and set it aside. It is immaterial whether such action was had by reason of defects and informalities in the verdict or whether the evidence was such as to indicate that it was rendered through passion or prejudice; the result would be the same, and that result would be that a new trial should have been granted. Such is necessarily the law; for if it were otherwise, these parties would be deprived of their right to a trial by jury. When the court vacated and set aside the verdict, it was its duty to order a new trial. It had no power to proceed to determine the case. 'As the court cannot enter a verdict contrary to the will of the jury' (Hine v. Robbins, 8 Conn. 342), so it cannot substitute its judgment for theirs, and assume the power to decide issues of fact once submitted to the jury."

[9] See Anglo-Nevada etc. Corp. v. Ross, 123 Cal. 520, 56 Pac. 335.

motion for a new trial on the minutes of the court, constitute the record.[10]

The fact that the trial court did not avail itself of the power conferred by this section has been made use of occasionally in support *arguendo* of the verdict on appeal.[11]

The power of the court to grant a new trial *sua sponte* has sometimes been exercised in connection with orders vacating and setting aside judgments under section 473, Code of Civil Procedure, and similar sections which contemplate relief from the effects of mistake, inadvertence, etc.[12] While no serious criticism can be advanced against such a practice, it is not to be confounded with the statutory procedure outlined by section 662, above. Where a judgment is set aside, and a retrial of the case does not follow as a matter of course, care should be exercised in appending to the order a clause making provision for such retrial. In most cases where judgments by default are set aside, the main purpose of the order is to give to the defendant an opportunity to answer and defend. No previous trial has ever been had, for the simple reason that no issue of fact has ever been drawn. To order a new trial in such a case might be excused on the ground of inadvertence, but not otherwise.

§ 11. Steps Necessary to be Taken to Obtain a New Trial—Division of the Subject.—Speaking generally, there are three stages of every proceeding for a new trial, viz.:

(1) The initiation of the proceedings by giving a notice of intention;

(2) The preparation and authentication of the papers on which the motion is made; and

(3) The motion by counsel in open court.

[10] Emeric v. Alvarado, 64 Cal. 529, 2 Pac. 418. Also Eades v. Trowbridge, 143 Cal. 25, 76 Pac. 714.

[11] Schneider v. Market Street Ry., 134 Cal. 482, 66 Pac. 734.

[12] In Thomas v. Morris, 8 Utah, 284, 31 Pac. 446, it was held that it was not error to order a new trial in connection with an order vacating a judgment which was entered during the excusable absence of the attorney for the defendant; and in Henrichsen v. Smith, 29 Or. 475, 42 Pac. 486, 44 Pac. 496, the same was held with regard to a case under an Oregon statute where the death of the trial judge occurred prior to the signing of a bill of exceptions which contained an issue of fact, the new judge declining to sign the same because of his want of knowledge of the fact. In both of these cases the judgment was set aside under the authority of relief statutes.

This was well expressed in Jenkins v. Frink.[1] The point decided in that case was, that a statement filed after the time allowed by law for the filing thereof was of no avail. In the course of its decision, the court said: "The statute recognizes three distinct steps in a proceeding to obtain a new trial. Firstly. A notice of intention must be given within five days [as the statute then stood] after the rendition of the verdict, when the case is tried by a jury, and within ten days after receiving written notice of the rendering of the decision of the judge, or of the filing of the report of the referee or commissioner, when tried by such officers, unless the time for giving notice is extended by the court for a period not exceeding thirty days, when the parties do not consent to a longer period, as provided by section 530 [of the old Practice Act]. Secondly. Filing and serving statements or affidavits, which must be done within five days [as the statute then stood] after giving notice of intention to move, unless the time be extended by the court for a period not exceeding twenty days, or by consent of parties (Practice Act, sec. 195). And thirdly. The motion, or in the language of the Practice Act, 'the application for new trial,' which shall be made at the earliest period practicable after filing the affidavits or statement. (Sec. 196.) 'An application for an order is a motion.' (Sec. 515.) The motion then is a distinct and separate step in the proceedings, and subsequent to the notice of intention to move and to the filing of the statement."

Accordingly, in the part of this treatise which relates to new trial will be considered,—1. The notice of intention to move for a new trial; 2. The papers upon which the motion may be made; 3. The motion, or in the language of the statute, "the application for new trial"; and 4. The order of court disposing of the motion.

[1] 27 Cal. 337.

CHAPTER II.

THE NOTICE OF INTENTION.

§ 12. Notice of intention—Contents.
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§ 22. Party bound who gives notice before expiration of time.
§ 23. Grounds of motion—How stated in notice.

§ 12. What is the Notice of Intention and What It must Contain.—The notice of intention is the first step in the proceedings to obtain a new trial.[1] Its purpose is to initiate the proceedings, just as the purpose of the original summons is to initiate the original action; and its chief function is to bring within the jurisdiction of the court those parties to the original action whose interests would be adversely affected by the granting of the motion.

The new trial proceeding is itself so far independent of and collateral to the proceedings incident to the original action, which may be said to terminate in the judgment, that a party to the action is not, by reason of that fact alone, a party to the motion.[1a] The parties to the motion, therefore, other than the moving party, and he also incidentally, are determined by the notice of intention, and

[1] As appears in the synopsis of statutes of the various jurisdictions, note 6, *post*, no notice is specifically prescribed in some of the states. If the same states contain no general provision prescribing notice of the motion, the proceeding is initiated by the service and filing of the motion itself, which takes the place of a notice. See Boarman v. Hinckley, 17 Wash. 126, 49 Pac. 226. Usually, however, a formal motion is not regarded as necessary. See section 164, *post*. The notice itself more often stands for the formal motion, and the latter is not essential. East v. Mooney, 7 Utah, 414, 27 Pac. 4.

[1a] See Spanagel v. Dellinger, 34 Cal. 476, and section 16, *post*, as to independent and collateral character of the new trial proceeding. See, also, Fowden v. Pacific Coast S. S. Co., 149 Cal. 151, 86 Pac. 178, for discussion of analogy between the original action and the new trial proceeding.

jurisdiction of them is acquired by its service upon them.[1b] It is for this reason that it is often said that the notice is the first step in the new trial proceeding, and that, in the absence of a valid notice, or a waiver thereof, no subsequent steps will avail.[2]

The notice is, moreover, so far analogous to the original process, that once served upon a party to the original action, such party becomes at once "adverse" to the proceeding, and continues so until its final disposition; but, unlike the proceedings founded upon the original process, the rule, *actio personalis moritur cum persona*, has no application to the proceedings founded upon the notice of intention. The original cause of action, after judgment, no longer exists. It becomes merged in the judgment, and death does not terminate, but merely suspends proceedings for new trial, which may be said to be of the nature of proceedings under writ of error, or an appeal in the nature of a writ of error, and are, in effect, a new action brought to reverse the judgment of the lower court.[2a] Death, therefore, merely suspends the proceedings for the purpose of having the substitution of a personal representative made to take the place of the deceased, so that the estate of the latter may be bound. No order would otherwise be binding thereon.[3]

The provision of the act of 1851 in relation to the notice was as follows:[4] "The party intending to move for a new trial, *shall give notice of the same* within two days," etc. The time within which the notice was required to be given was frequently changed; but the language above quoted was not materially altered until the adoption of the Code of Civil Procedure.[5] The language of the

[1b] See section 15, *post*. And see Bell v. San Francisco Savings Union, 153 Cal. 64, 94 Pac. 225.

[2] See section 15, *post;* and particularly, Estate of Ryer, 110 Cal. 556, 42 Pac. 1082; Herriman v. Menzies, 115 Cal. 16, 56 Am. St. Rep. 82, 44 Pac. 660, 46 Pac. 730, 35 L. R. A. 318; United States v. Crooks, 116 Cal. 43, 47 Pac. 870; Johnson v. Phenix etc. Co., 146 Cal. 571, 80 Pac. 719; S. C., 152 Cal. 196, 92 Pac. 182.

[2a] Fowden v. Pacific Coast S. S. Co., 149 Cal. 151, 86 Pac. 178.

[3] Bell v. San Francisco Savings Union, 153 Cal. 64, 94 Pac. 225. It was held in this case that death terminated the authority of his attorneys to represent an adverse party to a new trial proceeding, and that it was necessary to serve a notice of appeal from an order thereon upon the personal representative of the deceased, failing which the appeal, as to such party, would be lost, even though such failure resulted from inability, from the shortness of the time available, to secure the appointment of such representative. Citing Judson v. Love, 35 Cal. 463; Moyle v. Landers, 78 Cal. 99, 12 Am. St. Rep. 22, 20 Pac. 241; Pedlar v. Stroud, 116 Cal. 461, 48 Pac. 371; Williams v. Long, 130 Cal. 58, 80 Am. St. Rep. 68, 62 Pac. 264; Estate of Turner, 139 Cal. 85, 72 Pac. 718, and see sections 208 and 210, *post*.

[4] California Laws of 1851, p. 81, sec. 195.

[5] See note 6, *post*.

code is, that "the party intending to move for a new trial must file with the clerk, and serve upon the adverse party a notice of his intention," etc.[6]

[6] The language quoted is from the section in its present form; i. e., after the amendment of 1907.

The same, or practically identical language is to be found in the codes of other states, as follows:

Arizona: No notice of intention or of motion for new trial prescribed. Section 1478, Revised Statutes of 1901 (section 269, Civil Practice), provides that "all motions for new trials in arrest of judgment or to set aside a judgment shall be made within five days," etc. If a notice of the motion is deemed necessary, such notice would doubtless require to be given as prescribed by section 1568, Revised Statutes of 1901 (section 359, Civil Practice), which is as follows: "Whenever in the commencement or progress of any suit it shall be necessary to serve any notice on any party to such suit such notice may be served either by an officer authorized by law to serve original process of the court, ... or by any person who would be a competent witness," etc.

California: Section 659, Code of Civil Procedure: "The party intending to move for a new trial must, within ten days after receiving notice of the entry of the judgment, file with the clerk and serve upon the adverse party a notice of his intention, designating the grounds upon which the motion will be made, and whether the same will be made upon affidavits, or the minutes of the court, or a bill of exceptions, or statement of the case."

Colorado: Section 201 of the code of 1877 followed closely the California practice as to notice. This section was repealed by section 444 of the present code, and the practice is that outlined in section 218, Mills' Annotated Code, which makes no provision for notice. The motion itself requires to be filed within four days after verdict, or after filing report of referee, or after announcement of decision of court.

Idaho: Section 4441, Revised Codes: "The party intending to move for a new trial must, within ten days after the verdict of the jury, if the action were tried by a jury, or after notice of the decision of the court or referee, if the action were tried without a jury, file with the clerk, and serve upon the adverse party, a notice of his intention, designating the grounds," etc.

Montana: Section 6796, Revised Codes, Code of Civil Procedure. Same as California.

Nevada: Section 3292, Cutting's Compiled Laws (section 197, Civil Practice): "The party intending to move for a new trial shall give notice of the same, as follows: When the action has been tried by a jury, within five days after the rendition of the verdict, and when the action has been tried by the court or by a referee, within ten days after receiving written notice of the rendering of the decision of the judge or of the filing of the report of the referee, the notice shall designate," etc.

New Mexico: No notice of intention or of motion is prescribed except by implication. Section 2685, subsection 132, Compiled Laws, provides that "upon the rendition of any verdict, or the making of findings in a case tried by the court, judgment shall be immediately rendered thereon, unless notice is given at the time of the intention of the party to make a motion for a new trial." Subsection 98 provides that "when a notice of a motion is necessary, it must be served five days before the time appointed for the hearing, but the court or judge may, by an order to show cause, prescribe a shorter time." Subsection 133 provides that "all motions for new trials in cases tried by juries shall be filed during the term of the court at which the case is tried, and within five days after the rendition of the verdict or findings."

North Dakota: Section 7065, Revised Codes of 1905, is the same as the Idaho section above quoted, except that the time is twenty in the place of ten days, the word "referee" is

Both under the code and under the old Practice Act the thing required is a notice of intention and not a notice of motion strictly so called; that is to say, it was not required to specify the time and place at which the motion would be made; all that should be done was to simply state that it is the intention of the party to

omitted, and the provision as to filing is left out.

Oklahoma: Section 5827, Compiled Laws of 1909, is as follows: "The application for a new trial must be made at the term the verdict, report or decision is rendered; and except for the cause of newly discovered evidence, material for the party applying, which he could not, with reasonable diligence, have discovered and produced at the trial, shall be made within three days after the verdict or decision is rendered, unless such party is unavoidably prevented from filing the same within such time."

No provision is made for notice. Section 5829 provides for an application for a new trial after the adjournment of the term, "not later than the second term," to be made by petition, and the issue of a summons and its service as original process. No other notice than this summons is prescribed.

Oregon: Section 175, Lord's Oregon Laws, is as follows: "A motion to set aside a judgment for a new trial, with the affidavit, if any, in support thereof, shall be filed within one day after the entry of the judgment sought to be set aside, or such further time as the court may allow. The motion shall be heard and determined during the term, unless the court continue the same for advisement, or want of time to hear it. When not so heard and determined or continued, it shall be deemed withdrawn and may be disregarded."

Section 176 provides for a new trial motion when the decision is given in vacation. The motion must be filed within twenty days after the decision, unless the next regular term of the court begins within that time, in which event the motion must be filed on the first day of the term.

South Dakota: Section 303, Code of Civil Procedure. Same as North Dakota.

Utah: Section 3294, Compiled Laws of 1907. Same as Idaho, except that the notice must be given in five instead of ten days.

Washington: Section 402, Rem. & Bal. Codes (section 5075, Bal. Code), provides as follows: "The party moving for a new trial must, within two days after the verdict of the jury, if the action was tried by a jury, or two days after notice in writing, of the decision of the court or referee, if the action was tried without a jury, file with the clerk and serve upon the adverse party, his motion for a new trial," etc.

No previous notice of such motion is prescribed. In Boarman v. Hinckley, 17 Wash. 126, 49 Pac. 226, it was contended that notice was a prerequisite and that none had been given, and the court seemed to recognize the correctness of the contention. "The first contention of appellant is that no notice of intention to move for a new trial was filed within two days after the rendition of the verdict, as required by statute; but the motion itself, specifying the grounds assigned for a new trial was filed and served on the defendant within the time required by statute. The motion for a new trial filed by plaintiff in this case fully advised the defendant of plaintiff's intention to move for a new trial and specified the grounds. The motion itself here fulfills the functions of the notice required by statute."

Wyoming: Section 4603, Compiled Statutes, is identical with the Oklahoma provision, above quoted; as is also section 4605, with reference to the Oklahoma provision for a new trial after the adjournment of the term, by petition and summons. No specific requirement for a notice of intention is made. Section 4446 contains provisions for notices in general.

The changes of the California provision, in themselves suggestive of the

move, etc. Whether a specification of the time and place at which the motion is to be made would vitiate the notice, if proper objections to it were taken, has not been decided. Such a specification might lead to awkward complications; for, in practice, the completion of the moving papers depends upon so many contingencies

state of the law in other states, which, in many cases, copied the existing law of the older state into their first codes, have been numerous. The provision of the act of 1850 was as follows: "The party who believes himself aggrieved by the judgment against him may, within four judicial days after such judgment has been rendered, pray for a new trial, which must be granted if there be good ground therefor." Laws of 1850, p. 451, sec. 252. The act of 1851 provided that "the party intending to move for a new trial shall give notice of the same within two days after the trial." Laws of 1851, p. 81, sec. 195. In 1861 an amendment was made which created a distinction between trials by jury and trials without a jury, and provided that when an action was tried without a jury the notice of intention should be given "within ten days after receiving written notice of the filing of the findings of the judge or the report of the referee. Laws of 1861, p. 590, sec. 195. In 1863 the section was amended so as to provide that the notice of intention should be given "when the action has been tried by the court, or by a commissioner or a referee, within ten days after receiving written notice of the filing of the findings of the judge or the report of the commissioner or referee." Laws of 1863, p. 643, sec. 195. In 1864 this section was amended so as to provide that the notice of intention should be given as follows: " When the action has been tried by the court, or by a commissioner or referee, within ten days after receiving written notice of the rendering of the decision of the judge, or of the filing of the report of the commissioner or referee." Laws 1863–64, p. 246, sec. 195. In 1866 the section was amended so as to adapt it to the system of implied findings, then introduced, and as amended, provided that the party should give notice of his intention as follows: " When tried by a commissioner, referee, or by the court, within ten days after receiving written notice of the filing of the findings of the commissioner, referee, or court, when written findings are filed by the court, or of the rendering of the decision of the court when no findings are filed; provided, the decision be rendered in open court, and if rendered at vacation, then within ten days after receiving written notice of the filing thereof; and when amendments are filed to remedy defects in the findings, within ten days after receiving written notice of the filing of such amendments." Laws of 1865–66, p. 845, sec. 195. This language was not changed until the adoption of the Code of Civil Procedure. As first enacted the code provided that the notice of intention should be given "within thirty days after the decision or verdict." Section 659, Code of Civil Procedure. By the amendment which took effect July 1, 1874, the provision was amended so as to read, "The party intending to move for a new trial, must within ten days after the verdict of the jury, if the action were tried by a jury, or after notice of the decision of the court or referee, if the action were tried without a jury, file with the clerk, and serve upon the adverse party, a notice of his intention," etc. Thus it remained without change until 1907, when it was amended so as to read as above quoted. During this time, i. e., from 1874 to 1907, the various states which took their procedure from California adopted their civil practice statutes, with the exception of Nevada, whose Practice Act was adopted in 1868 (Statutes of 1868, p. 196, sec. 197), but not from the California provision then existing (Laws 1865–66, p. 845, sec. 195; see above), but that adopted in 1864, which was a very different matter.

that it is impossible to state in advance the date at which they will be completed. If they should not be completed by the time designated in the notice of intention, the motion might lapse. If, on the other hand, the moving party is to be allowed to designate a time sufficiently remote to allow for all possible delays in the preparation of the papers on which the motion is to be made, there can be no logical reason why he may not designate a time so extremely remote as to defeat the provision which requires the motion to be brought on for a hearing "at the earliest practicable period" after the completion of the moving papers. Whether its specification would vitiate the notice (proper objections being reserved), or whether this would depend upon the reasonableness of the time designated, cannot be satisfactorily answered in the absence of a decision upon the point. Certainly, if an unreasonable time should be designated, objections to the notice, properly taken,[7] would have to be sustained. Where, however, the motion is made upon the minutes of the court,[8] it is heard *before* the preparation of the moving papers, strictly so called, and in such a case the inconvenience above

See Elder v. Frevert, 18 Nev. 278, 3 Pac. 237.

The requirement as to filing is omitted from the following: Section 7065, Revised Codes of North Dakota; section 303, Code of Civil Procedure of South Dakota.

No specific provision for notice of intention is made in Arizona, and the general provision (section 1568, Revised Statutes; section 359, Courts) merely provides for service in the manner prescribed for the service of original writs.

Section 3292, Cutting's Compiled Laws of Nevada, section 197, Civil Practice, provides as follows: "The party intending to move for a new trial shall give notice of the same, as follows."

No specific provision for a notice of intention is made in New Mexico; but section 2685, subsection 98, Compiled Laws, provides that when a notice of motion is necessary, it must be served.

In Oregon, provision is made for filing the motion. See sections 175 and 176, Lord's Oregon Laws.

No specific provision for a notice of intention is made in Wyoming, but notices of motions in general require service only. See section 4446 et seq., Compiled Statutes.

[7] The objection should be taken at the time of the service of the notice; but it may be taken either at the settlement of the statement, or bill, or at the hearing of the motion, unless it be waived. See sections 14 and 15, *post*, and compare section 146, *post*. Unless taken at the time of the service of the notice, the objection may be lost through implied waiver. Thus, the proposal of amendments without reserving the objection has been held to be a waiver thereof. See Hook v. Hall, 68 Cal. 22, 8 Pac. 596, and Heine v. Treadwell, 72 Cal. 217, 13 Pac. 503. Also see sections 14 and 15, *post*. Amendments should therefore be expressly stated, or be accompanied with a statement, that they are proposed without prejudice to objections to the notice. See section 146, *post*. Such reservations amount to nothing, however, in the absence of a proper showing thereof in the record. Hook v. Hall, *supra;* and see Gray v. Nunan, 63 Cal. 220.

[8] The old Practice Act contained no provision authorizing the motion

pointed out would not arise. And, as if in recognition of this, the statute speaks of the notice, where the motion is made upon the minutes of the court, as a "notice of motion," instead of a notice of intention.[9]

The Notice must be in Writing.—The profession seem at one time to have entertained some doubt in regard to this. Before the code the language of the statute was simply that the party should "give notice" of his intention,[9a] etc., without providing how the notice was to be given.[10]

All doubt upon the question was done away with, however, by the Code of Civil Procedure; for, not only does it contain a general provision that all notices must be in writing,[11] but the section in relation to this particular notice provides that the party intending

to be made on the minutes of the court. That feature was added by the code amendments of 1874.

It is also to be noted that the provision requiring the motion to be heard at the earliest practicable time after the notice applies exclusively to a motion made upon the minutes of the court.

[9] Section 659, subdivision 4, California Code of Civil Procedure.

[9a] Section 3292, Cutting's Compiled Statutes (section 197, Civil Practice), provides that "the party intending to move for a new trial shall *give* notice," etc. In all other Pacific Coast states, however, the "giving" of the notice is no longer provided for in terms.

[10] See statute quoted in first part of this section. In Borland v. Thornton, 12 Cal. 440, with reference to a notice of motion to dissolve an injunction, the supreme court said: "Verbal notice, it is true, is not such notice as the statute requires. When the statute speaks of notice it means written notice, *or notice in open court, of which a minute is made by the clerk.*" In a subsequent case (Bear River Co. v. Boles, 24 Cal. 359, 4 Morr. Min. Rep. 592), the counsel (probably having in mind the foregoing language) gave notice of his intention to move for a new trial in open court. The supreme court said that whether such a notice could be given in that manner was doubtful; but that, assuming that it could, the notice in question was insufficient because the entry in the minutes did not show that the opposite counsel was present. In Flateau v. Lubeck, 24 Cal. 364, the court took occasion to doubt the *dictum* in Borland v. Thornton, above quoted, and said: "That a motion in legal proceedings should be in writing we deem essential to the protection of the rights of the party to be affected by it. Any other practice would in many instances be attended with mischievous results, and hence should be discountenanced."

[11] Section 1010, California Code of Civil Procedure. The old Practice Act did not contain this provision. Look at sections 517, 519. See, also, as to necessity of written notice of decision, the same principle being also applicable there, Biagi v. Howes, 66 Cal. 469, 6 Pac. 100; Forni v. Yoell, 99 Cal. 173, 33 Pac. 887; Mallory v. See, 129 Cal. 356, 61 Pac. 1123; Elder v. Court, 136 Cal. 364, 68 Pac. 1022; Estate of Richards, 154 Cal. 478, 98 Pac. 528; and see section 19, *post*, note 7. As to the practice in criminal cases see Page v. Superior Court, 122 Cal. 209, 54 Pac. 730. Similar provisions in other states are to be found as follows: Sections 372, 373, Mills' Annotated Code of Civil Procedure of Colorado; sections 7145 and 7146, Revised Codes of Montana (sections 1830 and 1831, Code of Civil Procedure); sections 7330 and 7331, Revised Codes of North Dakota; sections 538 and 539, Lord's Oregon Laws; sections 552

to move for a new trial shall "file with the clerk and serve upon the adverse party a notice of his intention," etc.[12]

The ordinary form of notice states simply that the party "intends to move" the court to vacate and set aside the verdict or other decision, as the case may be, and grant a new trial of the action; and that the motion will be made upon certain specified grounds, and upon certain specified papers. It seems that it is not necessary that the notice should state that the motion will be to have the verdict or other decision "vacated," for the vacation of the decision is a necessary consequence of granting a new trial;[13] and therefore, a notice stating that the party intends to move the court to grant a new trial of the action, etc., would be sufficient; but it is always better to follow the language of the statute.

The notice must state the grounds upon which the motion will be made,[14]—generally, in every case except where the motion is to be made upon the minutes of the court, and generally and specifically in that case,[15]—and it must specify the papers upon which the motion is to be made.[16] Otherwise it cannot be considered.

and 553, Compiled Laws of South Dakota; sections 3330, 3331, Compiled Laws of Utah; sections 244 and 245, Rem. & Bal. Codes (sections 4888 and 4889, Bal. Code), Washington; section 4446, Compiled Statutes of Wyoming.

In other states, while no specific provision is made for written notices, the necessity therefor may be said to be implied. See section 1568, Revised Statutes of Arizona (section 359, Courts), provides for the service of notices in the manner prescribed for the service of original writs; which would seem to contemplate notices in writing alone. Sections 4882, 4889 et seq., Revised Codes of Idaho, would seem to imply notices in writing alone. And the same may be said of section 3588 (section 493, Civil Practice) and section 3590 (section 495, Civil Practice) et seq., Cutting's Compiled Laws of Nevada, which are practically in the same language. See, also, to same effect, section 2685, subsection 101, Compiled Laws of Mexico.

[12] Section 659, California Code of Civil Procedure.

[13] Bauder v. Tyrrel, 59 Cal. 99; also Kimple v. Conway, 69 Cal. 71, 10 Pac. 189; Heinlen v. Heilbron, 71 Cal. 557, 12 Pac. 673; Locke v. Moulton, 96 Cal. 21, 30 Pac. 957; and compare Sawyer v. Sargent, 65 Cal. 259, 3 Pac. 872, and O'Connell v. Main etc. Co., 90 Cal. 515, 27 Pac. 373.

[14] See section 23, *post*.

[15] See section 23, *post*.

[16] Section 659, California Code of Civil Procedure. The old Practice Act did not contain this provision. Under the code a notice of intention which does not specify the papers upon which the motion is to be made is defective. Fabian v. Callahan, 56 Cal. 159. The result of such failure is a denial of consideration of the motion. Hughes v. Alsip, 112 Cal. 587, 44 Pac. 1027. The defect, however, would be waived by participation in the preparation of the papers without reserving an objection, as in the case of a failure to serve the notice in time. See note 7, *supra*. But this remark has been held not to apply in the case of bills of exceptions, though the cogency of the reason given must be questioned. See section 14, *post*.

The notice should be addressed to the attorney of the successful party.[17]

§ 13. Signature of the Notice of Intention.—The code has prescribed the manner in which a defendant may appear,[1] and has designated the persons upon whom papers shall be served;[2] but it contains no express provision as to who shall sign the various papers in a cause. It provides, however, that "an attorney and counselor shall have authority (1) to bind his client in any of the steps of an action or proceeding by his agreement filed with the clerk or entered upon the minutes of the court, and not otherwise."[3] Probably the power of the attorney of record to sign the various papers in an action is derived from this provision. That the attorney of record has such power is well settled;[4] but no attorney other than the attorney of record has it. This has been held in a number of decisions.[5] So long as a party has an attorney of record, the signature

[17] It is not necessary to address the notice to the clerk, but many practitioners do so. As to notices of appeals, see section 207, *post*. See sections 1010 and 1011, California Code of Civil Procedure, as to contents and service of notices in general. Note 11, *supra*. See Cook v. Sudden, 94 Cal. 443, 29 Pac. 949, where the notice was served on the attorneys for all the plaintiffs, but the name of one of the plaintiffs was inadvertently omitted from the caption. The notice was nevertheless held sufficient.

[1] Section 1014, California Code of Civil Procedure. The codes of other states contain similar provisions.

[2] Sections 1010–1015, California Code of Civil Procedure. See note 11, section 12, *ante*.

[3] Section 283, California Code of Civil Procedure. The language of this section, with slight variations in some instances, is to be found in most of the other states: section 3998, Revised Codes of Idaho; section 6389, Revised Codes of Montana (section 398, Code of Civil Procedure); section 2621, Cutting's Compiled Laws of Nevada (section 10, act of October 31, 1861); section 502, Revised Codes of North Dakota; section 1083, Lord's Oregon Laws; section 130, Rem. & Bal. Codes (section 4766, Bal. Code) of Washington.

Section 1309, Revised Statutes of Arizona (section 100, Courts), authorizes a party to appear and prosecute or defend in person or by attorney; section 1339 (section 130) makes provision as to acceptance of service in writing, and the filing thereof with the papers, and section 1340 (section 131) has to do with appearance in general.

Section 104, Code of Civil Procedure of South Dakota, confers upon the attorney the right to sign the summons.

[4] As to notices of appeal, see Damrell v. Board of Supervisors San Joaquin Co., 40 Cal. 154, and section 208, *post*.

[5] See Hobbs v. Duff, 43 Cal. 485, where there were several defendants, Mr. G. F. Sharp being the attorney of record of the defendant Duff, and the notice was signed by "G. F. & W. H. Sharp, attorneys for the defendants," neither of whom was attorney of record for any of the defendants except Duff. The notice was held to be of no avail as to any defendant except Duff.

Also Prescott v. Salthouse, 53 Cal. 221, where the notice was signed by an attorney who had been *associated* with the attorney of record by an order to that effect, the attorney of record not thereafter appearing in the case. The notice was held insuffi-

of such attorney is a necessity to every paper which may require to be signed; and the court will decline to recognize any other attorney, for this purpose, as the professional representative of such party, in the place and stead of such attorney of record, in the absence of a regular substitution, made in the prescribed form.[6] Nor will the court recognize the party himself, for the purpose of signing the notice *in pro. per.*, so long as the record shows that he is represented by an attorney.[7]

cient, the court holding that the act of "associating" an attorney in a cause was not an act recognized by the code, and that it was not such a "substitution" as the code required in such a case.

See, also, Jones v. Spears, 56 Cal. 163, and Livermore v. Webb, 56 Cal. 489. Also Whittle v. Renner, 55 Cal. 395. In these cases it appeared that the notice was authorized, but was not signed by the attorney of record, no formal substitution having been ordered. See, also, cases cited below.

[6] See section 284, California Code of Civil Procedure. There is no question as to the right of a client to change his attorney whenever he sees fit, but it must be done in accordance with the provision of the code, and after appropriate notice to the adverse party, who is entitled to constant information as to the identity of the party upon whom notices may be lawfully served, and who may lawfully act for his adversary in whatever steps may be taken. See Gage v. Atwater, 136 Cal. 170, 68 Pac. 581, and cases there cited. Corresponding provisions in other states are to be found as follows: section 3999, Revised Codes of Idaho; section 6390, Revised Codes of Montana (section 399, Code of Civil Procedure); section 2622, Cutting's Compiled Laws of Nevada; section 1086, Lord's Oregon Laws; section 133, Rem. & Bal. (section 4769, Bal.) Washington Codes.

In some states provision is made for requiring an attorney, upon motion of either party, and upon a showing of reasonable grounds therefor, to produce or prove his authority; and when such a motion is presented, the attorney whose authority is thus questioned must comply therewith, and until he does so he may not continue to represent his client. See sections 410, 411 and 412, Revised Statutes of Arizona; section 503, Revised Codes of North Dakota; sections 1084 and 1085, Lord's Oregon Laws; sections 131 and 132, Rem. & Bal. (sections 4767 and 4768, Bal.) Washington Codes; section 977, Compiled Statutes of Wyoming.

The following cases illustrate the rules of practice here involved: Curtis v. Richards, 4 Idaho, 434, 95 Am. St. Rep. 134, 40 Pac. 57; Lydon v. Piper, 5 Idaho, 541, 51 Pac. 101; State v. Court, 30 Mont. 8, 75 Pac. 516; Payette v. Willis, 23 Wash. 299, 63 Pac. 254; Belle etc. Co. v. Kemp, 27 Wash. 111, 67 Pac. 580; Schulteis v. Nash, 27 Wash. 250, 67 Pac. 707; Farwell v. Colman, 35 Wash. 308, 77 Pac. 379.

[7] See Wylie v. Sierra Gold Co., 120 Cal. 485, 52 Pac. 809; Crescent Canal Co. v. Montgomery, 124 Cal. 134, 56 Pac. 797; Boca etc. Co. v. Superior Court, 150 Cal. 153, 88 Pac. 718.

In Estate of Richards, 154 Cal. 478, 98 Pac. 528, a service of notice upon the party instead of upon the attorney was held ineffectual. See, also, Commissioners v. Younger, 29 Cal. 147, 87 Am. Dec. 164, where the court, by Sanderson, C. J., said:

"A party to an action may appear in his own proper person or by attorney, but he cannot do both. If he appears by attorney, he must be heard through him, and it is indispensable to the decorum of the court and the due and orderly conduct of the cause that such attorney shall have the management and control of the action, and his acts go unquestioned by anyone except the party whom he represents. So long as he remains attorney of record the court cannot recognize any other as having the management of the case. If the

The attorney who appears at the inception of the cause is the attorney of record, and he will continue as such, and be recognized by the court, until expressly removed or replaced by the substitution of another in the manner prescribed by law.[8] This is the universal rule applicable to all legal notices alike, and no distinction has ever been made in this respect between notices of intention and the various other notices which mark the consecutive steps of the litigation.[9]

Where a litigant is represented by a firm of attorneys, it would seem that the signature of the firm is necessary;[10] but it is clear that a single member of the firm is sufficient in court at the hearing of the motion.[11]

party, for any cause, becomes dissatisfied with his attorney, the law points out a remedy. He may move for leave to change his attorney, as provided in section 9 of the act concerning attorneys and counselors. Until that has been done, the client cannot assume control of the case. While there is an attorney of record, no stipulation as to the conduct or disposal of the action should be entertained by the court unless the same is signed or assented to by the attorney. Such a rule is not only indispensable to the orderly conduct of the cause, but it is likewise a safeguard to the client against the intrigues of his adversary."

Upon the authority of this case it was held in Mott v. Foster, 45 Cal. 72, that a party having an attorney of record could not sign a stipulation extending the time to file a statement on motion for new trial, even though the attorney was out of the county at the time. See section 147, *post*.

See, also, Merritt v. Campbell, 47 Cal. 542. Also Thielman v. Superior Court, 95 Cal. 224, 30 Pac. 193.

[8] See Woodbury v. Nevada etc. Co., 120 Cal. 367, 52 Pac. 650. And see note 6, *supra*.

See, also, McMahon v. Thomas, 114 Cal. 588, 46 Pac. 732, where objection was raised to the signature of the notice of intention, as being that of an attorney who had not been regularly substituted in accordance with the code provision. The appellant contended that having failed to object at the time of the appearance of the attorney of record in the lower court, it was too late to raise the point afterward. The court thought differently, however, and held that there must be a substitution in the manner prescribed by section 284, Code of Civil Procedure. This decision had the effect of overruling the earlier case of Sowden v. Idaho etc. Co., 55 Cal. 443, 2 Morr. Min. Rep. 199.

[9] It is true the supreme court in the early case of McDonald v. McConkey, 54 Cal. 143, suggested that inasmuch as an appeal is to be regarded as a new proceeding in the course of the litigation, the notice might be signed by an attorney other than the attorney of record in the lower court. This was merely a *dictum* of the court, however, and although seemingly reiterated in a later case (Buell v. Buell, 92 Cal. 393, 28 Pac. 443), is to be regarded as doubtful in principle. The language of the Buell case, where the motion was one to recall an execution, was even stronger than the earlier one. "The motion was a new and original proceeding, as much so as would have been an action to review an order of the court directing the issue of the writ, and the respondent had full power to employ such attorneys as he might choose to conduct it."

[10] Prescott v. Salthouse, 53 Cal. 221.

[11] Romine v. Cralle, 80 Cal. 626, 22 Pac. 296.

§ 14. There must be a Valid Notice of Intention, if It be not Waived.—The several propositions of this section will be considered separately:

1. *There must be a Valid Notice of Intention.*—As above stated, the notice of intention is the initiation and foundation of the proceedings to obtain a new trial.[1] If there be no notice of intention, or an invalid one, and the defect be not waived, a new trial cannot be granted. In Flateau v. Lubeck[1a] no notice at all was given. The supreme court affirmed the order refusing a new trial, saying: "There is nothing in the transcript from which it can be inferred that the defendant or his counsel had any notice of the motion for a new trial, or that he or they appeared or participated in the argument of the motion."

So in Wright v. Snowball[2] there was no notice at all. The order denying the motion was affirmed, the court saying: "It nowhere appears that a notice of intention to move for a new trial was given by the appellant or waived by the respondent, by appearance to the motion or in any other manner, and it is objected, and we think well objected, by the respondent, that in the absence of such a notice or waiver, the order denying a new trial cannot be reviewed here."

So in Wittenbrock v. Bellmer,[3] which was an action to foreclose a mortgage, judgment was rendered in favor of the plaintiff against the defendant Bellmer, and in favor of one Kleinsorge, against whom the defendant Bellmer had filed a cross-complaint. The notice of intention given by Bellmer was addressed to "the plaintiff and his attorneys," and was not served upon Kleinsorge; *held,* that an order granting defendant a new trial as to Kleinsorge must be reversed, "on the ground that he was not made a party to the motion." In Bear River v. Boles,[4] the party attempted to give his notice of intention in open court. The supreme court held that,

[1] See section 12, *ante.* In Eades v. Trowbridge, 143 Cal. 25, 76 Pac. 714, with respect to the necessity for a notice, the court said: ". . . . The only power conferred upon the court to vacate and set aside a verdict of its own motion is that found in the above-quoted section. (Sec. 662, C. C. P.) In all other cases it must be made upon notice served upon the adverse party within ten days after verdict."

And see Gardner v. Stare, 135 Cal. 118, 67 Pac. 5, and Estate of Dougherty, 139 Cal. 14, 72 Pac. 357.

[1a] 24 Cal. 364.

[2] 45 Cal. 654.

[3] 57 Cal. 12. And see Johnson v. Phenix etc. Co., 152 Cal. 196, 92 Pac. 182, and Niles v. Gonzalez, 155 Cal. 359, 100 Pac. 1080, for similar decisions in similar cases.

[4] 24 Cal. 354.

even if the notice could be given in that way, it was necessary that the minutes should show that the adverse party was present; and as the minutes did not show this, the order granting a new trial was reversed. So in Martin v. Matfield,[5] where the ground stated in the notice of intention was insufficiency of the evidence to sustain the judgment, the court held the notice bad on the ground that it should have been directed at the decision, and reversed the order granting a new trial.

So where the notice stated that the grounds of the motion were "insufficiency of the evidence to support the *judgment*," and that "the *judgment* is against law," it was held fatally defective, inasmuch as neither of the grounds stated was a ground for a new trial.[5a]

So the notice should not be directed to the *judgment* instead of the *decision*, and a notice of intention to move the court to vacate and set aside the *judgment* has been held ineffectual.[5b]

[5] 49 Cal. 42. See, also, Sawyer v. Sargent, 65 Cal. 259, 3 Pac. 872; Little v. Jacks, 67 Cal. 165, 7 Pac. 449.

[5a] Mazkewitz v. Pimentel, 83 Cal. 450, 23 Pac. 527. See, also, Falkner v. Hendy, 107 Cal. 49, 40 Pac. 21, 386.

But "insufficiency of the evidence herein to support or justify the findings of the court" is sufficient. Boston Tunnel Co. v. McKenzie, 67 Cal. 485, 8 Pac. 22.

[5b] See Little v. Jacks, 67 Cal. 165, 7 Pac. 449; but see O'Connell v. Main etc. Co., 90 Cal. 515, 27 Pac. 373, where a notice that defendant "intends to and will move this court to set aside the *decision and judgment* heretofore rendered, entered and made in said cause," etc., no specific motion for a new trial being made, although the grounds stated were "insufficiency of the evidence, errors in law, and newly discovered evidence," was held sufficient, partly because of a waiver by stipulation extending time to prepare and propose a statement; but partly, also, because it was thought that the meaning to move for a new trial was clearly apparent from the fact that granting a new trial was the sole method within the power of the court of setting aside the *decision* on the ground of insufficiency of the evidence, or newly discovered evidence. See, also, Locke v. Moulton, 96 Cal. 21, 30 Pac. 957, where a notice in the following language, "You will take notice that the defendants, and each of them, intends to move the court to set aside and vacate the *judgment* rendered and entered herein, and grant a new trial in this case upon," etc., was held sufficient, all that portion of the notice with reference to setting aside and vacating the judgment being treated as surplusage. From which it appears that while the principle of the earlier cases, as Martin v. Matfield, Sawyer v. Sargent, and Little v. Jacks, has not been disturbed, and a notice directed exclusively to the *judgment*, instead of to the findings or decision, would doubtless be held radically defective, yet there is a manifest tendency to construe the notice with somewhat more of liberality than formerly, and allow a notice to pass muster if it can possibly be determined therefrom that its purpose was to give notice for a new trial, and that this purpose was expressed with sufficient clearness to exclude therefrom any possibility that the adverse party has been misled.

So where the notice stated that the motion would be made upon the minutes of the court, and upon the grounds, among others, of errors of law occurring at the trial, and duly excepted to, but failed to specify the particular errors relied upon, it was held radically defective.[5c]

So where the notice failed to specify the papers upon which the motion would be made, the motion was denied for want of a valid notice of intention.[5d]

So if the notice be given before the verdict or decision is rendered, it is invalid, and a new trial motion will be denied.[6] So if the notice be not given within the time prescribed by law, it is invalid, and a new trial cannot be granted upon it, if proper objections be reserved.[7] Nor can a defective notice be amended after the expiration of the time prescribed for giving it; for to permit an amendment under such conditions would be, in effect, to extend the time to give the notice, and this the court has not the power to do.[7a]

So, if the notice be not signed by the proper person, it is insufficient.[8] Or if it be not filed, the motion cannot be considered, and if the judge persists in hearing it, prohibition will issue to prevent him from doing so.[8a]

2. *But the Notice of Intention may be Waived.*—Thus in Williams v. Gregory,[9] it was held that proposing a "counter-statement" (by which was probably meant amendments to a proposed statement) amounted to a waiver of the notice, the court saying: "There is in the record no evidence of any notice of intention to move for a new trial; but we think this irregularity was waived by filing the counter-statement. The object of the notice was accomplished without it." So in Frost v. Meetz,[10] it was held that proposing amendments to the proposed statement would amount to a waiver of the notice of intention, and the court said:

[5c] Weyl v. Sonoma etc. Co., 69 Cal. 202, 10 Pac. 510; Buckley v. Althorf, 86 Cal. 643, 25 Pac. 134; Neale v. Depot Ry. Co., 94 Cal. 425, 29 Pac. 954; Packer v. Doray, 98 Cal. 315, 33 Pac. 118; Salisbury v. Burr, 114 Cal. 451, 46 Pac. 270; and see section 23, *post*.

[5d] Hughes v. Alsip, 112 Cal. 587, 44 Pac. 1027.

[6] See section 1, *ante;* and also Mahoney v. Caperton, 15 Cal. 313.

[7] See section 17, *post*.

[7a] Cooney v. Furlong, 66 Cal. 520, 6 Pac. 388; Little v. Jacks, 67 Cal. 165, 7 Pac. 449; Packer v. Doray, 98 Cal. 315, 33 Pac. 118; and see section 21, *post*. Also State v. Mason, 18 Mont. 362, 45 Pac. 557; Blue Creek etc. Co. v. Anderson, 35 Utah, 61, 99 Pac. 444.

[8] See section 13, *ante*.

[8a] See White v. Superior Court, 72 Cal. 475, 14 Pac. 87; and see Gregg v. Garrett, 13 Mont. 10, 31 Pac. 721.

[9] 9 Cal. 76.

[10] 52 Cal. 664.

"It is now contended by the respondent that the right to move for a new trial in the court below had been lost by a failure to give the required preliminary notice of intention to move for such new trial; but we think this objection is not open to the respondent. The statement as settled sets forth that the defendant *had given the notice,* 'and the defendant Meetz having given notice of his intention to move for a new trial,' etc.; and by this will be intended a notice given in due time and form. Nor is the position of the respondent upon this point aided by a resort to the affidavits found in the printed transcript on file here; for if those affidavits be taken to be part of the record on this appeal, there is found the uncontradicted allegation by the counsel for appellant that the respondent appeared at the settlement of the statement, proposed amendments thereto, and did not then allege the want of proper notice of intention to move for a new trial, nor object to the settlement of the statement on that ground."

Proposing amendments to the proposed statement without reserving objections is a common way in which the want of a valid notice of intention is waived.[11] In the cases first above cited,[11a] the language used seems to imply that appearance at and participation in the argument of the motion would amount to such waiver. But this cannot be the case, for the appearance at the hearing may have been for the sole purpose of insisting upon the want of a sufficient notice as a reason for denying the motion, and the whole argument of counsel may have been directed to that

[11] In the case of Hughes v. Alsip, 112 Cal. 587, 44 Pac. 1027, the supreme court seems to have held that the doctrine of waiver from failure to reserve objections when proposing amendments to statements did not apply in the case of bills of exceptions. This distinction was placed upon the ground that a defective notice would affect the right of the moving party to have a bill of exceptions on appeal from the judgment; but he might abandon his motion for a new trial and use the settled bill on appeal from the judgment; and the respondent would have the right to assume that such was his purpose, in the face of the want of a valid notice of intention.

If this is the correct construction of the language of the decision, this case is believed to stand alone upon the point involved. It does not appear to have been cited or referred to in that connection in any subsequent case; nor does the distinction itself appear to have afterward been regarded; whereas the doctrine has been often applied in the case of bills of exceptions as well as in statements, as late even as Mendocino Co. v. Peters, 2 Cal. App. 24, 82 Pac. 1122.

If its correctness is conceded, then the whole fabric of the doctrine of waiver, and presumptive waiver, as outlined in the text, must be deemed to have disappeared.

[11a] Flateau v. Lubeck, 24 Cal. 364; Wright v. Snowball, 45 Cal. 654; and see B. R. & A. W. v. Boles, 24 Cal. 354.

point; and as the code makes no provision for bringing up the argument of counsel, no presumption should be founded upon its absence. It has been held that it would not be presumed, from the mere fact that a statement or affidavits were filed, that a notice was given, or that it was waived.[12]

Proposing amendments without reserving objections is not the only way in which waiver may be accomplished. It may be presumed from various facts. Thus in Millard v. Hathaway,[12a] where there was a recital in the order denying the motion to the effect that the motion was submitted upon certain statements and affidavits, *by consent* of the parties, the court held that such recital was inconsistent with an objection that the statement was invalidated for want of a notice of intention. So in Gray v. Nunan [12b] there was a stipulation extending the time to serve the statement on motion for new trial. Defendant's attorney, when it was served, acknowledged receipt thereof, reserving the right to object that the statement was not served in time, but at no time objected to the settlement on the ground that proper notice of intention had not been given. The supreme court said: "The court below, in denying the motion, does not appear to have proceeded upon the supposed want of notice of intention, but upon the determination of the questions presented by the motion itself. We must presume, therefore, that the court below found that proper notice was given, or that defendant had waived the objection."

So in Christy v. Spring Valley Water Co.[12c] no objection that the notice was not in time was made either at the settlement of the statement or at the hearing of the motion. "The motion was contested and submitted for decision without objecting or reserving any right to object that the notice of motion was not made or given according to law. Such being the case, the attorney for the corporation defendant waived any supposable irregularity in

[12] Dominguez v. Mascotti, 74 Cal. 269, 15 Pac. 773.

[12a] 27 Cal. 119.

[12b] 63 Cal. 220. The opening sentence of this quotation contains a very important suggestion; for, if the record had contained no intimation as to whether the order of the trial court was based upon want of jurisdiction, or upon want of merits, the supreme court must necessarily have affirmed it. Such action would have been responsive to the well-settled rule of legal presumption which is always invoked to sustain the action of the trial court where the record fails to show upon what such action was based, and every material circumstance in connection therewith.

[12c] 68 Cal. 73, 8 Pac. 849.

the notice of the motion of which he now in this court for the first time seeks to avail himself." So in Schieffery v. Tapia[12d] it was held that an objection that a notice of intention was not served or filed in time is waived if there is nothing in the statement to show that the attorney for the respondent objected to the service of the notice on admitting service of it or of the statement, or at the settlement of the statement. So in Hegard v. California Ins. Co.[12e] it was held that an objection that the notice of intention was not served and filed within the time prescribed by law would not be considered on appeal when no such objection was raised either at the settlement of the bill of exceptions (upon which the motion for new trial was made) or at the hearing of the motion. So in Hibernia etc. Soc. v. Moore,[12f] where the notice of intention stated that the motion would be made upon affidavits as to certain grounds, and upon a statement as to others and no affidavit was filed, but a statement was prepared, settled and certified in form, and on this statement the motion was heard and decided, without objection, it was held that whatever irregularity there may have been in the proceedings was waived, and an objection, based upon the failure of the moving party to perfect his motion as outlined in his notice of intention, could not be taken for the first time on appeal. So in Mendocino Co. v. Peters,[12g] where no objection to failure to serve in time was made when the notice was served, or when the bill was settled, it was held that such objection was waived; and in the same case there was a stipulation that the bill, which recited that the notice was served in due time, be settled "as a correct bill of exceptions," and it was held that it was too late for respondent to urge the objection that the notice was not served in time.

This decision suggests a distinct method of waiver—by stipulation. There can be no question as to the privilege of a party

[12d] 68 Cal. 184, 8 Pac. 878.

[12e] 72 Cal. 535, 14 Pac. 180, 359.

[12f] 68 Cal. 156, 8 Pac. 824. It is to be noted with reference to this case that while there is no question as to the correctness of the application of principle, the moving party has the unquestioned right to perfect his motion upon any one or other of the papers designated in his notice, while abandoning the others. Duncan v. Times-Mirror Co., 120 Cal. 402, 52 Pac. 652. Also Hart v. Kimball, 72 Cal. 283, 13 Pac. 852, and Pereira v. City Savings Bank, 128 Cal. 45, 60 Pac. 524.

[12g] 2 Cal. App. 24, 82 Pac. 1122. This and the citations which immediately precede it are intended merely to illustrate the general rule that a notice of intention may be waived by other conduct than the proposing of amendments without reserving the objection that a valid notice was not given.

to stipulate away his right to have a valid notice of intention.[12h] "Anyone may waive the advantage of a law intended solely for his benefit."[12k] But "evidence of a waiver which deprives a party of a positive right should be of such positive and conclusive character as to leave no rational doubt."[12l] Evidence of this description need not depend upon an express stipulation, as the above citations clearly show. If this is true, waiver may therefore be said to result, or may be presumed, from stipulations not pointed directly at the notice itself. A stipulation which is inconsistent with the want of a valid notice, or whose utility depends upon the existence, either actual or presumed, of a properly framed, signed, served and filed notice of intention, may be as positive and conclusive as one pointed directly at the notice. Thus a stipulation to extend the time to prepare and propose, or serve, a statement, has been held to be, in effect, a waiver of notice, or a waiver of objections to a defective notice.[12m] So a stipulation that the statement was full and correct was also held to be such waiver, the presumption being, in the opinion of the court, that notice was either given or waived.[12n] So the following stipulation was held to give ample ground for the presumption that a valid notice of intention had been either given or waived: "It is hereby stipulated by and between the attorneys for the plaintiffs and the defendants in the above-entitled action, that the foregoing statement hereto annexed is a true and correct statement on motion for a new trial. That upon said statement the said court did, on the first day of September, 1863, overrule the plaintiff's motion for a new trial, and refuse to grant the said plaintiffs a new trial in said action, to which ruling the said plaintiffs then and there excepted. And it is hereby further stipulated that the judgment-roll, orders, and instructions given and refused by the court, the aforesaid statement on motion for new trial and this stipulation is a true and correct statement on appeal to

[12h] See Hobbs v. Duff, 43 Cal. 485; Gray v. Nunan, 63 Cal. 220; Patrick v. Morse, 64 Cal. 462, 2 Pac. 49; Brichman v. Ross, 67 Cal. 601, 8 Pac. 316; Schieffery v. Tapia, 68 Cal. 184, 8 Pac. 878; Curtis v. Superior Court, 70 Cal. 390, 11 Pac. 652; Simpson v. Budd, 91 Cal. 488, 27 Pac. 758; and see other cases cited in this section.

[12k] See section 3513, California Civil Code. And see Mallory v. See, 129 Cal. 356, 61 Pac. 1123.

[12l] Forni v. Yoell, 99 Cal. 173, 33 Pac. 887. And see Mallory v. See, 129 Cal. 356, 61 Pac. 1123.

[12m] O'Connell v. Main etc. Co., 90 Cal. 515, 27 Pac. 373.

[12n] Cockrill v. Hall, 76 Cal. 192, 18 Pac. 318.

the supreme court, and may be used as such without further certificate or identification.'' [12p]

3. *Practice Where No Valid Notice of Intention has been Given.* Where no valid notice of intention has been given, the proper course for the party opposing the motion, to avoid presumptive waiver of the defect, is to reserve the same when acknowledging service. There is, however, a practical reason why such a reservation should not be relied upon to the extent of omitting a second reservation, at a time when a record thereof can be depended upon. The notice of intention is not, as will hereafter more particularly appear,[13] a necessary part of the record on appeal, and unless a second reservation of the objection is made, it may happen that the record of the first may not be available on appeal.[13a]

However this may be, no amendments should be proposed without reserving the objection.

If the objection is not reserved, or amendments are proposed and the record is silent as to the defects in the notice, such defects are held to be waived. If, on the other hand, the objection is reserved, the proposal of amendments does not operate as a waiver thereof.[14] They may, when so reserved, be pressed when the statement is presented for settlement, as a reason why the judge should not settle the same; and they may be urged at the hearing of the motion in the court below, and in the appellate court, on appeal from the order granting or denying the motion. If no amendments are proposed, the adverse party can hardly be said to have participated in the preparation of the statement, and there is no overpowering necessity for his appearance at and participation in the settlement. If he does not, he cannot be said to have had an opportunity to raise the question as to the validity of the notice.[15]

[12p] Godchaux v. Mulford, 26 Cal. 316, 85 Am. Dec. 178.

[13] See note 4 to section 151, and section 168, *post*.

[13a] The only record of the reservation of the objection when made at the service of the notice is the indorsement to that effect on the notice; and the appellant may not embody the notice in his record on appeal.

[14] See Quivey v. Gambert, 32 Cal. 309; Cottle v. Leitch, 43 Cal. 320; Hobbs v. Duff, 43 Cal. 485.

[15] See cases cited above, some of which seem to go to the extent of holding that unless the objection is presented at the settlement of the statement it will be held too late if presented subsequently. But if no amendments are presented, and the party is not present when the statement is settled, it is obvious that there is no opportunity for the presentation of objections of any sort until the hearing of the motion. Nevertheless, there is authority for the doctrine that objections to the statement must be offered at the settlement, or it will be too late (see note 6, section 146, *post*), and this would seem to in-

If not waived at the settlement the objection may, of course, be urged at the hearing of the motion. It would seem, indeed, that the objection may be urged at the hearing, even though made and overruled at the settlement, since such an objection goes directly to the jurisdiction of the court to grant the motion. Whether raised at the settlement or not, if an objection to the notice of intention is raised at the hearing of the motion, and found to be valid, and sustained, it is fatal to the motion.[15a]

If, when urged at the settlement of the statement, the objection should be sustained, it is incumbent upon the moving party to take the proper steps to obtain the opinion of the appellate court as to whether the refusal to settle the statement, based upon such objection, was proper. This is by application for writ of mandate, unless it is sought at the same time to obtain relief, under section 473 of the Code of Civil Procedure, from the failure to give a valid notice, in which case the remedy would be by appeal.[16] The practice in this regard is the same as that which obtains where the proposed statement was not in time, and other similar objections to its settlement. Further consideration of it here is unnecessary.[16a]

If the objection is sustained at the hearing of the motion, and the latter, for that reason, denied, it is incumbent upon the

clude objections to the notice, since, unless there is a valid notice of intention, the statement itself is neither authorized nor required. Buckley v. Althorf, 86 Cal. 643, 25 Pac. 134.

[15a] The trial court is precluded from reviewing and reversing its former action in settling the statement. Such settlement is conclusive upon it, not only at the hearing of the motion, but in all subsequent proceedings in the case. This is merely in accord with the well-established rule that no action of a court can be reviewed otherwise than in the manner prescribed by statute, and no provision has been made for the review by the trial court of its own actions except by new trial. But the trial court may be called upon repeatedly in the course of the proceedings in an action to rule upon the same principle of law, and no reason suggests itself against the urging of an objection to the jurisdiction upon every occasion of its exercise. If so, the court is never precluded from reversing itself whenever it realizes that it committed error in its former ruling. Unlike the court of last resort, its rulings are not subject to the rule of the law of the case. Lawrence v. Ballou, 37 Cal. 518; De la Beckwith v. Superior Court, 146 Cal. 496, 80 Pac. 717. In these cases the action of the trial court in ruling on demurrers and afterward reversing the same was upheld. The court is called upon to determine its jurisdiction both at the settlement of the statement and at the hearing of the motion, and while it cannot set aside the settlement of the statement because of error in ruling upon a question of jurisdiction arising out of the notice of intention, it may reverse its ruling when the same objection is raised at the hearing of the motion.

[16] See section 145, *post*.

[16a] See chapter on "Statement on Motion for New Trial."

moving party to prepare a bill of exceptions, containing the objection, the facts in contravention thereof, including a copy of the notice itself, the order of the court, and whatever else may be required to properly present his side of the matter to the higher court. In the settlement of the bill, his adversary may propose whatever amendments are required to establish the objection.[16b] In no other way (except where the motion is made on the minutes) can a proper record of the transaction be prepared for the use of the appellate court. The statement is not available, because, having been engrossed, certified and filed, it cannot now be amended. The notice itself cannot be utilized, since, as above stated, it is not a part of the record of itself, and cannot be considered on appeal unless embodied in the statement or a bill of exceptions,[16c] and then only to meet an objection, either presumptive or actual, as to its sufficiency or effect.[16d]

If the objection is overruled, the process is reversed, and the party adverse to the motion must prepare the bill of exceptions.

4. *Effect of a Complete Silence in the Record on Appeal as to the Notice or Any Waiver Thereof.*—Objections to the notice of intention not made in the trial court cannot be considered for the first time on appeal.[16e] But although such objection cannot be considered for the first time on appeal, it may be necessary to found a presumption upon a silent record that there was an objection made, and that it was disposed of in such a way as to sustain rather than defeat the action of the lower court, and in this

[16b] As will hereafter appear (see chapter on "Statement on Motion for New Trial"), the amendments must be pointed directly at the original matter contained in the statement, and new matter cannot be inserted, bearing upon specifications not contained in the paper as originally proposed.

[16c] Hook v. Hall, 68 Cal. 22, 8 Pac. 596; Girdner v. Beswick, 69 Cal. 112, 10 Pac. 278; Heine v. Treadwell, 72 Cal. 217, 13 Pac. 503; Dominguez v. Mascotti, 74 Cal. 269, 15 Pac. 773; Pico v. Cohn, 78 Cal. 384, 20 Pac. 706; Gage v. Downey, 79 Cal. 140, 21 Pac. 527, 855; Monterey Co. v. Cushing, 83 Cal. 507, 23 Pac. 700; Richardson v. Eureka, 92 Cal. 64, 28 Pac. 102; Nye v. Marysville etc. Co., 97 Cal. 461, 32 Pac. 530; Kahn v. Wilson, 120 Cal. 643, 53 Pac. 24; Williams v. Hawley, 144 Cal. 99, 77 Pac. 762; Skinner v. Horn, 146 Cal. 62, 79 Pac. 597; Great Western Co. v. Chambers, 153 Cal. 307, 95 Pac. 151. And see note 4, section 151, *post*.

[16d] Southern Pac. R. Co. v. Superior Court, 105 Cal. 84, 86, 38 Pac. 627; Kahn v. Wilson, 120 Cal. 643, 53 Pac. 24; and see Pico v. Cohn, 78 Cal. 384, 20 Pac. 706; Richardson v. Eureka, 92 Cal. 64, 28 Pac. 102.

[16e] See section 280, *post*. And see the cases cited in subdivision 2, *supra*; and see particularly Brichman v. Rose, 67 Cal. 601, 8 Pac. 316. Questions which require to be presented to the appellate court by statement or bill of exceptions must necessarily be raised in the tribunal where the record is prepared.

way the fact as to whether a valid notice of intention was really given or waived in the trial court may become both an appropriate and a necessary subject of inquiry in the appellate court without having in fact been raised in the court below.

In the case of an appeal from an order granting a new trial, the burden is undoubtedly upon the appellant to show from the record that the court below had no jurisdiction to make the order. If, therefore, the record is silent, showing nothing as to the existence or character of the notice of intention, or its service, or a waiver of service, the usual presumptions which attend the judgments of courts of record will apply, and, in support of the order, it will be assumed, as against the appellant, that a proper notice was given.

As was said in Kahn v. Wilson,[16f] in reviewing an order granting a new trial: "If, as a matter of fact, there was no notice as a basis of the motion in the court below, that fact must be affirmatively shown by the appellant, and he must cause it to be included in a statement or proper bill of exceptions." Under this ruling it becomes incumbent upon the party resisting a motion for a new trial, if there is any defect in the notice or failure or irregularity in its service, to insert the facts in the proposed statement or bill of exceptions, so that he may present the point upon appeal. Failing to do this he will be precluded from insisting in the appellate court that the order should be reversed for want of jurisdiction in the trial court to entertain the motion. And see Hook v. Hall;[16g] Patrick v. Morse.[16h]

The case of an appeal from an order denying a motion for a new trial, the record being silent as to the notice, presents a different question, as to which there has been some want of harmony in the decisions.

Of course, it is not to the interest of the appellant to insist that the trial court was without jurisdiction to pass on the motion, because, if the appellate court should so hold, the order must be affirmed. The question presented, therefore, is, whether the burden is on the appellant to show that the trial court had jurisdiction, or on the respondent to show the reverse, or, in other words, whether the presumptions shall be in favor of the regularity of the pro-

[16f] 120 Cal. 643, 53 Pac. 24.
[16g] 68 Cal. 22, 8 Pac. 596.
[16h] 64 Cal. 462, 2 Pac. 48.

ceedings leading up to the decision of the court below, or against such regularity.

As to this the supreme court has repeatedly held that, the record being silent, it would hold the presumption to be that, the lower court, having settled the statement or bill of exceptions, entertained the motion, and disposed of it, had acquired jurisdiction to do so, and that it was not incumbent on the appellant to make an affirmative showing of the fact.

Thus in Gray v. Nunan,[16k] an appeal from an order refusing a new trial, the record contained no evidence of the service of a notice of intention. Neither did it show any objection by the respondent to the settlement or consideration of the statement on that ground. The court, therefore, disposed of respondent's objection to the consideration of the statement, made in the appellate court, on the ground that no notice of intention was filed or served, by invoking the presumption that the court below had found that proper notice was given, or that respondent had waived the objection.

Girdner v. Beswick[161] was also an appeal from an order of refusal, in which the record did not contain the notice of intention and the statement did not recite the giving of such notice. Nor did the record show any objection made in the lower court by the respondent to the settlement or consideration of the statement on the ground that proper notice had not been given. On this the supreme court felt "bound to hold, nothing appearing to the contrary," that the notice was in all respects regular, and was given in time. This decision was expressly based, not upon any waiver of notice by respondent, but upon the presumption arising on the record, that proper notice was given or waived, which is a very different thing.

In the next case, Dominguez v. Mascotti,[16m] the supreme court came to an opposite conclusion, holding that, on a record which omitted the notice of intention, and showed nothing as to a waiver of notice, there could be no inference or presumption that such a waiver occurred, and that the order of refusal must therefore be affirmed.

In Pico v. Cohn,[16n] the point came up again on an appeal from an order of refusal, based on a record, which said nothing as to the service of a notice of intention. The court said:

16k 63 Cal. 220.
161 69 Cal. 112, 10 Pac. 278.
16m 74 Cal. 269, 15 Pac. 773.
16n 78 Cal. 384, 20 Pac. 706.

"The question is not a new one, but the decisions of this court have not distinctly and clearly settled the practice in this respect.

"Formerly the notice was made a part of the record on appeal by express statutory provision. But it is not so under the present code. (Code Civ. Proc., sec. 670; Girdner v. Beswick, 69 Cal. 112, 10 Pac. 278; Dominguez v. Mascotti, 74 Cal. 269, 15 Pac. 773.)

"Nor is there any provision of the code requiring that such notice shall be brought to this court by including it in the statement, or in any other manner. The papers necessary to be brought up are set out in sections 661 and 952 of the Code of Civil Procedure, and the notice of intention is not one of them.

"The former statute having made the notice of intention a part of the record, we must assume that it was omitted from the present code with a purpose. Being omitted from the section providing what papers shall constitute the record on appeal, and no provision being made for bringing it up in any other way, it is fair to presume that it was not intended to require it to be brought to this court at all. This leads us to the conclusion that it was the legislative intention that the notice should be the basis of the motion to be made in the court below, and that, upon the proper statement being filed, and the necessary motion made and passed upon by the court below, the notice has performed its functions, and is not a necessary part of the record on appeal, or to be presented here in any form. When the case comes to us we must look to the statement or bill of exceptions, and the specifications in which the decision of the court below is not sustained by the evidence, and the specifications of errors of law, as our guide in reviewing the case, and to these alone. If a question is presented by such specifications, and is properly saved in the statement or bill of exceptions, this court will look no further, but must presume that the question was properly presented to the court below, and passed upon in its ruling upon the motion for a new trial.

"We do not put this upon the ground of waiver by the opposite party, as is done in some of the earlier cases, but upon the sole ground that we must look alone to the statement or bill of exceptions for the question to be determined, in the absence of any showing by the respondent that no notice, or an insufficient one, was given. Undoubtedly, the notice of intention is necessary, but if it has not been given, or has been given too late, that must be shown by the respondent as against the settlement of the statement

or bill of exceptions, or at the time of and in opposition to the motion for a new trial; and if the court below rules against him, he must cause the facts necessary to present the question to be then included in the statement or a proper bill of exceptions, so that this court can determine whether a proper notice has been given or not.

"The specifications in the statement or bill should conform to the notice of intention to move for a new trial.

"If they do not, the opposite party should move such amendments thereto as will remove therefrom all matter foreign to the grounds stated in the notice, and in settling the same the court below should see that the statement does not go beyond the notice, either in the body of it or in the specifications. If this is done, and the statement or bill is properly made up, no injury can result to anyone from the failure to bring up the notice.

"It has been held by this court in a number of cases that it must be made to appear *by the statement* that a notice of intention has been given, or that the giving of such notice has been waived. (Calderwood v. Brooks, 28 Cal. 151; Wright v. Snowball, 45 Cal. 654; Dominguez v. Mascotti, 74 Cal. 269, 15 Pac. 773.)

"There may be other cases to the same effect. The legislature has said, in effect, that the notice need not come to this court as a part of the judgment-roll, and has made no provision for bringing it here in any other way. The conclusion that must necessarily be drawn from this is, that it was not the intention that it should come to this court at all, and we so hold.

"The cases cited above, and all others laying down a rule of practice, under the code as it now stands, in conflict with the practice as above stated, are overruled."

The rationale of this decision, which may be looked upon as the leading case in this state upon the point discussed, is evidently that, in dealing with a motion for a new trial, the trial court performs not one but several judicial acts. It not only determines the motion, but, preliminarily to its action in that regard, it settles and forms the record upon which the motion shall be presented, and, in doing the latter, it must, and does, decide that it has jurisdiction, by reason of the regularity of the initial steps taken by the moving party, to settle the statement or bill of exceptions, to hear the motion, and to dispose of it on its merits. In settling the statement or bill the court assumes and exercises jurisdiction. If,

therefore, the record in the appellate court shows nothing more than a settled statement or bill, the presumption that the notice was duly given or waived is a presumption in support of the jurisdiction of the lower court to settle the statement or bill and to proceed to a final determination of the motion. And upon this presumption, in support of the action of the trial court, the appellant is entitled to rely. It is for the respondent to rebut it, if he can, by a proper showing to that effect in the record itself.

The Pico case has been followed in Affierbach v. McGovern,[16o] Gage v. Downey,[16p] Scott v. Wood,[16q] Richardson v. City of Eureka,[16r] Nippert v. Warneke,[16s] Reclamation Dist. v. Thisby,[16t] Schneider v. Market St. Ry. Co.[16u]

The authority of the cases here considered has been somewhat shaken by the decision in Niles v. Gonzalez.[16v] In that case the plaintiff recovered a judgment against two persons, Gonzalez and Tarr. Gonzalez appealed from an order refusing his motion for a new trial. The respondent contended that the order should be affirmed on the ground that Tarr was an adverse party to the motion in the court below, and there was no showing in the record of the service upon her of the notice of intention, or anything in the record to indicate that she participated in the motion. There was nothing in the record to show that Tarr was a party to the motion for a new trial, that she took any part in the hearing, or that she was served with notice of intention. The notice of intention was not incorporated in the transcript (152 Cal. 96, 92 Pac. 74). The court held that Tarr was a necessary party to the motion for a new trial, and then went on to say:

"In the absence of an affirmative showing that Mrs. Tarr was either a moving party or was served with notice, should not this court presume that the superior court did not have jurisdiction to grant the motion for a new trial, and that said motion was therefore properly denied?

"On appeal all intendments are in favor of the regularity of the action of the trial court. Error will never be presumed, and the burden is upon the appellant to show that it exists. (Cutting Fruit Packing Co. v. Canty, 141 Cal. 692, (75 Pac. 564); McLennan v. Wilcox, 126 Cal. 51, (58 Pac. 305).) There is nothing

[16o] 79 Cal. 268, 21 Pac. 837.
[16p] 79 Cal. 140, 21 Pac. 527, 855.
[16q] 81 Cal. 398, 22 Pac. 871.
[16r] 92 Cal. 64, 28 Pac. 102.
[16s] 128 Cal. 501, 61 Pac. 96, 270.
[16t] 131 Cal. 572, 63 Pac. 918.
[16u] 134 Cal. 482, 66 Pac. 734.
[16v] 155 Cal. 359, 100 Pac. 1080.

in the record to show that Mrs. Tarr was a party to the motion for a new trial, that she took any part in the hearing of said motion, or that she was served with notice of intention to move for a new trial. Her answer was separate from that of the defendants Gonzalez; she was represented by her own attorney; and the statement on motion for new trial is signed by the attorney for defendant Lillian L. Gonzalez and the attorney for the plaintiff. The order denying the motion for a new trial is as follows: 'On this cause, defendants' motion for a new trial is denied.' It is also a significant circumstance that Mrs. Tarr's attorney does not join in the notice of appeal from the order denying a new trial.

"It seems obvious that appellants have failed to meet the burden imposed upon them, and we are therefore bound to assume that the court below did not acquire jurisdiction to grant a new trial."

Clearly, the court here decided that it was incumbent on the appellant to show by the record that the notice of intention was served on Tarr, and that, as the record was silent on the point, it was the duty of the court to assume that no such service was ever made. But this was to overrule, and the case does overrule, without mentioning them, all the previous cases *in pari materia* which have been hereinabove cited. No distinction can be drawn between the necessity to serve the notice of intention on an adverse party, who participates in the hearing of the motion, and the necessity to serve the notice on an adverse party who does not participate in the hearing. Both services are equally jurisdictional, and it is impossible to see why, if, in such a condition of the record, as existed in the Pico case and the other cases of like tenor above considered, the court should presume, in support of the action of the court below in settling the statement, proceeding with the hearing and determining the motion, that the notice was duly served, it should refuse to indulge the same presumption in a case such as was presented in Niles v. Gonzalez.

From the cases here considered the following practical conclusions may be fairly deduced, in view of the varying relations which the parties to an action may bear to the proceedings on motion for a new trial and on appeal from an order disposing of the motion.

1st. The party moving for a new trial should, as a matter of prudence, incorporate his notice of motion in the statement or bill of exceptions. If he do not, and the trial court should, for any

reason, hold that his notice was defective, and deny his motion on that ground, he may be precluded from taking the question to the appellate court. If he inserts the notice in the record, he will be in a position to meet the requirements of the decision in Niles v. Gonzalez, in case he should have to appeal from an adverse ruling on his motion.

2d. The party resisting the motion should, if he wishes to raise a question as to the sufficiency of service of the notice, insist on the introduction into the statement or bill of the facts on which his objection is based. If he succeeds in the trial court and the motion is denied, he will be in a position, on the appeal, to show that the order of refusal should be affirmed for want of jurisdiction in the court below.[16w]

§ 15. The Notice of Intention must be Served upon the Adverse Party.—As heretofore suggested, the language of the old Practice Act was, that the party must "give notice" of his intention to move for a new trial.[1] This language was held to require service of the notice upon the adverse party.[2] The language of the code is more specific. It provides that the party intending to move for a new trial "must file with the clerk, and *serve* upon the adverse party," a notice, etc.

[16w] There are numerous cases in the reports where the appellate court has held that the inference that a valid notice of intention was given, or that such a notice was waived, might be founded upon statements in the record to that effect, or statements inconsistent with a different view, even though the notice itself was omitted from the record. In Frost v. Meetz, 52 Cal. 664, where there was an objection that no notice of intention had been given, the supreme court said: "The statement, as settled, sets forth that the defendant *had given notice*, 'defendant Meetz having given notice of his intention to move for a new trial,' etc., and by this will be intended a notice given in due time and form." So in Randall v. Duff, 79 Cal. 115, 19 Pac. 532, 21 Pac. 610, 3 L. R. A. 754, it was said that the fact that a valid notice of intention had been given might be inferred from a recital in the order denying that the motion was made "upon the ground set forth in defendants' notice of motion." So in B. nk of Healdsburg v. Hitchcock, 76 Cal. 489, 18 Pac. 648, where there was nothing in the record to show whether notice was given or not, it was inferred that notice was given from the decision of the court that "a motion for a new trial was not the proper remedy," the court saying: "If the notice was not given or was not in time, the court might and would have denied the motion on one or the other of such grounds." So in Gray v. Nunan, 63 Cal. 220, the court's inference that the notice had been given or waived was based partly on the fact that the court below, in denying the motion, did not appear to have proceeded upon the want of notice of intention, but upon the determination of the questions presented by the motion itself.

[1] Laws of 1851, p. 81, sec. 195.

[2] In the B. R. & A. W. & M. Co. v. Boles, 24 Cal. 354, it was held that

Failure to serve all adverse parties, whether plaintiffs or defendants in the original action, is always fatal, unless service is waived. This rule has been often stated.[3]

The "adverse party" referred to[4] is determined by rules analogous to those which govern the service of the notice of appeal.[5] "Every party whose interest in the subject matter of the motion is adverse to or will be affected by the granting of the motion or changing the former decision of the court" is an "adverse party" within the meaning of the code. This is the language of the supreme court in Herriman v. Menzies,[6] where it is also said that "a failure to serve such adverse party with a notice of an intention to move for a new trial will be attended with the same consequences as a failure to serve an adverse party with a notice of appeal from the judgment." Also, "The superior court can have no jurisdiction to re-examine an issue of fact that it has tried, and change its decision thereon, unless all the parties to the issue and former decision are properly before it."

Not only is the failure to serve the notice fatal to the jurisdiction of the trial court to grant the motion, but it is sufficient to justify the appellate court in affirming an order denying the same. Thus in Johnson v. Phenix etc. Co.,[7] it was held that an order denying a motion for a new trial, where the notice of intention had not been served upon the adverse party, must be affirmed, the court saying:

" Without examination of the points made on the motion for new trial, the order denying that motion must be affirmed, for the reason that the notice of intention to move for a new trial was not served upon the Bank of San Mateo County."

even if notice could be given in open court, it was necessary that the minutes should show that the adverse party was present. See, also, Flateau v. Lubeck, 24 Cal. 364; Calderwood v. Brooks, 28 Cal. 151; and look at Wittenbrock v. Bellmer, 57 Cal. 12.

[3] See Wittenbrock v. Bellmer, 62 Cal. 558; Perkins v. Wakeham, 86 Cal. 580, 21 Am. St. Rep. 67, 25 Pac. 51; Herriman v. Menzies, 115 Cal. 16, 56 Am. St. Rep. 82, 44 Pac. 660, 46 Pac. 730, 35 L. R. A. 318; United States v. Crooks, 116 Cal. 43, 47 Pac. 870; McCloud v. Hewlett, 135 Cal. 361, 67 Pac. 333; Johnson v. Phenix etc. Co., 146 Cal. 1, 80 Pac. 719; S. C., 152 Cal. 196, 92 Pac. 182; Bell v. San Francisco Savings Union, 153 Cal. 64, 92 Pac. 225; Niles v. Gonzalez, 152 Cal. 90, 92 Pac. 74; S. C., 155 Cal. 359, 100 Pac. 1080. And look at Watson v. Sutro, 77 Cal. 609, 20 Pac. 88; Barnhart v. Fulkerth, 92 Cal. 155, 28 Pac. 221; In re Ryer, 110 Cal. 556, 42 Pac. 1082; Estate of Young, 149 Cal. 173, 85 Pac. 145.

[4] Section 659, Code of Civil Procedure.

[5] See section 210, *post*.

[6] 115 Cal. 16, 56 Am. St. Rep. 82, 44 Pac. 660, 46 Pac. 130, 35 L. R. A. 318.

[7] 152 Cal. 196, 92 Pac. 182.

The inquiry of the court was directed exclusively to the question as to whether the bank was a party adverse to the motion. That point being decided in the affirmative, the court declined to consider the appeal on its merits, because of the appellant's failure to serve it with the notice of intention. So in Niles v. Gonzalez,[7a] Mrs. Tarr, a codefendant of the appellant from an order denying the motion, appeared neither to have participated in the proceedings for new trial as a moving party, nor to have been served with a notice of intention as an adverse party. The supreme court, as in the last-cited case, directed its inquiry exclusively to the question as to whether she was an adverse party or not. This point being determined in the affirmative, the court held that failure to serve her with a copy of the notice of intention was fatal to the jurisdiction of the trial court to grant the motion, and that its order denying the same must, for that reason, be affirmed.

But the service of the notice may be waived. The general subject of waiver of notice of intention is considered in the previous section. Waiver of service is manifestly included in the broader subject. A valid notice of intention is composed of several distinct, but very essential, elements, and the effect of a failure in a single particular is to invalidate the notice, though every other requirement may be fully met. A notice may be valid in form, contents, and signature, and may have been filed within the statutory time, and yet be invalid by reason of the failure of the moving party to serve it upon one or more adverse parties to the motion, within the prescribed time. Unless waived, or the failure otherwise cured,[7b] this single defect will be sufficient ground for the denial of the motion.[7c] Failure of service, therefore, as well as failure in any other particular, amounts to failure of notice, and whatever constitutes waiver of notice may be accepted as a correct guide in the determination of what shall be regarded as waiver of

[7a] See 152 Cal. 90, 92 Pac. 74, and 155 Cal. 359, 100 Pac. 1080.

[7b] If the failure to serve the notice in time is due to mistake or inadvertence, so as to bring it within the operation of section 473 of the Code of Civil Procedure, it may be cured, no doubt, if application be made within a reasonable time (within six months).

[7c] In Brundage v. Adams, 41 Cal. 621, 11 Morr. Min. Rep. 470, the court said: "The point is now made in argument here that the motion for new trial was correctly denied, because the defendants, though they filed, did not serve, their notice of intention to move for a new trial. But the answer is that the plaintiff did not make this objection, nor reserve his right to make it, when he proposed his amendments to the statement. Had he done so the fact of service might possibly have been shown, or a waiver of it in some way made to appear."

service. Aside from this it may be stated, in general, that waiver may appear from some act or acquiescence in open court, or in the proceedings in the case as disclosed by the record, or the files of the case and the minutes of the court; or when the conduct of the party, as it appears from the record or minutes, is inconsistent with any other theory than that notice has been given or waived; or if the question is limited to service, that the notice has been served or the service waived.[7d]

The service must be upon the attorney of record, if there be one. Section 1015 of the code provides, that " in all cases where a party has an attorney in the action or proceeding, the service of papers when required must be upon the attorney instead of the party, except of subpoenas, of writs, and other process issued in the suit."[8] The attorney here designated is the attorney of record; but service upon one who has acted and been recognized throughout as attorney, although he was not attorney of record, has in some instances been held to be sufficient.[9] If the attorney's authority be revoked—as by the death of his client—service upon him is insufficient.[10] The manner and proof of service is to be the same as of other papers.[11]

§ 16. Commencement of Proceedings for New Trial—Entry of Judgment—Adjournment of Term.—As already shown, the notice of intention cannot be given before the verdict or other decision of fact;[1] but, in the absence of statutory provision, it may be given either before or after entry of judgment. The judgment here spoken of is the formal judgment which is drawn up by the clerk, and by him entered or recorded in the judgment-

[7d] See section 14, *ante*, as to waiver in general, and presumption where the record is silent; and see section 20, *post*, as to analogous subject of waiver of notice of decision, and of entry of judgment.

[8] See section 524, old Practice Act; and see Abrahms v. Stokes, 39 Cal. 150, and Welton v. Garibardi, 6 Cal. 245.

[9] Roussin v. Stewart, 33 Cal. 208; Sowden v. Idaho Q. M. Co., 55 Cal. 443, 2 Morr. Min. Rep. 199; and see McCreery v. Everding, 44 Cal. 286. But see section 13, *ante*, and section 208 et seq.

[10] Judson v. Love, 35 Cal. 463; and see section 286, Code of Civil Procedure. And see section 210, notes 11 and 11a.

[11] See section 210, as to service of notice of appeal.

[1] See section 1, *ante*.

book,[2] or journal of the court,[2a] a copy of which entry usually constitutes a part of the judgment-roll.[3] That the notice of intention may be given, in any case, after the entry of judgment is plain; for the judgment must be entered after the verdict or decision is rendered, the only limitation being as to whether the case is reserved or a stay of proceedings granted, or not;[4] while the

[2] See section 668, Code of Civil Procedure, California; section 228, Mills' Annotated Code of Colorado; section 4454, Revised Codes of Idaho; section 6804, Revised Codes of Montana (1194, Code of Civil Procedure); section 3298, Cutting's Compiled Laws of Nevada (section 203, Civil Practice); section 7078, Revised Codes of North Dakota; section 3195, Compiled Laws of Oklahoma; section 315, Code of Civil Procedure of South Dakota.

[2a] See section 5936, Compiled Laws of Oklahoma; section 196, Lord's Oregon Laws; section 435, Rem. & Bal. Codes of Washington (section 5119, Bal. Code); section 4627, Compiled Statutes of Wyoming.

[3] See section 1443, Revised Statutes of Arizona (section 234, Civil Practice); section 670, Code of Civil Procedure of California; section 4456, Revised Codes of Idaho; section 6806, Revised Codes of Montana (section 1196, Code of Civil Procedure); section 3300, Cutting's Compiled Laws of Nevada (section 205, Civil Practice); section 7081, Revised Codes of North Dakota; section 208, Lord's Oregon Laws; section 5939, Compiled Laws of Oklahoma; section 319, Code of Civil Procedure of South Dakota; section 3197, Compiled Laws of Utah; section 442, Rem. & Bal. Codes (section 5126, Bal. Codes) of Washington; section 4630, Compiled Statutes of Wyoming.

[4] No provision is made as to the time when entry of judgment must take place in Arizona, except that section 1442, Revised Statutes (section 233, Civil Practice), provides that "judgment may be entered either in term time or vacation."

Trials to a Jury: Section 664, Code of Civil Procedure of California, provides for entry of judgment within twenty-four hours after rendition of verdict, unless the court order the case reserved for argument or further consideration. Similar provisions are to be found in the codes of other states, as follows: See section 224, Mills' Annotated Code of Colorado; section 4450, Revised Codes of Idaho; section 6800, Revised Codes of Montana (section 1190, Code of Civil Procedure); section 3294, Cutting's Compiled Laws of Nevada (section 199, Civil Practice).

The language of the New Mexico statute is somewhat vague. Section 2685, subsection 132, is as follows:

"Upon the rendition of any verdict, or the making of findings in a case tried by the court, judgment shall be immediately rendered thereon, unless notice is given at the time of the intention of the party to make a motion for a new trial."

Subsection 135 of the same section is as follows:

"Judgment shall be entered and execution may be issued thereon unless a motion for a new trial is made within the time hereinbefore provided. "

If the word "rendered" as applied to the judgment in subsection 132, above quoted, is intended as "entered," these provisions are clear, and consistent with subsection 133, which provides that motions for new trial shall be made "within five days after the rendition of the verdict or findings."

In North Dakota (section 7070, Revised Codes), and South Dakota (section 309, Code of Civil Procedure), "judgment upon an issue of law, or fact, or upon confession, or upon failure to answer, may be entered by the clerk upon the order of the court or the judge thereof." No time is fixed. Williams v. Wait, 2 S. D 210, 49 N. W. 209; and see Gould v.

notice of intention may be given, if not within some fixed time after entry of judgment,[4a] or notice thereof,[4b] within a certain time, varying in different states, after rendition of verdict or decision.[5] It is true, requirements fixing a definite time for the entry of judgment after verdict or decision are usually directory; but the two provisions, taken together, sufficiently show the intention of the law-makers in this particular. That the notice may be given before entry of judgment, unless otherwise provided, follows from the well-established proposition that a new trial is

Elevator Co., 3 N. D. 96, 54 N. W. 316.

In Oregon, "when a trial has been had before the court without a jury, a judgment shall be entered by the clerk in conformity with the findings within the day the findings are filed. If the trial be by jury, the judgment shall be given by the court in conformity with the verdict, and so entered by the clerk within the day on which the verdict is returned." And the same may be said of judgments *pro confesso*, by default, and upon demurrer. See section 201, Lord's Oregon Laws. Section 204 of the same provides for the entry of judgment in vacation, when the clerk has omitted to enter in term time, or when the judgment was rendered in vacation.

Section 3191, Compiled Laws of Utah, is practically the same as the California section.

Section 431, Rem. & Bal. Code, Washington (section 5115, Bal. Code), is as follows:

"When a trial by jury has been had, judgment shall be entered by the clerk immediately."

In Wyoming, no time is fixed for entry of judgment. Section 4622, Compiled Statutes of 1910, provides: "When a trial by jury has been had, judgment must be entered by the clerk in conformity to the verdict, unless the verdict is special, or the court order the case to be reserved for future argument or consideration."

Trial to the Court, or Referee: In California no time is fixed for the entry of a judgment upon findings of the court or referee. Section 633, Code of Civil Procedure, merely provides for stating the facts and conclusions separately, and the entry of the judgment accordingly. As to referees, see section 644, Code of Civil Procedure. Sections 4407 and 4420, Revised Codes of Idaho; sections 6764 and 6781, Revised Codes of Montana; sections 3277 and 3284, of Cutting's Compiled Laws of Nevada, are in practically the same language. Section 367, Rem. & Bal. Code of Washington (section 5029, Bal. Code), as to trials by the court, is in similar language, but the sections covering trials by referees have no counterpart in the last-named state.

See *supra*, as to provisions applicable to trials by courts or referee in New Mexico, North and South Dakota and Oregon.

[4a] As in Oregon (section 175, Lord's Oregon Laws). See note 6, section 12, *ante*. But no notice of intention is required.

[4b] As in California (section 659, Code of Civil Procedure), and Montana (section 6796, Revised Codes). See note 6, section 12, *ante*.

[5] See note 6, section 12, *ante*.

The distinction between trials to a jury and trials to a court or referee, which was the basis of the California provision regulating the time for giving notice of intention prior to the amendment of 1907, is still maintained in Idaho, Nevada, North Dakota, South Dakota, Utah, and Washington. In the state last mentioned, however, no specific provision is made for notice. But see Boarman v. Hinckley, 17 Wash. 126, 49 Pac. 226. Notice is not prescribed

a re-examination of issues of fact,[6] and has nothing to do with the judgment, which is the sentence of the law upon the facts.[6a] Accordingly in People v. Hill,[7] it was held that the time to give the notice of intention began to run from the rendition of the special verdict, covering all the issues, and not from the decision of the court as to what judgment should be given thereon. The principle here stated was adopted in Fisher v. Emerson,[7a] where the court said:

"When the written findings and conclusions were filed, the trial was ended. There remained nothing further to be done, except the entry of judgment, which would not constitute any part of the trial. The respondent was not prevented from filing a motion for a new trial upon the findings before judgment was rendered. A new trial is a re-examination of the issues of fact, and has nothing to do with the judgment, which is the sentence of the law upon the facts. Proceedings may be commenced either before or after entry of judgment. Hayne New Trial and Appeal, secs. 16, 1."

The case of Johnson v. Phenix etc. Co.,[7b] which arose in California previous to the amendment of 1907, also supports this doctrine. The question there was whether a certain party was "adverse" so as to require the service of a notice of intention. The court said:

in Arizona, Colorado, New Mexico, Oklahoma, Oregon and Wyoming.

In Arizona, Colorado, New Mexico, Oklahoma, Oregon and Wyoming, the motion must be made in the term during which the verdict or decision was rendered, except that in Oklahoma and Wyoming it may be made subsequently upon the ground of newly discovered evidence.

[6] See sections 1 and 2, *ante*.

[6a] See Fisher v. Emerson, 15 Utah, 517, 50 Pac. 619.

[7] 16 Cal. 114. In this case it was said, that "the better practice in all such cases would be to settle all questions of this character in advance of the final action of the court" (p. 117). In Hutchinson v. Bours, 13 Cal. 50, Baldwin, J., delivering the opinion, said:

"We think it well, in order to secure uniformity of practice, to suggest that we consider it best in all cases where there is no question as to the proper judgment to be entered on a verdict, for the court to direct judgment to be entered at once, without waiting for a motion for a new trial, or any proceeding to set aside the verdict. The judgment can as well be set aside as the verdict, while there may be some embarrassment, as in this case, attending the postponement of the entry, and the plaintiff ought to have the benefit of the security, which is sometimes very important, afforded by the lien of the judgment."

[7a] 15 Utah, 517, 50 Pac. 619. In the earlier Oregon decisions the right to give a notice and prosecute a motion for a new trial was held not to be affected by a premature entry of judgment. See Arrigoni v. Johnson, 6 Or. 167; Jennings v. Frazier, 46 Or. 470, 80 Pac. 1011.

[7b] 152 Cal. 196, 92 Pac. 182.

"But it is urged by the appellant that inasmuch as a new trial is a re-examination of an issue of fact after a trial and decision by a jury or court (Code Civ. Proc., sec. 656) and the effect of an order granting a new trial is to vacate the verdict or other decision (Code Civ. Proc., sec. 657), it is the verdict or findings rather than the judgment which must be looked to to determine whether or not a party to whom notice has not been given is an adverse party.

"That the motion for new trial attacks the verdict rather than the judgment, and that such motion may be made prior to entry of judgment is no doubt true (Code Civ. Proc., sec. 659), and therefore the question who is an adverse party, entitled to notice of intention under section 659, is to be determined from the verdict rather than the judgment. It is conceivable that the judgment might declare rights in favor of a party, although the verdict did not authorize such declaration. Such party would be entitled to service of notice of appeal from the judgment, but he would not necessarily be entitled to notice of motion for new trial, which was intended only to attack the verdict."

The early case of Spanagel v. Dellinger[8] is recognized as the leading case upon this point. It was there held that the new trial proceeding was entirely independent of the judgment, that it possessed a record of its own, independent of the judgment record, or roll, which might be made up either before or after the entry of judgment, or the making up of the judgment-roll. It is obvious, therefore, that if the proceedings for new trial must be held to await entry of judgment before being initiated, the independent character, both of the proceeding and its record, disappears.

The other branch of the subject of this section was also much considered in Spanagel v. Dellinger, and the conclusion was there reached that the rule as to the adjournment of the term did not apply to proceedings on motion for new trial, and that therefore an order granting an extension of time to file a statement on motion for new trial could be amended after the adjournment of the term. In reasoning to this conclusion, Sanderson, J., delivering the opinion, said:

[8] 34 Cal. 476. See, also, Brison v. Brison, 90 Cal. 323, 27 Pac. 186; Houser & Haines Mfg. Co. v. Hargrove, 129 Cal. 90, 61 Pac. 660; Kaltschmidt v. Weber, 136 Cal. 675, 69 Pac. 497.

"Under the rule in De Castro v. Richardson, 25 Cal. 49, the court had no power to make the amendatory order; but after a careful re-examination of the question, we have become satisfied that our conclusion in that case was erroneous. The general rule that a court cannot amend its record after the adjournment of the term at which it was made, except where the record contains matter to amend by, announced in that case, is correct; but we erred in considering proceedings inaugurated or taken for the purpose of setting aside the verdict and obtaining a new trial as constituting a part of the record of the term at which the judgment was entered, within the sense of that rule, which was due, doubtless, to the fact that the difference which exists between the making of the record at common law and under our practice was overlooked. We said: 'At common law, when the proceedings have been entered of record, the courts would allow no further amendment; but by the statute of jeofails and amendments a still further right of amendment was given. The making up of the judgment-roll is the equivalent under our Practice Act of the entry of the record at common law.' The former proposition is correct, but the latter is too broad, and therein lies the vice of our decision in that case. In respect to the general purpose and effect of a record, the making up of the judgment-roll under our practice and the entry of record at common law are doubtless equivalents; but in respect to proceedings taken for the purpose of obtaining a new trial, they are not the equivalents of each other. The difference lies in the fact that at common law the judgment was not entered or signed until after the motion for new trial had been heard and determined. Hence the record was not made in the sense of the rule under consideration until the court had finally disposed of the whole case, including the motion for a new trial. So that the proceedings on the motion for a new trial did not reach beyond or succeed the entry of judgment and the adjournment of the term, and therefore did not thereafter continue 'in the breast or memory of the judge,' but like all the other proceedings in the case, existed in the record already made, which could not thereafter be altered or amended, except as already suggested. (Tidd's Practice, 903, 912, 930.) Under our practice the rule is otherwise. The motion for new trial may be made before or after the entry of judgment, or the making of the roll (Ketchum v. Crippen, 31 Cal. 365;

Pendegast v. Knox, 32 Cal. 73); but in either event, as we held in the cases cited, the motion proceeds independent of the judgment and mainly upon a record of its own, which may or may not be made at the term at which the judgment was entered, and be made out of term as well as in. (Statutes 1863, p. 336, sec. 25.) It is unaffected by an adjournment of the term, but proceeds all the same whether in term or vacation, and remains *in fieri* until the final order granting or denying it is made; and until that time, at least, the record cannot be said to have been made in the sense of the rule under consideration. Until then the proceedings must be considered as being 'in paper,' or 'in the breast of the judge,' in the common-law sense of those terms, and therefore within the judge's control on the score of amendment. In the sense of the rule in hand as to a motion for a new trial under our practice there is no term of court, or if there is it begins and ends with the motion."

The case of De Castro v. Richardson, overruled in the foregoing case, was to the effect that the rule as to the adjournment of the term applied to proceedings for a new trial; but although there is some confusion in some of the earlier cases on the subject, the rule was never applied so as to curtail the time allowed by the statute for the giving of notice of intention. The Practice Act always allowed a fixed period for giving the notice of intention, and if it was given within that period it was in time, whether the court had in the meantime adjourned for the term or not. Since the case of Spanagel v. Dellinger, above quoted, it is clear that the rule as to the adjournment of the term, has no application whatever to proceedings for new trial, in the absence of a statutory provision to the contrary, and since that case the rule has never applied.[9]

[9] Decisions in regard to the rule were usually made under section 68 of the Practice Act of California (section 473, Code of Civil Procedure), and the corresponding provisions of other codes, and the rule was that, except where the summons was not personally served, the relief there provided for could not be granted after the adjournment of the term. See Baldwin v. Kramer, 2 Cal. 582; Lurvey v. Wells, 4 Cal. 106; Suydam v. Pitcher, 4 Cal. 280; Carpentier v. Hart, 5 Cal. 406; Robb v. Robb, 6 Cal. 21; Shaw v. McGragor, 8 Cal. 521; Bell v. Thompson, 19 Cal. 706; Lattimer v. Ryan, 20 Cal. 628; Copper Hill Co. v. Spencer, 25 Cal. 16; De Castro v. Richardson, 25 Cal. 49; Casement v. Ringgold, 28 Cal. 335; Hegeler v. Henckell, 27 Cal. 491. In 1866 the California practice was amended so as to fix the term within which relief might be granted thereunder within five months after adjournment of the term. Under this provision it was held that if the application was within the five months,

As above intimated, the time within which a notice of intention, or a new trial motion itself, may be given or made, may, by statutory provision, be affected by entry of judgment. So it may, by adjournment of term.[9a] The legislatures of the states of California, Montana and Oregon, in 1907, adopted amendments to existing law whereby entry of judgment or the notice thereof, is fixed as the starting point of the period within which either the notice or the motion must be given or made;[10] and the statutes of Arizona,[11] New Mexico,[12] Oklahoma,[13] Oregon,[14] and Wyoming,[15] require the application for a new trial, and necessarily the notice of intention, where one is required, to be made within the term, or before its adjournment.[15a] So far, however, as the ancient question of a completed record, which must not be disturbed after the adjournment of the term at which it was made, is concerned, it has never, since the decision in Spanagel v. Dellinger, been recognized in any jurisdiction where the practice is similar.

Upon the question as to the effect of the amendments of 1907, as to entry of judgment, upon the rule that the notice of intention may be given either before or after that entry, some doubt may be said to exist. The language of the amendment is the same in both California,[16] and Montana,[17] or practically so. "The party intending to move for a new trial must, within ten days after receiving notice of the entry of judgment, file with the clerk, and serve upon the adverse party, a notice of his intention," etc. This language takes the place of language similar

but no excuse for delay shown, relief would not be granted: Mahoney v. Mahoney, 51 Cal. 118; and if the application was made after expiration of five months no relief would be granted. Hartman v. Olvera, 49 Cal. 101. In 1880, terms of court having been abolished, the section of the code (section 473) was amended so as to fix the time, as it now provides, to not exceeding six months.

[9a] The adoption of sections 48 and 74, California Code of Civil Procedure, had the effect of abolishing terms of court in that state; but terms of court still exist in a majority of the states.

[10] See notes 4a and 4b, *supra*.

[11] Sections 1478 and 1479, Revised Statutes (sections 269 and 270, Civil Practice). See note 5, *supra*.

[12] Section 2685, subsection 133, Compiled Laws of 1897. See note 5, *supra*.

[13] Section 5827, Compiled Laws of 1909. See note 5, *supra*.

[14] Section 175, Lord's Oregon Laws. See note 5, *supra*.

[15] Section 4603, Compiled Statutes of 1910. See note 5, *supra*.

[15a] See note 6, section 12, for synopsis of provisions of the several states as to adjournment of term. See, also, note 5, *supra*.

[16] Section 659, Code of Civil Procedure.

[17] Section 6796, Revised Codes.

to that which governs in Idaho and other states.[18] "The party intending to move for a new trial must within ten days after the verdict of the jury, if the action were tried by a jury, or after notice of the decision of the court or referee, if the action were tried without a jury, file with the clerk, and serve upon the adverse party, a notice of his intention," etc.

The effect of this amendment would seem to be merely to eliminate the distinction between jury trials and trials by the court or referee, and to fix the receipt of notice of entry of judgment as the common and uniform point in all cases alike, without regard to the method of trial, when the time to give notice of intention begins to run against the moving party. The independent character of the new trial proceeding remains unaffected. If, as above suggested, the moving party must wait for entry of judgment before making his motion, or giving his notice of intention, this independent character of the proceeding disappears, along with the collateral nature of the record upon which it rests.[18a] Moreover, the same reason which would require him to wait for entry of judgment would also demand that he should wait for notice thereof, for it is the latter and not the former which fixes the commencement of the period within which the notice must be given. Nevertheless, in Montana, at least, the court has taken the contrary view. In Power v. Turner,[19] the notice was given on the 15th of July, after the decision of fact. The judgment was not entered until July 25th. The court held the notice premature. So in McIntyre v. MacGinniss,[20] it was held that a notice of intention, served after the decision, but before entry of judgment, was premature. In neither case did the court see fit to advance any reason for the decision, and it is doubtful if its conclusion will be sustained upon a more careful consideration of the point.[21]

§ 17. **The Notice of Intention must be Given Within the Time Allowed by Law Therefor.**—The periods within which the notice of intention must be given, after the various methods of trial, and in the different jurisdictions, have been previously outlined,[1] and

[18] See note, 5, *supra*.

[18a] See section 2, *ante*,

[19] 37 Mont. 521, 97 Pac. 950; and see Curn v. Perkins, 40 Mont. 588, 107 Pac. 901.

[20] 47 Mont. 87, 137 Am. St. Rep. 701, 108 Pac. 353.

[21] As to the Oregon provision, see note 4a, *supra*.

[1] See section 16, note 5, *ante*.

are to be treated in detail hereafter.[1a] Whatever may be the period prescribed, the notice must be given before it elapses, whether limited to the term or not. This has been held in every state, in an unbroken line of decisions, from the earliest period of its judicial history. The requirement that the notice be given within the prescribed time is mandatory,[1b] and unless so given no right of review by the method in question can be acquired.[1c] Since the procedure is statutory the mode pointed out by statute must be pursued;[2] and this implies the giving of the notice within the time prescribed.

The reports show that the point was first ruled upon in Eliott v. Osborne,[3] which was decided upon the act of 1850. In that case Bennett, J., delivering the opinion said:

"A motion for a new trial must be made within four days after judgment; the motion was not made within that time, and was

[1a] See sections 18 and 19, *post*.

[1b] See Kent v. Upton, 3 Wyo. 43, 2 Pac. 234; McLaughlin v. Upton, 3 Wyo. 48, 2 Pac. 534; Todd v. Peterson, 13 Wyo. 513, 81 Pac. 878; Boswell v. Bliler, 9 Wyo. 277, 62 Pac. 350; Casteel v. State, 9 Wyo. 267, 62 Pac. 348. See, also, Joiner v. Goldsmith, 25 Okl. 840, 107 Pac. 733, and cases cited.

[1c] In Walker v. Blake (Ariz.), 108 Pac. 221, the court held that a motion for new trial filed after the statutory time was properly denied. No notice is prescribed in Arizona, but the principle is the same.

In Clark v. Perry, 17 Colo. 56, 28 Pac. 329, and Robert E. Lee etc. Co. v. Englebach, 18 Colo. 106, 31 Pac. 771, it was held that section 218, providing for a new trial motion, with the reasons and affidavits in support thereof, to be filed within five days after verdict, but, in any event, before adjournment of the term, unless the time is extended, does not permit a motion to be made after the expiration of such time, without an extension, and such a motion must be stricken from the files without regard to the merits shown. In Mason v. Sieglitz, 22 Colo. 320, 44 Pac. 588, it was held that errors in rulings upon a motion for a new trial could not be considered unless the notice required was given within the prescribed time.

In Vreeland v. Edens, 35 Mont. 413, 89 Pac. 735, it was held that while a court might settle the statement, yet failure to serve the notice in the prescribed time renders denial of the motion necessary.

[2] "A motion for a new trial is a statutory remedy, and can only be invoked in the manner, within the time, and upon the grounds provided for in the statutes. The moving party must, within ten days after the verdict or notice of the decision of the court or referee (as the case may be), file with the clerk and serve upon the adverse party his notice of intention, ... The notice is the foundation of the proceeding. " Ogle v. Potter, 24 Mont. 501, 62 Pac. 920; Wright v. Mathews, 28 Mont. 442, 72 Pac. 820; State v. Court, 28 Mont. 123, 72 Pac. 412; also Arnold v. Sinclair, 12 Mont. 248, 29 Pac. 1124. Where a notice is prescribed it is a prerequisite. See Spiegelberg v. Mink, 1 N. M. 308; Anderson v. Territory, 4 N. M. 228, 13 Pac. 21; Sierra Co. v. Dona Ana Co., 5 N. M. 190, 21 Pac. 83; Rogers v. Richards, 8 N. M. 658, 47 Pac. 719; MacGregor v. Pierce, 17 S. D. 51, 95 N. W. 281.

[3] 1 Cal. 396.

therefore properly refused for that reason, unless there be circumstances which take the case out of the general rule."

And the court held that the fact that proceedings in the case had been enjoined by an order made in another suit, brought for that purpose, did not take the case out of the general rule. On petition for rehearing, the court said:

"We held in our former opinion in this case, that the making of the injunction order, or even the service of it, could not operate to extend the time for making the motion for new trial. The motion was therefore made too late, and after the court had lost the right, under the statute, to entertain it. This was the principle upon which our former decision was based. We think it correct, and a rehearing should therefore be denied."

So in Dennison v. Smith,[4] the same learned justice, delivering the opinion, said: "One month after judgment was rendered, the defendant moved the court for a new trial. The motion was made at too late a day, and the court decided correctly in denying it. By our statute a motion for new trial must come within four days after judgment. (Sec. 252 of Practice Act of 1850.)" So in Caney v. Silverthorn,[5] it was held that the appellant, "having failed to give notice of his intention to move for a new trial, or to file his statement within the time limited by the statute, lost his right to move for a new trial." So in Mahoney v. Caperton,[6] Cope, J., delivering the opinion said: "The proceedings on the motion for a new trial were irregular and void. Notice of the motion was given one day before the judgment, and six days after the filing of the report of the referee. If the trial terminated with the filing of the report, the notice was not given in time; if it continued in contemplation of law until the entry of the judgment, the notice was premature. In either case it was ineffectual for any purpose." So in Allen v. Hill,[7] Cope, J., delivering the opinion, said: "The notice of motion for new trial in this case was not given in time, and the proceedings based on such notice must therefore be disregarded." So in Ellsassar v. Hunter,[8] Currey, J., delivering the opinion, said: "A verdict was rendered for the plaintiff, on which judgment was entered. On motion of the defendant the court 'ordered that all proceedings be stayed for twenty days, with leave to the defendant to file papers herein.' Twenty days afterward, the defendant filed and gave to

[4] 1 Cal. 437.
[5] 9 Cal. 67; see, also, McCartney v. Fitz Henry, 16 Cal. 184.
[6] 15 Cal. 313, 314, 315.
[7] 16 Cal. 113.
[8] 26 Cal. 279, 283, 284.

the plaintiff's attorneys notice of a motion for new trial. Some time subsequently the court passed upon the motion, denying the application for new trial. From this order and from the judgment the defendants have appealed. The counsel for the respondent makes an objection that the notice of motion for a new trial was not filed and served until twenty days after the verdict and judgment were rendered, and therefore the right to move for a new trial was waived. This objection is well taken, which carries with it the statement prepared and filed as on motion for new trial." So in Regan v. McMahon,[9] the court said: "The motion for a new trial was correctly denied. We have no doubt that such a motion, if made within proper time, may be resorted to for the purpose of correcting the errors in a preliminary decree of partition. But the motion for new trial made in this instance was clearly too late, and the right to make it was waived by the neglect of the parties." So in Clark v. Gridley,[10] the court said: "The defendant's motion for new trial was not served or filed within the time required by law, and the motion was properly denied on this ground." So in Coveny v. Hale,[11] the court said: "The notice of intention to move for new trial was not filed within thirty days after the 'findings' were filed. (Code Civ. Proc., sec. 659.) The motion for a new trial was therefore properly denied." So in Hodgdon v. Griffin,[12] it was held that under the Code of Civil Procedure as first enacted, the notice of intention must be given within thirty days, and it not having been given within that time in that case the order granting a new trial was reversed. So in Burton v. Todd,[13] it was held that the right to move for a new trial was statutory, and must be pursued in the manner pointed out by the statute; hence, the notice must be given within the statutory period. So in Sutton v. Symons,[14] the order denying the motion for a new trial was affirmed because of the failure of the moving party to file his notice within the time prescribed. So in Scott v. Glenn,[15] the same action of the appellate court followed an appeal from a similar order, and upon the same ground. So in other cases.[15a]

[9] 43 Cal. 625.
[10] 49 Cal. 105.
[11] 49 Cal. 552.
[12] 56 Cal. 610; see, also, Clark v. Crane, 57 Cal. 629.
[13] 68 Cal. 485, 9 Pac. 663. See, also, California Imp. Co. v. Baroteau, 116 Cal. 136, 47 Pac. 1018.
[14] 100 Cal. 576, 35 Pac. 158.
[15] 97 Cal. 513, 32 Pac. 573.
[15a] Hand v. Ruff, 3 Ariz. 175, 24 Pac. 257; Svea Ins. Co. v. McFarland, 7 Ariz. 131, 60 Pac. 936; Kansas Pacific Co. v. Twombley's Admx., 2 Colo. 559; Ogle v. Potter, 24 Mont. 501, 62 Pac. 920; Sullivan v. Helena, 10 Mont. 134, 25 Pac. 94; McCune v. Missoula, 10 Mont. 146, 25 Pac.

The time for giving the notice of intention is not limited by the time within which an appeal may be taken from the judgment, but solely by that expressed in the code.[16] This was the opinion of the court in Mallory v. See,[17] where it was contended that after the time for taking an appeal from the judgment had expired, the latter, having become final and conclusive, could not thereafter be reviewed, either directly or indirectly. The court, on appeal from an order striking the notice of intention from the files, as not being authorized, said:

442; Pearce v. Strickler, 9 N. M. 46, 49 Pac. 727; Schofield v. Slaughter, 9 N. M. 422, 54 Pac. 757; Henry v. Lincoln etc. Co., 13 N. M. 384, 85 Pac. 1043; McGrath v. Tallent, 7 Utah, 256, 26 Pac. 574; East v. Mooney, 7 Utah, 414, 27 Pac. 4; Todd v. Peterson, 13 Wyo. 513, 81 Pac. 878.

In Oklahoma and Wyoming (see note 3a, section 12, *ante*) the provision is that for any other ground except newly discovered evidence, the motion must be made within the time fixed, "unless unavoidably prevented," and it has been held that this provision is mandatory, and that in the absence of a showing that the moving party was unavoidably prevented from filing his motion in time, it will be disregarded when filed after the expiration of the statutory time. See United States ex rel. v. Choctaw etc. Co., 3 Okl. 404, 41 Pac. 729; Ryland v. Coyle, 7 Okl. 226, 54 Pac. 456; Joiner v. Goldsmith, 25 Okl. 840, 107 Pac. 733; Boswell v. Bliler, 9 Wyo. 277, 62 Pac. 350. But provisions of this kind are sometimes, as in Arizona, Colorado, and New Mexico (see note 3a, section 12, *ante*), accompanied with a requirement that in any event the motion must be made at the term of court wherein the verdict or decision was rendered. This provision is mandatory. See Hand v. Ruff, 3 Ariz. 175, 24 Pac. 257. But if the verdict is rendered on the last day of the term, a notice may give the court jurisdiction to review the verdict or decision upon motion for new trial at the next term. See Gomer v. Chaffe, 5 Colo. 383; Snider v. Rinehart, 18 Colo. 18, 31 Pac. 716; Robert E. Lee Mining Co. v. Englebach, 18 Colo. 106, 31 Pac. 771; and see Kansas Pac. Co. v. Twombley's Admx., 2 Colo. 559; Clark v. Perry, 17 Colo. 56, 28 Pac. 329. Otherwise parties might be deprived of the right to have such review without any fault of their own. In practice, it is customary to make a general order carrying such matters over. See Pearce v. Strickler, 9 N. M. 46, 49 Pac. 727.

Where the motion may be made at any time during the term, it is in time if made prior to adjournment. Thwing v. Doye, 2 Okl. 608, 44 Pac. 381.

In New Mexico the courts have held the necessity of making the new trial motion in time as equivalent to the necessity of making it at all. The court will no more consider the case in the one instance than in the others. See Spiegelberg v. Mink, 1 N. M. 308; Anderson v. Territory, 4 N. M. 228, 13 Pac. 21; Sierra Co. v. Dona Ana Co., 5 N. M. 190, 21 Pac. 83; Rogers v. Richards, 8 N. M. 658, 47 Pac. 719; Territory v. Chavez, 9 N. M. 282, 50 Pac. 324; Schofield v. Slaughter, 9 N. M. 422, 54 Pac. 757.

The rule applies also to criminal cases. See State v. Smith, 5 Idaho, 291, 48 Pac. 1060; State v. Dupuis, 7 Idaho, 614, 65 Pac. 65; State v. Rice, 7 Idaho, 762, 66 Pac. 87; State v. Davis, 8 Idaho, 115, 66 Pac. 932; McKinney v. State, 3 Wyo. 719, 30 Pac. 293, 16 L. R. A. 710. See cases cited in section 19, *post*, on the subject of waiver of notice of decision.

[16] Section 659, California Code of Civil Procedure.

[17] 129 Cal. 356, 61 Pac. 1123.

"Numerous sections of the Code of Civil Procedure, and several cases, are cited in support of this contention, but do not seem to sustain it. Nor is there anything in the section itself to indicate such intention. We must hold, therefore, that—unless by the general principles of the law, in cases of laches—there is no limit of time for filing the notice other than that expressed in the section."

The giving of the notice prematurely is equally as fatal to the proceedings as giving it too late or failing to give it at all; for it is said that until a decision is rendered it cannot be known whether it will be favorable or otherwise, or who must give, and who receive, the notice.[18]

The *giving* of the notice of intention, provided for in the old Practice Act, is merely the survival of a convenient form of expression. The code provides for *serving* and *filing* the notice, and these two separate acts may be said to constitute the concrete act of *giving* the notice. It is essential, however, that the notice of intention to move for a new trial should be both served and filed, and that both acts should be accomplished with the prescribed time. This was specifically decided in the case of Sutton v. Symons, *ubi supra*, and in the case of Davis v. Hurgren,[19] where the notice was duly served within the required time, but, by reason of the failure of the moving party to pay the requisite filing fee, although the notice was handed to the clerk in time, it was not actually indorsed as having been filed, and the court held the omission fatal.

The time to give notice of intention may be extended by order, but the extension must be ordered before the expiration of the time to give the notice as prescribed by statute.[20]

As to the practice where the notice is not in time, see section 14, *ante*, subdivision 3, and section 146, *post*.[21]

§ 18. Time to Give Notice of Intention—After Verdict.—Where, as in Idaho,[1] the statute provides that "the party intend-

[18] Mahoney v. Caperton, 15 Cal. 313; Bates v. Gage, 49 Cal. 126, 5 Pac. 615; Hinds v. Gage, 56 Cal. 486; Careaga v. Fernald, 66 Cal. 351, 5 Pac. 615; Spottiswood v. Weir, 66 Cal. 525, 6 Pac. 381; Duff v. Duff, 71 Cal. 513, 12 Pac. 570; Dominguez v. Mascotti, 74 Cal. 269, 15 Pac. 773; and see, as to *parties*, Johnson v. Phenix etc. Co., 152 Cal. 196, 92 Pac. 182.

[19] 125 Cal. 48, 57 Pac. 684. See note 8a, section 14, *ante*.

[20] See section 21, *post*.

[21] As to waiver, see sections 14 and 15, *ante*. As to legal presumption where record fails to show anything relative to the notice, see subdivision 4, section 14, *ante*.

[1] And in California, prior to the amendment of 1907. See section 16, note 5.

ing to move for a new trial must, within ten days after the verdict of the jury, if the action were tried by a jury, ... file with the clerk and serve upon the adverse party, a notice of his intention," etc.,[1a] the only possible difficulty is to determine when the time begins to run; and with respect to general verdicts, there can be little doubt on this score. "After the verdict" means after the rendition of the verdict, and it seems clear that the verdict is rendered when it is received by the court and entered in the minutes.[2] But as to special verdicts there is more room for doubt. As to such verdicts there is a distinction between special verdicts which dispose of all the issues, and special verdicts which dispose of only a part of the issues; and there seems to be a doubt as to whether there does not exist a distinction between special verdicts in common-law cases and special verdicts in equity cases.

1. Where only a part of the issues are submitted to a jury, the notice of intention should not be given until all the issues have been disposed of. Until then there has been no trial and decision within the meaning of the code.[3] As to equity cases, this was decided in Bates v. Gage,[4] and subsequently reiterated in numerous cases;[5] and although the precise point has not been ruled in a common-law case, it is manifest that the equity rule must be held to apply, for if judgment be entered upon a special verdict which does not dispose

[1a] Notes 4a, 4b, and 5, of section 16, *ante*, show the statutory provisions of the various jurisdictions.

[2] See sections 1413 and 1414, Revised Statutes of Arizona (sections 204 and 205, Civil Practice); section 628, Code of Civil Procedure of California; section 202, Mills' Annotated Code of Colorado; section 4400, Revised Codes of Idaho; section 3275, Cutting's Compiled Laws of Nevada (section 180, Civil Practice); section 7037, Revised Codes of North Dakota; sections 151 and 154, Lord's Oregon Laws; section 274, Code of Civil Procedure of South Dakota; sections 361 and 364, Rem. & Bal. Code of Washington (sections 5014 and 5021, Bal. Code). In Montana and Wyoming no specific provision is made for the entry of general verdicts. Section 6758, Revised Codes of Montana (section 1101, Code of Civil Procedure), provides that special verdicts shall be entered in the minutes; and section 4511, Compiled Statutes of Wyoming, makes the same provision. Section 4622 provides for entry of judgment in conformity to the verdict, "unless the verdict is special."

An entry in the rough minutes is believed to meet the statutory requirement. People v. Smith, 59 Cal. 601. See, also, section 234, *post*.

[3] See, generally, Crowther v. Rowlandson, 27 Cal. 376; and see cases cited in note 11, below, in note 18, section 17, *ante*, and note 11, section 19, *post*.

[4] 49 Cal. 126.

[5] Spottiswood v. Weir, 66 Cal. 525, 6 Pac. 381; Dominguez v. Mascotti, 74 Cal. 269, 15 Pac. 773; Bell v. Marsh, 80 Cal. 411, 22 Pac. 170. See, also, Reclamation Co. v. Thisby, 131 Cal. 572, 63 Pac. 918; Estate of McKenna, 138 Cal. 439, 71 Pac. 501; and cases cited and referred to in note 3, *supra*.

of all the issues, there will be a mistrial.[5a] As long as a single material issue remains undisposed of, it is impossible to say in whose favor the "decision" on the issues of fact will be, and until that is determined, it is impossible to tell who is to give the notice.[5b]

2. When all the issues are disposed of by the verdict, there seems to be a doubt whether there is not a distinction between common-law cases and cases in equity. In common-law cases it has been held that when all the issues have been disposed of by the verdict, the time to give notice of intention begins to run from the rendition of the verdict, and not from the action of the court thereon.[5c] There is a dictum of Judge Field to that effect in Peabody v. Phelps.[6] That dictum was approved and followed in Allen v. Hill.[7] In that case the notice of intention was given within two days after the decision of the judge as to what judgment should be given upon the verdict, but not within two days after the rendition of the verdict.[8] Cope, J., delivering the opinion, said:

"The notice of the intention for a new trial in this case was not given in time, and the proceedings based upon such notice must, therefore, be disregarded. The trial terminated with the rendition of the verdict, and the notice should have been given within two days thereafter. It is urged that as the verdict was special, it was necessary to invoke the action of the court before a judgment could be entered upon it, and that, therefore, the trial itself did not in contemplation of law terminate until the judgment was rendered. We cannot assent to this view. The facts were settled by the verdict, and it only remained for the court to pronounce the conclusion of the law upon the facts found. If the court erred in this respect, the error is a proper subject of review, and a motion for a new trial was

[5a] Kiel v. Reay, 50 Cal. 61.

[5b] See Bell v. Marsh, 80 Cal. 414, 22 Pac. 170.

[5c] But this rule is applicable only to verdicts upon which a final judgment may be entered. If the general verdict is inconsistent with special findings, the latter must prevail, and the court will be under the necessity of rendering judgment upon the special findings. Hence the verdict will be treated as a special verdict, and the rule applied, that the time to give notice runs from the rendition of judgment by the court. See Severy v. Rock Island etc. Co., 6 Okl. 153, 50 Pac. 162.

In New Mexico, and doubtless elsewhere, the rule as to verdicts upon instructions of the court is that such verdicts are decisions of the jury, and not of the court, and that the time to give the notice begins to run upon rendition, as in other cases. Schofield v. Slaughter, 9 N. M. 422, 54 Pac. 757.

[6] 9 Cal. 213.

[7] 16 Cal. 113.

[8] The statute as it then stood required the notice to be given within two days "after the trial."

unnecessary. If the verdict was not satisfactory, the right to correct it did not depend upon the judgment, and the steps for that purpose should have been taken within the time limited by the statute. The better practice in such cases would be to settle all questions of this character in advance of the final action of the court. It is argued by counsel that inasmuch as the party aggrieved by a verdict is alone entitled to object to it, the right to do so must be regarded as resulting from the judgment depending for its exercise upon the ultimate action of the court. The error of this argument is obvious. It makes the exercise of this right subservient to the opinion of the judge upon a matter of strict law in no way connected with any question to which it relates. The court acts on the verdict as it is and not as it should be, and if the right of a party to take the necessary steps for its correction depends upon such action, even an erroneous judgment is conclusive of this right. The successful party can never go behind it, for the purpose of calling in question the action of the jury."

The conclusion of the court in the above case is strengthened when we reflect that a new trial is a re-examination of an issue of fact and not of a conclusion of law,[9] and that proceedings for new trial are collateral to the main line of proceedings,[10] and that the notice of intention may be given either before or after the entry of judgment.[11]

In equity cases the rule seems to be different from that which prevails in common-law cases. As is elsewhere shown, the doctrine that a special verdict in an equity case is merely advisory is the last remaining consequence of the erroneous notion, which formerly prevailed, that the provisions of the Practice Act in relation to new trials did not apply to equity cases. According to the preponderance of authority this doctrine still obtains,[12] and the verdict of a jury in an equity case is merely advisory to the judge, and is of no force or validity until adopted by him, and when adopted derives its validity solely from such adoption, and is to be considered merely as a part of the findings of the judge. If the advisory theory is to be maintained, and no doubt it is, there is no "decision" of the issues of fact until the verdict is adopted by the judge and the time to give notice of intention begins to run from such adoption. If the advisory theory should be rejected, the doctrine of Allen v. Hill,

[9] See section 1, *ante*.
[10] See section 2, *ante*.
[11] See section 16, *ante*.
[12] See section 234, *post*.

above quoted, would undoubtedly apply, and the time to give the notice would begin to run from the rendition of the verdict.

3. There are some cases in which it is proper for a jury to render both a general and a special verdict; but not in equity, where a general verdict is never proper.[13] But in cases in which it is proper, if the special verdict is not inconsistent with the general verdict, the latter may be considered as the verdict in the case,[14] and the time when a notice of intention must be given will be held to run from the rendition of the general verdict. If, however, the special verdict is inconsistent with the general verdict, the former stands as the verdict in the case,[15] and if it covers all the issues, the doctrine of Allen v. Hill will apply, and the time when the notice must be given runs from the rendition of the special verdict. But if the special verdict does not cover all the issues, and is inconsistent with the general verdict, then the time within which the notice must be given will be governed by the rule announced in the first part of the section; i. e., such time will not begin to run until all the issues are disposed of.[15a]

When the point at which the time commences to run has been determined the rest is easy. Statutes in most of the states provide that "the time in which any act provided by law is to be done is computed by excluding the first and including the last, unless the last day is a holiday, and then it is also excluded."[16] To this it is

[13] Wingate v. Ferris, 50 Cal. 105; Warring v. Freear, 64 Cal. 54, 28 Pac. 115; and see section 234, *post*.

[14] Blood v. Light, 31 Cal. 115; and see section 234, *post*.

[15] See section 625, Code of Civil Procedure of California; section 199, Mills' Annotated Code of Colorado; section 4397, Revised Codes of Idaho; section 6758, Revised Codes of Montana (section 1101, Code of Civil Procedure); section 3272, Cutting's Compiled Laws of Nevada (section 177, Civil Practice); section 7034, Revised Codes of North Dakota; section 5806, Compiled Laws of Oklahoma; section 155, Lord's Oregon Laws; section 271, Code of Civil Procedure of South Dakota; section 3163, Compiled Laws of Utah; section 365, Rem. & Bal. Codes of Washington (section 5022, Bal. Code); section 4512, Compiled Statutes of Wyoming. No similar provision is to be found in the statutes of Arizona and New Mexico, but see chapter 13, Revised Statutes of Arizona.

See section 233, *post*.

[15a] See note 5c, *supra*.

[16] Section 1566, Revised Statutes of Arizona (357, Civil Practice); section 12, Code of Civil Procedure of California; section 382, Mills' Annotated Code of Colorado; section 11, Revised Codes of Idaho; sections 11 (11, P. C.), 6219 (4657, Civil Code), and 8067 (3459, Code of Civil Procedure), Revised Codes of Montana; section 3601, Cutting's Compiled Laws of Nevada (506, Civil Practice); section 2900, Compiled Laws of New Mexico; section 6736, Revised Codes of North Dakota; section 6258, Compiled Laws of Oklahoma; section 531, Lord's Oregon Laws; section 6, Code of Civil Procedure of South Dakota; section 2493, Compiled Laws of Utah; sections 150

usual to add Sundays and nonjudicial days,[16a] and sometimes the provision is added that "fractions of a day are to be disregarded in computations including more than one day, and involving no question of priority."[16b]

When the time computed includes a Sunday, or other nonjudicial day, or holiday, such day is included unless it is the last day of the term. Thus where the verdict was rendered on Saturday, the day following was included in a computation where the law required the motion to be made within two days after such rendition, and it was held that a motion made after Monday was too late.[16c]

The time in which the notice is to be given is not affected by the question as to the papers upon which the motion is to be made.[17]

§ 19. Time to Give Notice of Intention After Trial by the Court Without a Jury.—Where the distinction between the mode

and 252, Rem. & Bal. Codes of Washington (4790 and 4896, Bal. Code); section 4266, Compiled Statutes of Wyoming.

See in this connection People v. Whitman, 6 Cal. 659; Price v. Whitman, 8 Cal. 412; Hibernia etc. Soc. v. O'Grady, 47 Cal. 579; Misch v. Mayhew, 51 Cal. 514; Rauer v. Broder, 107 Cal. 282, 40 Pac. 430; Scoville v. Anderson, 131 Cal. 590, 63 Pac. 1013; Bellmer v. Blessington, 136 Cal. 3, 68 Pac. 111; Taylor v. Brown, 5 Dak. 335, 40 N. W. 525; Poppleton v. Nelson, 10 Or. 437; Nicklin v. Robertson, 28 Or. 278, 52 Am. St. Rep. 790, 42 Pac. 993; Grant v. Paddock, 30 Or. 312, 47 Pac. 712; Wachsmuth v. Routledge, 36 Or. 307, 51 Pac. 443, 59 Pac. 454; Boothe v. Scriber, 48 Or. 561, 87 Pac. 887, 90 Pac. 1002; Rynearson v. Union Co., 54 Or. 181, 102 Pac. 785; McCabe etc. Co. v. Justice Court (Or.), 102 Pac. 795; Chicago etc. Co. v. Nield, 16 S. D. 370, 92 N. W. 1069; Thompson v. Huron etc. Co., 5 Wash. 527, 32 Pac. 536; State v. Benson, 21 Wash. 365, 58 Pac. 217; Spokane etc. Co. v. Stanley, 25 Wash. 653, 66 Pac. 92; Perkins v. Jennings, 27 Wash. 145, 67 Pac. 590; White v. Hinton, 3 Wyo. 753, 30 Pac. 953, 17 L. R. A. 66; Conway v. Smith Mer. Co., 6 Wyo. 327, 44 Pac. 940, 49 L. R. A. 201; Columbia etc. Co. v. D. M. Co., 13 Wyo. 244, 79 Pac. 385.

[16a] See section 3601, Cutting's Compiled Laws of Nevada (506, Civil Practice); section 2900, Compiled Laws of New Mexico; section 531, Lord's Oregon Laws; section 150, Rem. & Bal. Codes of Washington (4790, Bal. Code). Sections 2900, Compiled Laws of New Mexico, and 252, Rem. & Bal. Code of Washington (4896, Bal. Code), mention Sunday alone, and do not include holidays.

See, also, Martin v. Sunset etc. Co., 18 Wash. 260, 51 Pac. 376; Spokane etc. Co. v. Stanley, 25 Wash. 653, 66 Pac. 92; Perkins v. Jennings, 27 Wash. 145, 67 Pac. 590; Kubillus v. Ewert, 40 Wash. 38, 82 Pac. 147; Goetzinger v. Rosenfeld, 16 Wash. 392, 47 Pac. 882, 38 L. R. A. 257; Hale v. Finch, 1 Wash. Ter. 517.

[16b] See section 2466, Civil Code of South Dakota. See, also, Lone Tree Ditch Co. v. Rapid City etc. Co., 16 S. D. 451, 93 N. W. 650; Goetsinger v. Rosenfeld, 16 Wash. 392, 47 Pac. 882, 38 L. R. A. 257; Perkins v. Jennings, 27 Wash. 145, 67 Pac. 590.

[16c] Svea Ins. Co. v. McFarland, 7 Ariz. 131, 60 Pac. 936.

[17] See section 659, Code of Civil Procedure of California, and corresponding statutory provisions of other states. See notes 4a, 4b and 5, section 16, *ante*.

of trial as fixing the time to give the notice of intention is maintained, as it is in several of the states having codes of procedure similar to that of California, and as it was in the latter state until the adoption of the amendment of 1907, the statute usually makes provision for a notice of the decision of the court or referee, "if the action were tried without a jury."[1] The party has, under the varying provisions, five, or ten, or twenty days, within which to give his notice of intention, or to file his motion, where no notice is required, the two acts being analogous so far as the present inquiry is concerned. The difficulty is to determine when the time begins to run. The language of the statute is that the moving party shall have so many days after notice of the decision. An inquiry as to the meaning of this language involves two elements, viz.: first, what is the decision of which notice must be given; and, second, what is sufficient notice of it.

1. *What is the Decision.*—The word "decision" has served to designate different things under different systems of findings. Under that of implied findings the time to give the notice of appeal began to run from the "rendition" of the judgment.[2] The judgment was said to be "rendered" when it was announced from the bench and entered in the minutes. The announcement must have been of the final determination of the cause, leaving nothing to be done but the mere clerical duty of entering what was announced in the minutes;[3] and it *seems* that the announcement from the bench, without the entry in the minutes, was not sufficient.[4] This rule was held to govern with reference to the time to give notices

[1] See note 6, section 12, *ante*, for a synopsis of the statutes of the various states upon the notice of intention, and an outline of the history of the California statute, from which they were mainly derived.

[2] Gray v. Palmer, 28 Cal. 416; Peck v. Courtis, 31 Cal. 207; Genella v. Relyea, 32 Cal. 159; and see chapter 30, *post*.

[3] Harris v. S. F. S. R. Co., 41 Cal. 393.

[4] Hastings v. Hastings, 31 Cal. 95. In practice every clerk has a book called the rough minute-book, in which he writes his memoranda of the proceedings before finally making the entries in the "minute-book" which he is required to keep. Clerks have been known to be weeks, and sometimes months, behind in transferring the minutes from the rough minute-book to the regular minute-book prescribed by statute. Probably the order or judgment would be held to be entered in the minutes when entered in the rough minute-book. Otherwise very serious consequences might arise. People v. Smith, 59 Cal. 601, generally.

A decision discharging an insolvent has been held not to be such a decision under the Insolvent Act as to authorize an appeal, where formal findings and conclusions of law were subsequently filed. Sullivan v. Washburn etc. Co., 139 Cal. 257, 72 Pac. 992.

of intention to move for new trial,[4a] as well as notices of appeal,[5] when written findings were not requested. If, when the cause was submitted, written findings were not requested, the decision of which notice was to be given was the announcement from the bench, entered in the minutes; but if, when the cause was submitted, written findings were requested, the rule was the same as under the system of express findings, and the written findings constituted the decision of which notice was to be given.[6] Under the system of express findings, as was remarked in Polhemus v. Carpenter,[6a] and as will more fully appear in the chapter on findings, the court has no power, unless findings are waived, to render an oral decision; but the difficulty in practice with this proposition is, that although the failure of a party to ask for written findings at the time of the submission of the case to the court constitutes a waiver thereof for the time being, he may ask for the reduction of the findings to writing at the time of the oral decision; and in such an event the question arises, Does the time to give the notice of intention begin to run upon the receipt of notice of the oral decision or of the filing of the findings? This question was considered in Elder v. Frevert,[6b] where a distinction was drawn between the "decision" referred to in section 195. Nevada Practice Act (section 3292, Cutting's Compiled Laws), and the findings, the filing of which, as decided in Polhemus v. Carpenter, above cited, was held to start the time against the moving party. The court said:

" The findings of fact contemplated by the statute is the written statement of each issuable fact established by the evidence. From these determined facts the conclusion of law is deduced. The decision is the announcement by the court of its judgment, and although based upon the settled facts of the case, such facts may never be reduced to writing so as to constitute findings within the meaning of that term as used in the Civil Practice Act. It is a matter of frequent occurrence for courts to announce judgment, and afterward to prepare findings. The decision may be rendered after or before the filing of findings, or,

[4a] And no doubt as to the time to file and serve the motion itself, where no provision is made for notice of intention.

[5] See section 195, Practice Act, as amended in 1866. See note 6, section 12, *ante*.

[6] Polhemus v. Carpenter, 42 Cal. 375.

[6a] 42 Cal. 375.

[6b] 18 Nev. 278, 3 Pac. 237.

as is frequently the case, no findings may be made. The decision is therefore distinct from the findings, and the time within which notice of intention to move for a new trial must be given begins to run from the announcement of the judgment."

Referring to the Polhemus v. Carpenter case, which was cited in support of the contention that the time began to run against the moving party upon the receipt of notice of the filing of the findings, instead of the receipt of notice of the rendition of the decision of the court orally, it was said:[6c]

"The decision in Polhemus v. Carpenter is inapplicable. Section 195 of the Civil Practice Act of the state of California underwent several amendments at the different sessions of the legislature of that state. At the session of 1864 the provisions embraced by our act were adopted. At the next session the section was changed so as to read as above set forth, and under these provisions that case was decided. When the legislature of our state in 1869 enacted the Practice Act they adopted, in the main, the California act as it then stood, but took section 195 as amended in 1864, and not as it existed in 1869. The adoption, *ex industria,* of provisions so entirely dissimilar indicates a different design from that of the California act as amended after 1864."

In Robinson v. Benson,[6d] the opinion of the court ordering judgment was filed April 11th. Notice thereof was served the same day. On the 18th of April, the notice of motion for new trial was filed and served. On the same day a stipulation was filed giving the moving party ten days to file and serve the statement. On the 8th of May, the findings of fact and conclusions of law were filed, and the judgment regularly entered. No written notice of such filing was given. On the 18th another notice of intention was filed and served, and also a statement. Upon the authority of Elder v. Frevert, *supra,* the decision was held to be distinct from the findings, and that the notice of intention must have been filed within the statutory period after the oral decision was rendered, and that the moving party acquired no rights under the second notice of intention, which was too late.

That a clear distinction must be recognized between the decision, which consists of both the findings of fact and the conclusions of

[6c] See note 6, section 12, *ante.* In Robinson v. Kind, 25 Nev. 261, 59 Pac. 863, 62 Pac. 705.

In Hamilton v. Dooly, 15 Utah, 280, 49 Pac. 769, the notice was filed within the statutory time after amended conclusions of law, and was nevertheless held to have been in time.

[6d] 19 Nev. 331, 10 Pac. 441.

law, and the findings alone, is manifest from the various statutes bearing upon the point. The provision which requires the separate statement of the findings and conclusions, by implication is based upon the fact that it takes both findings and conclusions to make the decision.[6e] So the provision which declares that a finding of fact is to have the force and effect of a special verdict alone,[6f] while a referee's report upon the whole issue is to be treated as a general verdict,[6g] clearly recognizes the incompleteness of findings as decisions within the meaning of the statute requiring notices thereof to start the time running against a moving party in a new trial proceeding. Finally, in the only definition given by statute, it is declared unequivocally that a decision is the signing and filing of the findings of fact and conclusions of law.[6h]

2. *What is Notice of the Decision.*—The time to give the notice of intention does not, except in one or two instances,[6k] commence to run from the decision, but from notice of the decision,[6l]

[6e] See note 4, section 16, *ante*, where the various sections as to the separate statement of findings and conclusions are given.

[6f] See note 18, section 8, *ante*, where a synopsis of code provisions declaring the report of a referee upon the facts alone to be a special verdict is given.

[6g] See section 8, *ante*.

[6h] See section 1033, Code of Civil Procedure of California.

[6k] Section 1478, Revised Statutes of Arizona, provides that "all motions for new trial in arrest of judgment shall be made within five days after rendition of verdict or judgment." The word "judgment" is clearly used in the sense of "decision."

Section 2685, subsection 133, Compiled Laws of New Mexico, provides as follows:

"All motions for new trials in cases tried by juries shall be filed during the term of the court at which the case is tried, and within five days after the rendition of the verdict or findings."

It would seem that here the legislature started out with the purpose of limiting the provision to cases tried by juries alone; and that afterward its purpose was changed; and the addition of the phrase "or findings" made it applicable to cases tried without a jury. This view is aided by the language of subsection 132: "Upon the rendition of any verdict or the making of findings in a case tried by the court, judgment shall be immediately rendered thereon, unless notice is given at the time of the intention of the party to make a motion for a new trial."

Section 5827, Compiled Laws of Oklahoma, and section 4603, Compiled Statutes of Wyoming, provide for motions for new trial within ten days after rendition of verdict or decision.

With the exception of New Mexico, notice of intention is not prescribed in these states, unless the motion itself is to be deemed a notice. See Boarman v. Hinckley, 17 Wash. 126, 49 Pac. 226. If so, there would be no need for a notice of decision, and the time would begin to run from the actual rendition of decision.

So, in Oregon (section 175, Lord's Oregon Laws), the motion is required to be filed within one day after the entry of the judgment. No notice of intention is prescribed. Manifestly no notice of entry of judgment is necessary.

[6l] Section 4441, Revised Codes of Idaho; section 7065, Revised Codes of North Dakota; section 303, Code of Civil Procedure of South Dakota; section 3294, Compiled Laws of Utah;

or receipt of notice of the decision.[6m] In Sawyer v. San Francisco,[7] the notice of intention was given a year after the decision, but was held to have been in time, no notice of decision having been given. So in Carpenter v. Hewel,[7a] the notice of intention was given twelve, and in Duff v. Duff [7b] eleven, days after the decision, but was held in each case to have been in time, no notice of decision having been given. So in Symons v. Bunnell,[7c] where, presumably, notice of intention was given long after the expiration of the ten day period (had notice of decision been given), it was held to have been in time, since no notice of the decision had been given. So in other cases.[7d]

Where, as in California and Montana, the time begins to run from notice of entry of judgment, or receipt of such notice, instead of notice of decision, the same principle will no doubt be held to apply. No reason suggests itself for a different view.[7e]

As already noted, the time to give notice of intention in equity cases, where a jury trial was had, begins to run from notice of decision of the court, after adopting or rejecting the verdict of the jury, and not from the rendition of latter.[7f] The trial is one to the court and not a jury.[7g]

The notice must be in writing. This is specifically prescribed in some instances,[7h] and may be said to be subject to the general pro-

section 402, Rem. & Bal. Codes of Washington (section 5075, Bal. Code).

[6m] Section 3292, Cutting's Compiled Laws of Nevada (section 197, Civil Practice).

[7] 50 Cal. 370; and see Roussin v. Stewart, 33 Cal. 208.

[7a] 67 Cal. 589.

[7b] 71 Cal. 513, 12 Pac. 570.

[7c] 80 Cal. 330, 22 Pac. 193.

[7d] See Biagi v. Howes, 66 Cal. 469, 6 Pac. 100, where it was held that a party intending to move for a new trial has a right to wait for notice of decision before he is called upon to give his notice of intention. And see Mallory v. See, 129 Cal. 356, 61 Pac. 1123; Estate of Richards, 154 Cal. 478, 98 Pac. 528; and see cases cited hereafter on the subject of waiver. The case first above cited has been severely criticised, but to the extent here specified was sustained by subsequent decisions. It matters not in this respect whether the decision is by the court or a referee. The rule is the same. See Peabody v. Phelps, 9 Cal. 214; Coombs v. Hibberd, 43 Cal. 452; People v. Center, 61 Cal. 191; Crowther v. Rowlandson, 27 Cal. 376; Careaga v. Fernald, 66 Cal. 351, 5 Pac. 615.

In First National Bank v. McCarthy, 13 S. D. 356, 83 N. W. 423, the findings of fact, conclusions of law, and judgment were served on the losing party on May 7th, but the notice of the entry of the findings and judgment were not served on him until November 12th; a notice dated November 29th was held to have been within time (twenty days). The service of May 7th was held insufficient, as not showing the fact and time of rendering the decision.

[7e] See section 16, *ante*. See State v. Court, 38 Mont. 119, 99 Pac. 139.

[7f] Power v. Lenoir, 22 Mont. 169, 56 Pac. 106; Spencer v. Hersam, 31 Mont. 120, 77 Pac. 418; Stanton v. Crane, 25 Nev. 114, 58 Pac. 53.

[7g] See section 18, *ante*.

[7h] See section 3292, Cutting's Compiled Laws of Nevada (section 197,

vision as to notices in others.[7k] No specific provision is made as to its contents; nor is it prescribed upon whom devolves the duty of giving it. It is usually given by the successful party, however, and its contents are determined by the purpose intended to be subserved. In Kelleher v. Creciat,[7l] the service of a copy of the findings and judgment upon the attorneys of the losing party was held to be a sufficient notice of entry of judgment under section 650, California Code of Civil Procedure. In Gumpel v. Castagnetto,[7m] the following notice was held sufficient in a like case: "You will please take notice that a decree, a copy of which is herewith served upon you, has been this day entered in this action, in accordance with the decision rendered by the above court on the 9th day of December, 1889, that defendant recover the premises," etc., giving the substance of the decree.

In practice it is usual for the successful party to give notice simply to the effect that a decision has been rendered in his favor, without stating the particulars of the decision or the time of its rendition. This seems sufficient to put the losing party upon inquiry, and this is perhaps all the statute contemplates in the present condition of the law. In Waddingham v. Tubbs[7n] a notice of intention was itself held a sufficient notice of the decision, from which it would appear that the notice need not even state in whose favor the decision was rendered; but it is doubtful whether a notice of entry of judgment, without stating any particulars, nor in whose favor either it or the verdict or other decision of fact upon which it is founded, was given, would be regarded as sufficient. The notice is to be construed most strongly against the party giving it. "If it fails to convey clearly this meaning to the other party the fault is his and the consequences must be on him."[8]

Civil Practice); section 402, Rem. & Bal. Code of Washington (section 5075, Bal. Code). And see section 1568, Revised Statutes of Arizona (section 359, Civil Practice), as to notices in general.

[7k] See note 11, section 12, *ante*. The following decisions specifically hold that the notice of decision must be in writing: Biagi v. Howes, 66 Cal. 469, 6 Pac. 100; Kelleher v. Creciat, 89 Cal. 38, 26 Pac. 619; Forni v. Yoell, 99 Cal. 173, 33 Pac. 887; Mallory v. See, 129 Cal. 356, 61 Pac. 1123; Estate of Richards, 154 Cal. 478, 98 Pac. 528; and compare the following: Wall v. Heald, 95 Cal. 364, 30 Pac. 551; Jones v. Justice's Court, 97 Cal. 523, 32 Pac. 575; Los Angeles v. Young, 118 Cal. 295, 62 Am. St. Rep. 234, 50 Pac. 534; Page v. Superior Court, 122 Cal. 209, 54 Pac. 730; Elder v. Justice's Court, 136 Cal. 364, 68 Pac. 1022. See note 8, section 12, *ante*.

[7l] 89 Cal. 38, 26 Pac. 619.

[7m] 97 Cal. 16, 31 Pac. 898.

[7n] 95 Cal. 249, 30 Pac. 527.

[8] Carpentier v. Thurston, 30 Cal. 123.

The notice should be directed to the losing party and his attorneys.[8a]

But notice may be waived. That it may be waived by written stipulation admits of no question, for a party may waive any act intended for his own benefit.[8b] But the decisions seem to go further, and to be to the effect that notice may be waived by the conduct of the party, without stipulation. Thus where the moving party gave his notice of intention without waiting for notice of decision, he thereby waives notice of decision, and if one be subsequently given it serves no purpose. This was held in Cottle v. Leitch.[9] In the subsequent case of San Fernando Assn. v. Porter,[10] where certain parties consented to a decree in partition, and did not give notice of intention within the prescribed time thereafter (no notice of decision having been given), it seems to have been held that, even if they could attack the consent decree, the attack was too late, as notice of decision was, in view of the consent, unnecessary. But a majority of the court do not appear to have concurred in the opinion. In the subsequent case of Barron v. Deleval,[11] the decision was in relation to the necessity for notice of the overruling of a demurrer, and it was held that under the circumstances notice was not necessary. Morrison, C. J., delivering the opinion of the department, said:

"In this case the appellant's attorney was present in court when the decision of the court overruling the demurrer was announced, and thereupon asked and obtained leave to file an answer within five days. Can he be heard now to say that he did not have written notice of the decision? What purpose would a wrtiten notice of a fact of which the attorney had direct and positive knowledge have subserved? Would it not have been a vain and idle ceremony to have given him a written notice, under the circumstances disclosed in this case? And not only did the attorney have actual knowledge of the fact that his demurrer was overruled, but he *acted* upon such knowledge by asking and obtaining leave of court

[8a] In Scott v. Glenn, 97 Cal. 513, 32 Pac. 573, the notice of decision was addressed to the "attorneys of record" and the acknowledgment of service was by "attorney for plaintiff and defendants to cross-complaint," and it was held to be a sufficient notice to bind the defendants in the cross-complaint.

[8b] See Walsh v. Wallace, 26 Nev. 299, 99 Am. St. Rep. 692, 67 Pac. 914.

[9] 43 Cal. 320. See, also, to same effect, Thorne v. Finn, 69 Cal. 251, 10 Pac. 414; Waddingham v. Tubbs, 95 Cal. 249, 30 Pac. 527.

[10] 58 Cal. 81.

[11] 58 Cal. 95.

to file his answer within five days. To hold that a party and his attorney were not bound by this proceeding, had in open court, would be trifling with justice, and also subversive of sound principles of law and morals. The Georgia Lumber Co. v. Strong, 3 How. Pr. 245."

In the subsequent case of People v. Center,[12] it was held that the fact that the losing party took an appeal from the judgment, without waiting for notice of decision, was a waiver of such notice, and that a notice of intention given more than ten days after such appeal was too late. McKee, J., delivering the opinion of a majority of the court in bank, said:

"Notice of the decision of a case, as the initiatory step, for a motion for a new trial, must be given under section 659, Code Civ. Proc.; but it may be waived. An appealable judgment cannot be rendered without a decision. When a party appeals from such a judgment, he knows of the entry of the judgment and of the decision upon which it was rendered. Knowledge of the decision and judgment upon which a party acts, puts in motion his right to have the decision reviewed by any of the remedies given him by law for that purpose, and the right when once put in motion must be exercised within statutory time. Time commences to run against a party from the time he receives notice or waives it. The taking of an appeal from the judgment in a case in which the finding and decision are on file, is a distinct act of waiver of notice of the decision; and a notice of intention to move for a new trial filed and served more than ten days after such waiver is too late. The motion for a new trial, therefore, was properly denied. (Coveny v. Hale, 49 Cal. 552.)"

In all of the above cases except the San Fernando Assn. v. Porter (in which the opinion was not concurred in by a majority of the court), the party not only had knowledge of the decision, *but acted upon such knowledge*, and the cases seem to proceed upon that ground. The language of some of the opinions, however, lends some countenance to the idea that mere knowledge of the rendition of the decision is the equivalent of notice. It is certainly true that for some purposes the law considers knowledge the equivalent of notice; but this does not hold in all cases. And it does not seem that the provision of the statute that the time to give notice of intention begins to run from notice of the decision, and

[12] 9 Pac. C. L. J. 766.

that "notices must be in writing" means that mere knowledge is notice. Where the party not only has knowledge but acts upon such knowledge, and such action appears of record, there is a distinct act of waiver—the written notice which would otherwise have been necessary is *dispensed* with by the act of the party. But in order to constitute a waiver there should be some *act*. Mere knowledge is not an act. And if knowledge is all that is necessary, it cannot be on the ground of a waiver by the party, but it must be upon the ground that knowledge is the *equivalent of notice*.

And this seems to be well supported by the later decisions upon the point. In Biagi v. Howes,[13] the court said:

"We are of opinion that the true construction of the statute (sec. 659, C. C. P.) is that a party intending to move has a right to wait for a notice in writing (sec. 1010, C. C. P.) of the decision from the adverse party, before giving notice of intention to move for a new trial, and that he is entitled to such notice of decision, before he is called on to act, although he is present in court when the decision is rendered, and waives findings, and asks for a stay of proceedings on the judgment. This is much the best rule. It is more certain and definite, prevents controversies, which, under any other construction, would be likely to arise, and above all accords in our opinion, with the intention of those enacting the statute."

It is true this decision has been quite severely criticised, and it is possible goes a little too far. In California Imp. Co. v. Baroteau,[14] the court referred to it in the following language:

"Of course, where a party in whose favor a decision is made has not given formal notice of decision, and there is a conflict of evidence as to whether the other party had actual knowledge of the same, this court would not look very closely into such evidence; but where, as in the case at bar, a party makes formal written motion to set aside findings, reciting in his motion that the court had filed the same, he will not be heard to say that he had no notice of such findings. Appellant relies somewhat upon Biagi v. Howes, 66 Cal. 469, 6 Pac. 100. That case, however, seems to have been based upon the authority of cases where there was a statutory provision that there must be a written notice of the decision, and upon that ground it was distinguished from the other cases upon the subject in the opinion of the court in Mullally v. Irish-Amer-

[13] 66 Cal. 469, 6 Pac. 100.

[14] 116 Cal. 136, 47 Pac. 1018.

ican Ben. Soc., *supra;* and if it cannot be so distinguished, it must be held as overruled by the later decisions above cited."

But the language of Mullaly v. Irish-American etc. Soc.[15] does not appear to justify the inference made. That was with reference to a cost bill, the court holding that the successful party had actual knowledge of the decision in her favor, and that this was all the statute required; that she acted upon this knowledge in contesting a motion for a new trial; and that, therefore, her cost bill was too late under section 1033, Code of Civil Procedure, when filed more than ninety days after such knowledge. Referring to Biagi v. Howes, the court said:

"Biagi v. Howes, 66 Cal. 469, 6 Pac. 100, was upon a different section of the code from the one involved here, and the ruling in this case is not necessarily in conflict with what was held in that."

It is not necessary, however, to attempt to harmonize these decisions. The principle there enunciated has received the almost unqualified support of all the later decisions of the supreme court, barring that of California Imp. Co. v. Baroteau, above quoted, and the later one of Dow v. Ross,[16] where actual knowledge was held to dispense with notice of decision as required by section 1033. Code of Civil Procedure.[17] The other decisions referred to in the opinion of the court in California Imp. Co. v. Baroteau, are Gray v. Winder,[18] Dow v. Ross,[19] and Wall v. Heald.[20] Dow v. Ross has been sufficiently considered. In Gray v. Winder the court said:

"It has been held that formal notice of a decision may be waived by the party entitled to such formal notice. (Thorne v. Finn,

[15] 69 Cal. 559, 11 Pac. 215.

[16] 90 Cal. 562, 27 Pac. 409.

[17] The language of section 1033, Code of Civil Procedure, is as follows: "The party in whose favor judgment is rendered, and who claims his costs, must deliver to the clerk, and serve upon the adverse party, within five days after the verdict or notice of the decision of the court or referee," etc.

The language of section 659 of the same code is as follows:

"The party intending to move for a new trial must, within ten days after the verdict of the jury or after notice of the decision of the court or referee," etc.

Referring to the language of the court in California Improvement Co. v. Baroteau, quoted in the text above, as follows: "Appellant relies somewhat upon Biagi v. Howes, 66 Cal. 469, 6 Pac. 100. That case, however, seems to have been based upon the authority of cases where there was a statutory provision that there must be a written notice of the decision," attention is invited to the fact that the statutory provision referred to is practically identical in language, and that if written notice is required in one case such notice is also required in the other.

[18] 77 Cal. 525, 20 Pac. 47.

[19] 90 Cal. 562, 27 Pac. 409.

[20] 95 Cal. 364, 30 Pac. 551.

69 Cal. 251, 10 Pac. 414; Cottle v. Leitch, 43 Cal. 320.) We understand that when a party acts as if he had formal notice of a decision, such acts constitute a waiver of such formal notice. It is a cardinal principle of construction that 'the object to be attained must be kept constantly in view.' We think the object to be attained by giving notice of a decision is as fully attained when the party entitled to notice has actual knowledge of the fact, *and acts upon that knowledge*, as when he has formal knowledge of it. When the action is tried by a jury, the party intending to move for a new trial must, within ten days after the verdict, without any formal notice of it, give notice of his intention so to move. The only reason which we can now conceive of for not requiring the notice of *intention* to be given in such a case the same as in other cases is, that where an action is tried by a jury it would barely be possible that both parties would not have actual knowledge of the result. Where an action is tried by the court, or a referee, the liability of the party to be ignorant of the decision for a considerable time after it is rendered is much greater. The object of the law, we doubt not, is to give a party ten days after he has actual knowledge of the decision, within which to give notice of his intention to move for a new trial. Be that as it may, we think that the plaintiffs in this case by their acts waived a formal written notice, and that their notice of intention to move for a new trial, giving fourteen years after such waiver, was too late."[21]

[Note: The italics are ours. Notice of *decision* is evidently intended, instead of notice of *intention*.—Eds.]

[21] Mr. Justice Thornton, concurring in this case, said: "The plaintiffs contend that their notice of intention was in time, because they never had written notice of the decision. Though a party has notice of the decision when the case was tried by the court, before giving notice of intention to move for a new trial, we are of the opinion that the rule should not be applied where the party in court consented to the filing of judgment when ordered within a certain time, and then waited for more than twelve years before giving notice of his intention to move the court for a new trial. He had knowledge sufficient to put him on inquiry as to the status of the cause during the long period; and whether or not the findings had been filed, the decision made, and judgment had been entered as ordered, his delay for more than twelve years amounted to such laches as is equivalent to a waiver of notice. It was, in effect, an abandonment of any intention to move for a new trial, and of all claim or right to do so. To permit such a notice to be prosecuted under the circumstances shown by the record in this case would be to allow an abuse of the process of the court."

The learned justice here appears to place his decision upon the ground of estoppel *in pais*, in part, and in part upon the ground of laches, the latter being held "equivalent to a waiver of notice," rather than upon the ground of waiver. Waiver is one thing, and laches which are equivalent to waiver

The case of Wall v. Heald was similar to that of Barron v. Delaval, above cited, and a similar ruling was made. The question was, whether notice of the decision upon the demurrer had been waived, and whether the demurring party had permitted the time to plead to elapse, the demurrer having been overruled.

It thus appears that the decisions which are called upon to sustain the principal criticism of the doctrine in Biagi v. Howes are clearly insufficient, and that knowledge must be accompanied with action based thereon to constitute waiver.[22] A comprehensive statement of the true principles of the law, deducible from the above cases, and others cited, is to be found in Mallory v. See,[23] and the late case of Estate of Richards.[24] In the former, after a thorough review of the cases, the court, by Smith, C., said:

"In all the cases cited—which, with exceptions to be noted presently, include all the cases on the subject that have been brought

is another and very different thing. So a condition which involves an abuse of the process of the court, and a virtual, if not an actual, estoppel *in pais*, is also a very different thing from a waiver of a right to such process.

[22] See Estate of Keating, 158 Cal. 109, 110 Pac. 109.

[23] 129 Cal. 356, 61 Pac. 1123.

[24] 154 Cal. 478, 98 Pac. 528.

In Burlock v. Shupe, 5 Utah, 428, 17 Pac. 19, the findings and decision of the court were made and filed February 25, 1886. No notice of decision was given, but on the day the decision was made the attorney for the moving party wrote a note to the judge who tried the case asking a stay of proceedings for thirty days, to prepare and file the motion and statement for a new trial, and the request was granted. On March 26th another extension of twenty days was given for the same purpose and to prepare an appeal. It was contended that the notice of decision was thus waived. The court said:

"We have no doubt that the giving of the notice of intention to move for a new trial was a waiver of the notice of the decision, under the authorities referred to by the plaintiffs (Cottle v. Leitch, 43 Cal. 320; Thorne v. Finn [69 Cal. 251], 10 Pac. 414); and for some purposes the law does no doubt consider mere knowledge as the equivalent of notice; but this does not hold good in all cases. It does not seem that the provision of the statute that the time to give the notice of the intention begins to run from the time of the notice of the decision, and that notices must be in writing could be held to mean that mere knowledge is notice. Where the party has knowledge, and acts in the manner pointed out in the statute as to follow the notice, there would be good reason to treat his action as a waiver of the notice, or as an equivalent of the notice. But we are not prepared to say that anything, short of doing something which the statute points out as to follow, or preceded by, the notice, would be treated as a waiver of the notice. The party must do some affirmative act pointed out in the statute as not necessary to be done until after the notice. The statute says that the notice of intention to move for a new trial need not be made until after the notice of the decision, but if the party proceeds to give his notice of intention without waiting for the notice of the decision, the inference would be that he had waived the notice of the decision. The asking of a stay of proceedings to prepare the notice of intention, etc., would not seem to be a waiver of the statutory right to have a written notice before he should file or serve a written no-

to our attention—the decision was put upon the ground that written notice of the filing of the decision had been waived; and in *every case* the waiver was evidenced by some act or acquiescence *of the* party in open court or in the proceedings in the case, appearing from the records, files or minutes. The rule would therefore seem to be that written notice of filing of decision is in all cases required, unless waived by facts appearing in the records, files, or minutes of the court; and it follows that actual notice, or knowledge, other than by written notice, is insufficient in any case unless it appears, from facts thus evidenced, that written notice was waived. This is in effect held to be the rule in Forni v. Yoell, *supra*, where the distinction between actual notice and waiver is pointed out and explained. The only case in which this principle has been departed from is that of Dow v. Ross, 90 Cal. 562, 27 Pac. 409, where actual knowledge, appearing from the affidavit of the moving party, was held to be sufficient to dispense with written notice; though in fact there was no evidence of waiver. But to adopt this rule would be to substitute for the written evidence prescribed by the statute, or the record evidence hitherto allowed by the court, the less satisfactory evidence of affidavits of interested parties; and thus to defeat the obvious intent of the statute. We have cited the case of Biagi v. Howes, *supra*, on the point that the notice prescribed by section 659 of the Code

tice of intention. This is the view taken by the supreme court of California of a like statute, and it seems to be the most reasonable rule to reconcile the conflicting views. Biagi v. Howes, 66 Cal. 469, 6 Pac. 100; Carpenter v. Hewel, 67 Cal. 589, 8 Pac. 314 (People v. Center, 66 Cal. 551, 5 Pac. 263, 6 Pac. 481)."

See, also, McCord & Nave Mercantile Co. v. Glen, 6 Utah, 139, 21 Pac. 500; Everett v. Jones, 32 Utah, 489, 91 Pac. 360.

In Corbett v. Swift, 6 Nev. 194, it was held that the prosecution of an appeal from the judgment was a waiver of the notice of decision "by accepting and acting upon his actual knowledge." This was the opinion of the trial court, and the supreme court said: "There would seem to be little doubt of the correctness of this decision. Had the appellant taken no action, no advantage could have been taken of his actual knowledge; but he appealed from the whole judgment recognizing it in its entirety, asking of this court its vacation, without the preliminary step of motion for new trial. The natural presumption is that such motion was waived. Had the notice of rendition of judgment in fact been given, and the appeal been taken, it would not be claimed that appellant could make his motion for new trial at this time. Why any more, when it is apparent that the full object of the notice has been accomplished, and he has suffered no wrong? It would look like trifling with the practice of the courts to adopt any other view than announced by the district court."

See, also, Hunter v. Truckee Lodge, 14 Nev. 24; State ex rel. Keane v. Murphy, 19 Nev. 89, 6 Pac. 840; First National Bank v. McCarthy, 13 S. D. 356, 83 N. W. 423.

of Civil Procedure is 'notice in writing,' and hence that the party intending to move for a new trial has a right to wait for such notice. To this extent the case has never been overruled, and it is, as we have said, in effect affirmed by the decision in Forni v. Yoell, *supra;* though, of course, the written notice prescribed may be waived."

This language was referred to with approval in the recent case of Estate of Richards, above cited. There, Mr. Justice Lorigan, for the court, said:

"Such waiver may appear, as declared in Mallory v. See, 129 Cal. 356, 359, (61 Pac. 1123), from some act or acquiescence of the party in open court, or in the proceedings in the case, as disclosed by the records, or files of the case, or the minutes of the court; when the conduct of the party in the case, as appears from such records or minutes, is inconsistent with any theory other than that he had formal notice of the decision. Under such circumstances he is deemed to have waived written notice."

It appears to be well settled that while written notice is the notice required by the statute, such written notice may be dispensed with by waiver, and such waiver may be either by express stipulation to that effect, or by actual knowledge if accompanied with conduct of the party of such a character as to be inconsistent with any theory other than that formal notice has been given, provided such conduct is apparent from or disclosed by the records, files or minutes of the court in the case, and the mere knowledge will not be sufficient to dispense with the formal notice required by the code, unless so accompanied, and unless such inconsistent conduct appears in the records, files or minutes of the court, as suggested.[25]

This, it is believed, is the meaning of the statute. An inquiry in each case as to whether the party had knowledge of the deci-

[25] See, also, Kelleher v. Creciat, 89 Cal. 38, 26 Pac. 619; Waddingham v. Tubbs, 95 Cal. 249, 30 Pac. 527; Forni v. Yoell, 99 Cal. 173, 33 Pac. 887; Hicks v. Masten, 101 Cal. 651, 36 Pac. 130; O'Brien v. O'Brien, 124 Cal. 422, 57 Pac. 225; Gardner v. Stare, 135 Cal. 118, 67 Pac. 5.

Mr. Hayne, in the original text (omitted here), thus gave expression to the guiding principle: "Where the party not only has knowledge, but acts upon such knowledge, and such action appears of record, there is a distinct act of waiver—the written notice which would otherwise have been necessary is *dispensed* with by the act of the party. But in order to constitute a waiver there must be some *act*. Mere knowledge is not an act. And if knowledge is all that is necessary, it cannot be on the ground of a waiver by the party, but it must be upon the ground that knowledge is the *equivalent* of notice."

sion would usually be attended with difficulty, and result in uncertainty; and it would seem that it was to avoid just such inquiries (as to knowledge) that the provisions as to notice in this section, and others of similar application, were adopted. Moreover, if knowledge is notice, within the meaning of the statute, there can be no sound reason why facts which are sufficient to put the party upon inquiry should not be considered to be the equivalent of knowledge; and if this be so, it would be impossible to avoid holding that verbal information of the rendition of the decision, given by one attorney to the other, would be sufficient to start the time running, which would be in direct violation of the provision that notices must be in writing. For these reasons it is thought that mere knowledge is not notice within the meaning of the statute above referred to. But the prudent practitioner must bear in mind that the language of some of the opinions above quoted is not in accord with this view, and govern himself accordingly. And it is certainly true that notice may be waived by acting upon knowledge of the decision.

Of course, where a written notice has actually been given there is no question of waiver, there being nothing to waive. The sole question in such a case would be as to the sufficiency of the notice given.[26]

It has not been judicially determined whether the foregoing rules as to what may be defined as involuntary waiver of notice of decision are to be held applicable to notice of entry of judgment; nor, if so, to what extent. Upon principle, as heretofore stated, the right of the moving party to voluntarily waive the safeguard provided by statute for his protection, and initiate his new trial proceedings without waiting for entry of judgment, or for notice thereof, cannot be denied; and no convincing argument is suggested why involuntary waiver may not be deduced in the same way with respect to notice of entry of judgment as with respect to notice of decision. On the contrary, every reason which was advanced in support of the doctrine of waiver of notice of decision applies with equal force to waiver of notice of entry of judgment. The object of the law has not been changed by the amendment; nor has the character of the act (receipt of notice) which was fixed for the purpose of starting the time to running against the moving party, been changed. The solitary change made

[26] Estate of Richards, 154 Cal. 478, 98 Pac. 528.

is in the character of the act, notice of which is required; and if the doctrine rested upon actual knowledge alone, it is possible some distinction might have to be made because of the somewhat greater formality, not to say solemnity, attaching to entry of judgment, as compared to that required with respect to the decision. But the doctrine, as clearly appears from the cases, rests largely upon the principle of estoppel and of laches, and is deduced altogether from the record conduct of the moving party, and not at all from the character of the record event, notice of which starts the time running against him.

The conclusion, in the absence of judicial expression upon the point, is believed to be that the doctrine of involuntary waiver of notice of decision follows the statutory change and is to be applied with equal force to involuntary notice of entry of judgment.

If it does not appear from the transcript when notice of decision was given, the appellate court will presume that the notice of intention was in time.[27]

The time within which the notice of intention must be given is not affected by the question as to the papers upon which the motion is to be made. As to computation of time, see the previous section.

§ 20. Time to Give Notice of Intention After a Trial Before a Referee.—It has already been shown that the provisions of the statutes as to new trials apply to cases tried by referees as well as those tried by the court or jury,[1] and that the same rules apply, in the main, in the computation of the time to give notice of intention, when the case is tried by a referee as when it is tried by the court, if it is a report upon the whole case, and that when it is merely a report upon the facts it is to be treated as a special verdict.[1a] Nothing remains, therefore, to complete the consideration of the subject, further than to draw attention somewhat more in detail to the authorities, and to note some of the early difficulties that beset the subject. The various statutes relative to reports of referees,[1b] and the time to give notice of intention,[1c] have been collected elsewhere. In California, from whose practice that of most of the other states of the Pacific Coast has been adapted, the provision between 1851

[27] Burnett v. Stearns, 33 Cal. 468; Roussin v. Stewart, 33 Cal. 218; Catanich v. Hayes, 52 Cal. 338.

[1] See section 8, *ante*.

[1a] See sections 18 and 19, *ante*.

[1b] See note 18, section 8, *ante*.

[1c] See note, 6, section 12, *ante*.

and 1861 was that the party should give notice of intention to move for a new trial within two days "after the trial." It was upon this provision that the case of Peabody v. Phelps[2] was decided. The facts of the case were as follows: The referee was "to find the facts and report a judgment thereon." On March 6, 1856, the referee filed his report, directing a judgment for the plaintiff, and on the same day the clerk entered judgment accordingly. The defendant within two days thereafter moved for a new trial; but having failed to file a statement in support of his motion, it was denied.[3] That would naturally have been an end to proceedings in motion for new trial in the cause;[4] but the defendant appealed from the judgment, and upon such appeal the supreme court reversed the judgment, because entered in vacation; and on the filing of the remittitur judgment was again entered by the clerk upon the report. The defendant thereupon made a second motion for new trial,[5] supported by a statement. This motion was more than a year after filing the report; but it was nevertheless held to be in time. The court said (what indeed is manifestly correct) that had the reference been to report the facts merely, without a judgment, the time to give notice of intention would have begun to run from the filing of the report, such a report having, under the statute, the effect of a special verdict. But it held that inasmuch as the reference was to report a judgment as well as the facts, the time did not begin to run until after the judgment was entered. The distinction taken seems to be without foundation. If the time begins to run from the filing of the report as to the facts merely, why should the addition of something as to the law make any difference? The court seems to have fallen into confusion in not distinguishing between the "judgment" to be entered by the clerk and that reported by the referee. The "judgment" reported by the referee is merely a direction to the clerk as to what judgment he shall enter in the judgment-book, and is nothing more than the conclusions of law in ordinary findings. This "judgment" must be in the referee's report, and consequently to say that the time to give notice of intention begins to run from the "judgment of the referee" is equivalent to saying that it begins to run from the filing of the report. But to say the time begins to run from the judgment entered by the clerk is quite a different thing,

[2] 9 Cal. 213.

[3] Look at Phelps v. Peabody, 7 Cal. 50.

[4] See Coombs v. Hibberd, 43 Cal. 452; People v. Center (Cal.), 9 Pac. C. L. J. 764.

[5] See Peabody v. Phelps, 9 Cal. 214.

and is contrary to the principles which have been shown to apply to the proceedings on motion for new trial.[6]

In 1861 the statute was amended so as to make the time to give the notice run from "written notice of the filing of the findings of the judge or the report of the referee." This change in the statute did away with the distinction taken in Peabody v. Phelps, and made it clear that in all cases where all the issues of fact were passed on by the referee the time to give notice of intention ran from the filing of the report, whether or not the referee was to report a judgment as well as the facts. From 1861 to 1866 the statute provided that the notice of intention should be given within ten days after notice of the filing of the report of the referee. In 1866 the word "findings" was substituted for the word "report,"[6a] and the provision was that the notice of intention should be given within ten days after written notice of the filing of the findings of the referee. There was no further change until after the adoption of the Code of Civil Procedure, which, as first enacted, provided that the notice of intention should be given "within thirty days after the decision or verdict."[7] In 1874 the code was amended so as to provide that the notice of intention should be given "within ten days after notice of the decision of the court or referee."[8] No further change was made until 1907, when all reference to either court, jury or referee was omitted, and notice of entry of judgment was fixed as the time when notice should be given. The same provision was adopted by Montana, but the old code provision was retained in all other states that had adopted it. As will more fully appear in the chapter on "Findings," the word "decision," under the present system of express findings, may be said to be equivalent to the findings and conclusions contained in the announcement of the court as to the judgment, and where the statute fixes the "decision" of court or referee, or the filing thereof, as the point when the time to give his notice begins to run against the moving party in new trial proceedings, the filing of the decision is neither more or less than the filing of the report of the referee, in which the findings of fact and conclusions of law are separately stated. If the word "findings" is

[6] See sections 1, 2, 16, and 19, *ante*.

[6a] See comment in section 8, *ante*.

[7] See note 6, section 12, and note 18, section 8, *ante*. The Practice Act of Nevada, section 197, adopted in 1869, followed the California Practice Act as it was prior to the amendment of 1866. It still reads "filing the report of the referee." Other states have followed the California code, instead of the Practice Act.

[8] Section 659, Code of Civil Procedure of California.

used, as a matter of course the effect is the same, for the report of the referee is his findings. Where, as in Nevada, the filing of the "report," *eo nomine*, is prescribed, no difficulty can arise.[8a]

The foregoing, however, applies only to cases where all the issues raised by the pleadings have been disposed of. As has been shown, where only a part of the issues have been disposed of by a special verdict, the party cannot give notice of intention, but must wait until all the issues have been tried.[9] And since the codes of most of the states declare that "when the reference is to report the facts, the finding reported has the effect of a special verdict," it follows that the same rule applies to the findings of referees on the facts. The principle was clearly stated in Crowther v. Row-

[8a] See note 18, section 8, and note 6, section 12, *ante*, for a synopsis of the various statutes with reference to referees.

No distinction is made anywhere in the statutes between reports of referees and decisions of courts. In both instances the findings of fact and the conclusions of law unite to constitute the announcement of the judgment. The report of a referee must in some cases pass muster before the court, but only by way of review as its own decisions. A court can no more set aside the report of a referee, arbitrarily, than it can vacate or set aside its own orders or judgments. See cases cited in note 18, section 8, *ante*. But these remarks apply only to reports upon the whole case. Reports upon the facts or upon a reference to state an account are subject to different rules. They are no more trials by referee, such as the statute refers to in fixing the time to give the notice of intention, than the finding of a jury in an equity case is a trial by jury, within the meaning of the same provision. The trial is by the court in both cases, and the rules which govern trials by the court are solely applicable.

The rule that the time to give the notice begins to run upon the filing of the report upon the whole case, nothing then being necessary save the entry of judgment by the clerk, has not been specifically denied in any jurisdiction where the practice is similar to that of California, but, under systems which do not prescribe notices, it would seem that the motion itself cannot be made until the report is confirmed and judgment rendered by the court. In Oklahoma the report of the referee upon the whole issue "shall stand as the decision of the court," and "judgment may be entered thereon in the same manner as if the action had been tried by the court." Nevertheless, in Blevins v. Morledge, 5 Okl. 141, 47 Pac. 1068, the necessity of confirmation by the court following the filing of exceptions at least, was treated as essential, and the time to make the motion for new trial was held to run from the date the exceptions were overruled, and the report confirmed. Not only is the conclusion somewhat at variance with the well-understood principle of the rule that the time begins to run from the report of the referee, but the practice would seem to be unusual. If the court could review the report of the referee upon the whole case, upon exceptions and a motion to set it aside, of what use is a new trial provision? It is well understood that a court may set aside a referee's report, but only in the same manner it might set aside its own decision, i. e., by motion for new trial, or similar procedure. This decision is believed to be a departure from the well-settled practice, however, and not authoritative.

[9] See section 18, *ante*.

landson,[10] in which case part of the issues were first tried by the court and the remainder referred for trial to a referee. Shafter, J., delivering the opinion, said:

"The issues in this case were tried in part by the court, and were in part committed for trial to a referee, and therefore the case does not fall within either of the express allotments of the section. But it is apparent that the intention of the legislature was that proceedings in new trials should be postponed until cases had been 'tried.' The trial of this case was not complete until the final report of the referee was filed. As the defendants renewed their notice of motion for new trial after the report was filed, and on a new statement, a decision of the point on which we have just passed is of no practical consequence, except as it bears upon the regularity and effect of the referee's report as a proceeding in the case."

This *dictum* was followed in Hinds v. Gage,[11] a case arising under the California code. Where, therefore, only a part of the issues have been tried—whether by a jury, by a referee, or by the court [11a]—the time to give the notice does not begin to run until all the issues have been disposed of.

As has already been stated,[12] where the reference is to report upon a collateral matter not put in issue by the pleadings, the proceedings before the referee do not amount to a "trial," and the report is not binding upon the court until adopted by it, and when adopted it is to be treated as part of its findings; consequently, in the case of such a report the time to give notice of intention does not begin to run until it is adopted.[13]

The issues not disposed of must be material to and essential to the judgment. If they are in no way connected with the findings upon which the judgment is founded, omission to find thereon need not delay the giving of the notice, and if a notice be given, the subse-

[10] 27 Cal. 376.

[11] 56 Cal. 486; and look at section 18, *ante*. See, also, Careaga v. Fernald, 66 Cal. 351, 5 Pac. 615; Duff v. Duff, 71 Cal. 513, 12 Pac. 570.

[11a] It is to be noted in this connection that failure to find upon a material issue is ground for a new trial, as being a decision "against law." The statement of the text, therefore, refers to cases only where the findings ostensibly cover the issues, or ostensibly cover a part only. If, while ostensibly disposing of all the issues, either court or referee fails to find upon a material issue, the moving party may give his notice and utilize such failure as a ground for his motion. If a part of the issues are consciously omitted, however (or, perhaps, inadvertently omitted), a notice given before the remainder of the issues are disposed of would be held premature.

[12] See section 8, *ante*.

[13] Harris v. San Francisco R. R. Co., 41 Cal. 393; and look at McHenry v. Moore, 5 Cal. 90; Johnston v. Dopkins, 6 Cal. 83.

quent filing of findings upon such issues will not invalidate the same.[14] This remark applies to all cases, whether the trial be by court or referee, where additional findings are filed.

§ 21. Extension of Time to Give Notice of Intention.—The power to grant extensions of time in general is derived from the statutes. The California provision, as amended in 1906,[1] is as follows:

"Sec. 1054. When an act to be done, as provided in this code, relates to the pleadings in the action, or the undertakings to be filed, or the justifications of sureties, or the preparation of statements, or of bills of exceptions, or of amendments thereto, or to *the service of notices* other than of appeal, the time allowed by this code may be extended, upon good cause shown, by the judge of the superior court

[14] See Bell v. Staacke, 141 Cal. 186, 74 Pac. 774.

[1] Section 1054, Code of Civil Procedure. Then follows the exception which allows an extension of thirty days beyond the adjournment of the legislature, where it appears that the attorney for the party is engaged in attendance upon a session of the same, and the proviso allowing an extension of ninety days, and removing the exception in the case of notices of appeal, until February 28, 1907.

Section 4932, Revised Codes of Idaho, is the same down to and including the phrase "upon good cause shown," and instead of the reference to the "judge of the superior court," etc., "by the court in which the action is pending or the judge thereof." No limit of time is prescribed.

Section 7190, Revised Codes of Montana, is the same as that of Idaho, with the addition of the following: "But such extension shall not exceed ninety days without the consent of the adverse party."

Section 3292, Cutting's Compiled Laws of Nevada (section 197, Civil Practice), provides: "The several periods of time limited may be enlarged by the written agreement of the parties, or upon good cause shown, by the court or the judge before whom the cause was tried."

Section 7328, Revised Codes of North Dakota, is as follows: "The time within which any proceedings in an action must be had after its commencement except the time within which an appeal must be taken may be enlarged upon an affidavit showing grounds therefor by a judge of the court. The affidavit or a copy thereof must be served with a copy of the order or the order may be disregarded."

Section 551, Code of Civil Procedure of South Dakota, is practically the same as that of North Dakota.

Section 3329, Compiled Laws of Utah, is the same as the Idaho provision. A provision as to the extension of the time to make a new trial motion is added to section 3005, which corresponds with the California provision as to relief from defaults, section 473.

Section 250, Rem. & Bal. Code (section 4894, Bal. Code), Washington, is partly as follows:

". . . . and the court may enlarge or extend the time, for good cause shown, within which by statute any act is to be done, proceeding had or taken, notice of paper filed or served, or may, on such terms as are just, permit the same to be done or supplied after the time therefor has expired, except that the time for bringing a writ of error or appeal shall in no case be enlarged, or a party permitted to bring such writ of error or appeal after the time therefor has expired."

in and for the county in which the action is pending, or by the judge who presided at the trial of said action; but such extension shall not exceed thirty days, without the consent of the adverse party. "

This section is not materially different from section 530 of the old Practice Act. Under section 530 it was held in Harper v. Minor [1a] that the court could grant an extension of the time to give the notice of intention; and the court, per Sawyer, J., said: "There can be no doubt that this provision covers notices of intention to move for new trial. 'The time allowed by this act' for 'the service of notices' may be extended, and a special exception is made of notices of appeal only. *Expressio unius est exclusio alterius.* We can see no good reason, we confess, why this authority to extend the time for giving notice of intention to move for a new trial should be given, for it would in most, if not in all, cases, be less trouble and inconvenience to give the notice than to procure an extension of time. But there can be no doubt that the power is given."

This ruling has never been expressly questioned. It was followed consistently until Hook v. Hall.[1b] In Cottle v. Leitch,[1c] the court held that an order extending the time "for preparing and filing a motion for a new trial" extended, by implication, the time to give notice of intention. In Hook v. Hall, *supra,* a department decision, the court said: "But the right to move for a new trial is statutory, and there is no provision of the Code of Civil Procedure, which gives to the superior court or to the judges power by order to extend *the time for filing a notice of intention to move for a new trial.* Section 1054 does not authorize such an order." In Girdner v. Beswick,[1d] another department decision, and in Brichman v. Ross,[1e] the court followed Hook v. Hall. Subsequently, hearings in bank were granted in both Hook v. Hall and Girdner v. Beswick, and they were ultimately decided without passing upon the point under consideration. In Burton v. Todd,[1f] the court overruled the depart-

1a 27 Cal. 113.

1b 6 West Coast Reporter, 134.

1c 43 Cal. 320.

1d 7 West Coast Reporter, 511.

1e 67 Cal. 601, 8 Pac. 316.

1f 68 Cal. 485, 9 Pac. 663. See, also, California Imp. Co. v. Baroteau, 116 Cal. 136, 47 Pac. 1018, where it was held that a motion to modify and set aside findings did not effect an extension of time to give the notice of intention. See, also, Shinn v. Cummins, 65 Cal. 97, 3 Pac. 133.

See, also, Estate of Richards, 154 Cal. 482, 98 Cal. 528, where the court held that an appeal from a new trial order would not be dismissed for failure to serve a notice of intention within the time prescribed by law, where it appeared that "within the time allowed by law, *and the additional time given by orders of court,*"

ment decisions above referred to and the case of Brichman v. Ross, above cited, and returned to the rule of Harper v. Minor, the court holding that the legislature clearly intended to include both *service* and *filing*, and hence the concrete act of *giving*, in the phraseology "the *service* of notices." The court said:

"Section 1054 is quite general in its scope, extends to a great variety of proceedings, and covers notices for varied and divers objects, which are required to be filed, and in some of which, at least, there can be no propriety whatever in filing before service; yet if the court or judges cannot extend the time for filing, this must in all instances of extension be done before the service. To illustrate: The court is by this section given the power to extend the time to plead, to amend pleadings, to prepare bills of exceptions, etc. Now, if the time for filing an answer cannot be extended, it would, in most cases be futile to extend the time for its preparation and service. In the construction of a statute, the intention of the legislature is to be pursued if possible. (Code Civ. Proc., sec. 1859.) We think when the legislature gave the courts and judges the authority to extend, within certain limits, the time within which notices were to be served and other acts were to be performed, the object was to give parties additional time within which to prepare such notices, and to do every act naturally following and dependent thereon and essentially connected therewith. Time may be essential for deliberation and consultation, before determining upon the propriety of a motion for a new trial, and we think this was the paramount reason for lodging in the courts and judges power to extend the time. These reasons are of constant recurrence, while the necessity for an extension to enable a party to procure a service of the notice will rarely present itself."

With the single exception, therefore, of the case of Hook v. Hall, *supra*, and the two other cases decided about the same time, and resting upon its authority, the courts have followed the rule of

the notice of intention to move for a new trial was regularly served and filed.

The principle of the California decisions has been followed by the courts of other states. See Snyder v. Viola etc. Co., 3 Idaho, 28, 26 Pac. 127; Titiman v. Alamance etc. Co., 9 Idaho, 240, 74 Pac. 529; State v. Landry, 29 Mont. 218, 74 Pac. 418; Nord v. Boston & M. Co., 33 Mont. 464, 84 Pac. 1116, 89 Pac. 647; Hill v. McKay, 36 Mont. 440, 93 Pac. 345; Twaddle v. Winters, 29 Nev. 88, 85 Pac. 280, 89 Pac. 289; Bailey v. Drake, 12 Wash. 99, 40 Pac. 631; Leavenworth v. Billings, 26 Wash. 1, 66 Pac. 107; Kreielsheimer v. Nelson, 31 Wash. 406, 72 Pac. 72; McAllister v. Seattle etc. Co., 44 Wash. 179, 87 Pac. 68; Nelson v. Carlson, 48 Wash. 651, 94 Pac. 477.

Harper v. Minor, *supra*, permitting the extension of time to give notices of intention. It is true, in the latter no distinction seems to have been recognized between the *giving* and the *serving* of the notice, and the decision of the court rested upon the principle of *expressio unius*, etc.; while in Burton v. Todd, *supra*, the necessity of differentiating the two separate acts of *serving* and *filing* which take the place in section 659, Code of Civil Procedure, of the former requirement as to the *giving* of the notice, no doubt suggested the need of a new reason for the rule, while explaining the omission by the court of all reference to the earlier case.

All extensions of time under section 1054 are to be computed as provided in section 12 of the same code. It is there provided that "the time in which any act provided by law is to be done is computed by excluding the first day and including the last, unless the last day is a holiday, and then it is also excluded."

In this connection it has been held that an extension may be granted as of the day following the expiration of time allowed for doing a legal act, conceding the application of section 1054, Code of Civil Procedure, to such act, where such date of expiration falls on a holiday.[1g]

Section 1054, Code of Civil Procedure, does not offer the sole means of extending the time for giving notice of intention. Such time may be extended by stipulation of the parties; and the stipulation is within the authority of the attorneys under the provisions of section 283 of the Code of Civil Procedure.[1h] Under that section

[1g] In Muir v. Galloway, 61 Cal. 498, it was held that section 1054, Code of Civil Procedure, covered extensions of time to prepare statements, and in Frassi v. McDonald, 122 Cal. 400, 55 Pac. 139, 772, it was held to cover extensions of time to serve bills of exceptions. In each case three separate extensions of ten days each were granted. The date of the expiration of the second extension fell upon Sunday. In the case first cited the third extension was granted on the previous Saturday to take effect from the following Monday; thus, in effect, extending the time a total of thirty-one days. In Frassi v. McDonald, the order granting the extension was made on the Monday following the Sunday which was the last day of the second extension. In Reay v. Butler, 99 Cal. 477, 33 Pac. 1134, the decision of Muir v. Galloway was questioned, and it was said that the question was still an open one. The Frassi v. McDonald case, however, disposed of the point.

[1h] See Simpson v. Budd, 91 Cal. 488, 27 Pac. 758. See, also, Smith v. Whittier, 95 Cal. 279, 30 Pac. 529; Reclamation Dist. v. Hamilton, 112 Cal. 603, 44 Pac. 1074.

See, also, section 283, California Code of Civil Procedure. See note 3, section 13, *ante*.

See, also, McGrath v. Tallent, 7 Utah, 256, 26 Pac. 574; East v. Mooney, 7 Utah, 414, 27 Pac. 4; Hill v. McKay, 36 Mont. 440, 93 Pac. 345.

an attorney has authority to bind his client in any of the steps of the proceeding, by his agreement in writing filed with the clerk or entered in the minutes of the court. The service and filing of a notice of intention to move for a new trial is a step in the action or proceeding within the meaning of this section.[1k] The provision as to filing the stipulation or agreement, or entering it in the minutes, is sufficiently met if it is so filed or entered when the court is called upon to act upon the matter affected by it.[11]

But a party cannot, of his own volition, extend the time to give the notice; and therefore a motion to modify and set aside the findings does not operate as an extension of such time; nor does an order, on motion of party moving for new trial, staying entry of judgment until after the determination of the motion to modify the findings.[1m]

In the absence of express enactment, however, conferring authority upon the court to grant extensions of time to file the notice, or make the motion, such authority does not exist. The provision of the law requiring that the notice shall be filed (or the motion made, where no notice is prescribed) is mandatory, and the court cannot enlarge the time thus prescribed.[1n]

But if the time to give the notice has expired, the right to give it is lost and cannot be restored by order. This was held under the old Practice Act in Thompson v. Lynch,[2] and under the Code of Civil Procedure in Clark v. Crane.[3] In the latter case Thornton, J., delivering the opinion of department two of the supreme court, said: "The party intending to move for a new trial has a period of ten days after the verdict of the jury within which to file with

[1k] Simpson v. Budd, 91 Cal. 488, 27 Pac. 758. See, also, Reclamation Dist. v. Hamilton, 112 Cal. 603, 44 Pac. 1074.

[11] Simpson v. Budd, 91 Cal. 488, 27 Pac. 758. See, also, Reclamation Dist. v. Hamilton, 112 Cal. 603, 44 Pac. 1074.

[1m] California Improvement Co. v. Baroteau, 116 Cal. 136, 47 Pac. 1018.

[1n] See Joiner v. Goldsmith (Okl.), 107 Pac. 733, and the cases there cited.

[2] 43 Cal. 482. The point was decided with reference to statements on appeal in Leech v. West, 2 Cal. 95. See section 145, *post*, as to latter.

[3] 57 Cal. 629. And look at Estate of Sbarboro, 63 Cal. 5. See, also, Cooney v. Furlong, 66 Cal. 520, 6 Pac. 388; Packer v. Doray, 98 Cal. 316, 33 Pac. 118.

It is to be noted, however, that the Washington statute permits the extension to be made after the expiration of the time. See Bailey v. Drake, 12 Wash. 99, 40 Pac. 631; Leavenworth v. Billings, 26 Wash. 1, 66 Pac. 107; Kreielsheimer v. Nelson, 31 Wash. 406, 72 Pac. 72; McAllister v. Seattle etc. Co., 44 Wash. 179, 87 Pac. 68.

the clerk and serve upon the adverse party a notice of his intention to make such motion. (Code Civ. Proc., sec. 659.) The language of the section is strong; it uses the words 'must within ten days' take the step. If he does not give such notice within the period above mentioned, his right to move is gone. The court or judge can extend the time under section 1054 above cited, but such extension must be granted within the period of ten days, or within such other period during which the right to give the notice is still alive. After the right to give such notice is gone, giving further time could not be called an extension of time, but it would be in effect reviving a right which no longer exists. In other words, when such right to give notice is gone, there is really no period of time to extend. The time ends with the period which the law allows for giving such notice; and when such time ends, to hold that the court or judge can extend it would be to affirm that the court or judge can dispense with the requirements of the statute. We are all of opinion that the court properly held that the period of ten days having elapsed when the order of the 20th of December, 1880, was made, extending the time to give the notice of motion, it no longer had jurisdiction in the matter, and that the order was of no force or validity. (De Castro v. Richardson, 25 Cal. 49; Leech v. West, 2 Cal. 95.)''

Where an extension of time is obtained it is undoubtedly better practice to serve and file the order. But it would seem from the case of Swift v. Canovan [4] that it is not absolutely necessary to file or serve the order.

The statutory provisions relating to extension of time do not, as a general rule, apply to proceedings subsequent to entry of judgment.[4a]

In some states,[4b] the order of extension is authorized only upon an affidavit setting out the cause therefor, and when served it is ineffective unless accompanied by the affidavit upon which it is based.

[4] 47 Cal. 86.

[4a] See National Bank of Commerce v. Seattle Pickle Works, 15 Wash. 126, 45 Pac. 731.

[4b] See note 1, *supra*, as to statutes of North and South Dakota. But, in general, the record need not set out the ground upon which the order is based. The presumption will be that such ground was "good." See Snyder v. Viola etc. Co., 3 Idaho, 28, 26 Pac. 127.

Separate provisions are to be found in most of the criminal codes allowing orders of extension of time. Such extensions do not demand the consent of the prosecuting attorney.[46]

As to extensions of time to file statements, see section 147 herein.

§ 22. If a Party Elects to Give Notice of Intention Before His Time Expires, He is Bound by His Election.—This was held in Leroy v. Rassette.[1] In that case the appellant gave his notice of intention on the 4th of May. Not having served his proposed statement within five days thereafter, he attempted to abandon the line of proceedings commenced by that notice, and accordingly on the 11th of May (which was within ten days from the notice of decision) he gave a second notice of intention. The proposed statement was served within five days thereafter. The supreme court held that the statement was too late; that having elected to give notice of intention before the expiration of the time allowed by law therefor, he was bound by his election; that the right to have a statement was waived by failure to serve the proposed statement within five days thereafter; and that a new line of proceedings could not be commenced. The same doctrine was asserted in Cottle v. Leitch.[2] In that case, on the 25th of January—the day the findings were filed—the defendant obtained an order purporting to extend his time to give notice of intention and serve the proposed statement for thirty days. Within three days thereafter, viz., on the 28th of January, he gave his notice of intention; on the next day, viz., on the 29th of January, a notice of the decision was served upon him; within thirty days from the date of the order granting the extension, to wit, on February 25th, he served his proposed statement. The supreme court held that under the statute the time to serve the statement could be extended for twenty days only, and that consequently the statement was too late; and Wallace, C. J., delivering the opinion said: "The order of January 25th extended the time of the defendant to give notice of intention to move for a new trial thirty days. He, however, derived no benefit from that extension, because he saw fit to give

[46] See State v. Landry, 29 Mont. 218, 74 Pac. 418. This case was decided with reference to an extension of time to prepare exceptions, but the principle is the same.

[1] 32 Cal. 171; and see Cooney v. Furlong, 66 Cal. 520, 6 Pac. 388.

[2] 43 Cal. 321.

notice of his intention to move for a new trial on the 28th of January, which was before he received notice of the filing of the findings, and before even the ten days allowed him by the statute itself had commenced to run. The defendant having on January 28th given notice of his intention to move for a new trial, the subsequent service on him of the plaintiff's notice of the filing of the findings effected nothing, and may be laid out of the case, for its effect could only have been to force the defendant to give the notice of intention to move for a new trial, and that notice he had by his own election given already."

The notice of intention, having been once given in time, is not subject to be stricken out on motion, for laches, or failure to prosecute the motion.[3] The proper procedure in such a case is a motion to dismiss the motion for failure to prosecute.[4] Nor does the withdrawal of a formal motion, and the substitution of another, constitute a withdrawal of the notice of intention, or an abandonment of the proceeding.[5]

§ 23. Grounds of the Motion—How Stated in the Notice of Intention.—The grounds upon which a motion for new trial may be made are prescribed by section 657 of the Code of Civil Procedure, which is as follows:[1]

"Sec. 657. The former verdict or other decision may be vacated and a new trial granted, on the application of the party aggrieved,

[3] See Heilbron v. Heinlen, 70 Cal. 482, 12 Pac. 385.

[4] See section 165, *post*.

[5] Wastl v. Montana Union Ry. Co., 13 Mont. 500, 34 Pac. 844.

[1] *Arizona:* Section 263 of the Practice Act (section 1472 of the Revised Statutes) provides that "new trials may be granted and judgments may be set aside or arrested on motion for good cause on such terms and conditions as the court shall direct." Sections 265, 266, and 267 of the Practice Act (sections 1474, 1475 and 1476, Revised Statutes) refer to errors in admitting or rejecting evidence; errors in charging the jury and in refusing instructions, and insufficiency of the evidence to sustain "the judgment or the verdict," are referred to as general grounds for the motion. No further reference is made to the subject in the statutes. There is a clear intimation in the provisions referred to, however, that other grounds will be recognized, and in Torque v. Carillo, 1 Ariz. 336, 25 Pac. 526, misconduct of the jury, in respect of a verdict as a result of chance, was advanced as a ground of the motion. In Copper Queen Min. Co. v. Arizona Prince Copper Co., 2 Ariz. 10, 7 Pac. 718, another form of misconduct—intoxication—was recognized, as well as, tacitly, irregularity of the prevailing, or adverse, party. In Southern Pac. Co. v. Tomlinson, 4 Ariz. 126, 33 Pac. 710, and Southern Pac. Co. v. Fitchett, 9 Ariz. 128, 80 Pac. 359, excessive damages was the ground of the motion. In Solomon v. Norton, 2 Ariz. 100, 11 Pac. 108, accident and surprise was the ground. Also, the same ground was advanced in Walker v. Gray, 6 Ariz. 359, 57

for any of the following causes, materially affecting the substantial rights of such party:—

"1. Irregularity in the proceedings of the court, jury, or adverse party, or any order of the court or abuse of discretion, by which the party was prevented from having a fair trial.

"2. Misconduct of the jury; and whenever any one or more of the jurors have been induced to assent to any general or special

Pac. 614. In Ryder v. Leach, 3 Ariz. 129, 77 Pac. 490, the ground was newly discovered evidence.

It thus appears that the courts have recognized the grounds, in the main, established in other jurisdictions by statute.

California: As in the text.

Colorado: "Section 217. The former verdict or other decision, or judgment of the court or referee, may be vacated, and a new trial granted on the application of the party aggrieved for any of the following causes, materially affecting the substantial rights of the said party:

"First. Irregularity in the proceedings of the court or referee, or abuse of discretion by which either party was prevented from having a fair trial;

"Second. Misconduct of the jury, and when any one or more of the jurors shall have been induced to assent to any general or special verdict, or to a finding upon any question or questions submitted to them by the court, by a resort to the determination of chance, such misconduct may be proved by the affidavits of one or more of the jurors;

"Third. Accident or surprise which ordinary prudence could not have guarded against;

"Fourth. Newly discovered evidence material for the party making the application, which he could not with reasonable diligence, have discovered and produced at the trial;

"Fifth. Excessive damages or inadequate damages, appearing to have been given under the influence of passion or prejudice;

"Sixth. Insufficiency of the evidence to justify the verdict, or other decision, or that it is against the law;

"Seventh. Errors in law, occurring at the trial, and excepted to by the party making the application."

New Mexico: None given in statutes.

Oklahoma: "Section 5825. The former verdict report or other decision shall be vacated, and a new trial granted, on the application of the party aggrieved, for any of the following causes, affecting materially the substantial rights of such party:

"First. Irregularity in the proceedings of the court, jury, referee, or prevailing party, or any order of the court, or referee, or abuse of discretion, by which the party was prevented from having a fair trial;

"Second. Misconduct of the jury or prevailing party;

"Third. Accident or surprise, which ordinary prudence could not have guarded against;

"Fourth. Excessive damages appearing to have been given under the influence of passion or prejudice;

"Fifth. Error in the assessment of the amount of recovery, whether too large or too small, where the action is upon a contract, or for the injury or detention of property;

"Sixth. That the verdict is not sustained by sufficient evidence, or is contrary to law;

"Seventh. Newly discovered evidence, material for the party making the application, which he could not with reasonable diligence have discovered and produced at the trial;

"Eighth. Error in law occurring at the trial and excepted to by the party making the application."

Wyoming: "Section 3746. The former verdict, report, or decision shall be vacated and a new trial granted, on the application of the party aggrieved, for any of the following causes, affecting materially the substantial rights of such party:

"First. Irregularity in the proceedings of the court, jury, referee, master or prevailing party, or any

verdict, or to a finding upon any question submitted to them by the court, by a resort to the determination of chance, such misconduct may be proved by the affidavit of any one of the jurors.

"3. Accident or surprise, which ordinary prudence could not have guarded against.

"4. Newly discovered evidence, material for the party making the application, which he could not with reasonable diligence have discovered and produced at the trial.

"5. Excessive damages, appearing to have been given under the influence of passion or prejudice.

"6. Insufficiency of the evidence to justify the verdict or other decision, or that it is against law.

"7. Error in law occurring at the trial and excepted to by the party making the application."

These grounds must be stated in the notice of intention. Such is the express provision of the statute,[1a] and a moving party

order of the court or referee, or abuse of discretion, by which the party was prevented from having a fair trial."

The remaining grounds are identical with those of Oklahoma.

The statutes of Idaho (section 4439, Revised Codes), Montana (section 6794, Revised Codes), North Dakota (section 7063, Revised Codes), Oregon (section 173, Lord's Oregon Laws), South Dakota (section 301, Compiled Laws), Utah (section 3292, Compiled Laws) and Washington (section 399, Rem. & Bal. Codes), are identical with that of California, as is that of Nevada, also, except as to the second subdivision (section 3290, Cutting's Compiled Laws), which omits all after "Misconduct of the jury."

[1a] *Arizona:* No notice of intention prescribed, but section 1473, Revised Statutes (section 264, Civil Practice), provides for a written motion in which the grounds are to be set out.

California: Section 659, Code of Civil Procedure; section 195, Practice Act.

Idaho: Section 4441, Revised Codes; section 413, Code of Civil Procedure of 1881; section 4441, Revised Statutes of 1887.

Montana: Section 6796, Revised Codes.

Nevada: Section 3292, Cutting's Compiled Laws; section 197, Practice Act.

North Dakota: Section 7065, Revised Codes; section 288, Code of Civil Procedure of 1877; section 5474, Revised Codes of 1899.

Oklahoma: No notice is required, but section 5828, Compiled Laws, provides as follows: "The application must be by motion, upon written grounds," etc.

Oregon: No notice is prescribed, but section 177, Lord's Oregon Laws, is as follows: "In all cases of motion for new trial, the grounds thereof shall be plainly specified," etc. It is assumed that the grounds are to be specified in the motions prescribed by sections 175 and 176, during the term and in vacation.

South Dakota: Section 303, Code of Civil Procedure.

Utah: Section 3294, Compiled Laws of 1907; section 3402, Compiled Laws of 1888; section 3294, Revised Statutes of 1898.

Washington: No notice prescribed. But see Boarman v. Hinckley, 17 Wash. 126, 49 Pac. 226. Section 402, Rem. & Bal. Code (section 5075, Bal. Code), provides that the motion shall designate the grounds, etc. Section 401, Rem. & Bal. Code (section 5074, Bal. Code), also provides that "the

cannot avail himself of a ground not stated.[2] The statement of the grounds in the notice may be in the general language of the statute,[3] except where the motion is to be made upon the minutes of the court. Before 1863 the statute did not expressly provide that the statement of the grounds in the notice could be in general terms; but such was the practice, and in that year [4] section 195 was amended so as to provide that "the notice shall designate *generally* the grounds upon which the motion will be made." The Code of Civil Procedure as first enacted contained a similar provision; but by the amendment of 1874 the word "generally" was omitted, and the provision was [5] that the party should serve and file a notice of his intention, "designating the grounds upon which the motion will be made," etc. But this change in the statute does not ap-

motion for new trial shall state the grounds or causes for which a new trial is asked." But section 400, Rem. & Bal. Code (section 5072, Bal. Code), provides, "in no case or motion for a new trial hereafter made in the courts of this state shall it be necessary to specify the grounds thereof, otherwise than in the language of the last preceding section" (stating grounds on which motion may be made).

Wyoming: Section 4604, Compiled Statutes of 1910; section 3749, Revised Statutes of 1899, is the same as the Oklahoma section above quoted. No notice is prescribed.

See, also, the following decisions: Gregg v. Garrett, 13 Mont. 10, 31 Pac. 721; Arnold v. Sinclair, 12 Mont. 248, 29 Pac. 1124; Ogle v. Potter, 24 Mont. 501, 62 Pac. 920; State v. Landry, 29 Mont. 218, 74 Pac. 418; Street v. Lemon etc. Co., 9 Nev. 251; Bradshaw v. Territory, 3 Wash. Ter. 265, 14 Pac. 594; Dawson v. Baum, 3 Wash. Ter. 464, 19 Pac. 46; Fletcher v. Nelson, 6 N. D. 94, 69 N. W. 53.

[2] See Wilcoxson v. Burton, 27 Cal. 228, 87 Am. Dec. 66; Fitch v. Bunch, 30 Cal. 208. But since the notice itself can be waived (see section 14), any defect in it could be waived in the same manner.

The moving party is not bound to follow up all the grounds stated in the notice, but may elect to make his motion ultimately upon any one or more of the grounds so mentioned, and abandon the others, and such abandonment will not prejudice any right he may have. Hart v. Kimball, 72 Cal. 283, 13 Pac. 852; Gamer v. Glenn, 8 Mont. 371, 20 Pac. 654. It is to be noted that these cases refer to the papers as *grounds*. The principle is no doubt the correct one, however. So the moving party may elect not to make use of all the papers stated in the notice, but to abandon all but one, as the bill of exceptions, where the notice stated that the motion would be made upon the records of the court and the minutes, and either a statement or bill of exceptions. Duncan v. Times-Mirror Co., 120 Cal. 402, 52 Pac. 652 But he must make use of at least one of the papers specified in the notice. Pereira v. City Sav. Bank, 128 Cal. 45, 60 Pac. 524.

[3] See, generally, Butterfield v. Central Pac. R. R. Co., 37 Cal. 381; Smith v. Christian, 47 Cal. 18. The notice of intention is not the place for the specification of particulars (Ferrer v. Home Mut. Ins. Co., 47 Cal. 416, 428), except where the motion is made on the minutes of the court. But the foregoing cases were decided while the statute expressly provided, as stated in the text, that the notice should state "generally" the grounds of the motion.

[4] Laws of 1863, p. 643.

[5] Section 659, California Code of Civil Procedure.

pear to have affected the practice[6] of designating the grounds of the motion in the notice in the general language of the statute. And it is submitted that the change in the statute was not designed to effect a change in the practice in the respect mentioned, but that the word "generally" was omitted because in view of the other provisions of the statute it was unnecessary. Provision is made for the specification of the particular grounds in the statement or bill of exceptions, and it seems entirely unnecessary (except where the motion is made on the minutes of the court) that a similar specification should be in the notice of intention. Besides, the fact that a specification of particulars in the notice is expressly required in cases where the motion is made upon the minutes of the court would seem to imply that in other cases it is not necessary.

Where the motion is made upon the minutes of the court, no formal record is made up before the motion is heard; and consequently unless the specification of particulars were placed in the notice it could not be made at all, and there would be nothing specific to inform the successful party or the court of the precise grounds relied upon. Accordingly, the provision of the statute in regard to the notice of intention in such case is as follows:[7]

"Sec. 659 (sub. 4). Where the motion is to be made upon the minutes of the court, and the ground of the motion is the insufficiency of the evidence to justify the verdict or other decision, the notice of motion must specify the particulars in which the evidence is alleged to be insufficient; and if the ground of the motion be errors in law occurring at the trial and excepted to by the moving party, the notice must specify the particular errors upon which the party will rely. If the notice do not contain the specifications here indicated, when the motion is made upon the minutes of the court, the motion must be denied."[8]

In the construction of this provision the supreme court has held that if the motion for a new trial is made on the minutes of the

[6] See chapter 21.

[7] This is taken from the California code.

In Idaho (section 4441, Revised Codes, subdivision 4) the provision is the same as that of the California code, except that the phrase "or deemed excepted to" is inserted after the phrase "excepted to by the moving party."

Section 7065, Revised Codes of North Dakota, is the same as California section above quoted.

[8] See Weyl v. Sonoma Val. R. Co., 69 Cal. 202, 10 Pac. 510; Neale v. Depot Ry. Co., 94 Cal. 425, 29 Pac. 954. And see chapter 23, as to motion on minutes of the court.

court, and no specifications of the insufficiency of the evidence or errors of law are given in the notice, no subsequent statement of the case or subsequently prepared bill of exceptions is authorized or required. In Buckley v. Althorf [8a] the notice of intention stated the motion would be made on the minutes of the court. The notice failed to contain any specification of insufficiency of the evidence or assignments of errors of law. The court held that, therefore, no subsequent statement of the case as provided by section 661, Code of Civil Procedure, was required or authorized. The court also decided in this case that appellant was not entitled to have any statement or bill of exceptions other than that provided for by said section 661.

The language above quoted, as to specifications, is the same as that providing for specifications in statements, and it seems clear that the specifications to be put into the notice, where the motion is made upon the minutes of the court, are the same as those required in statements in other cases.[9] The subdivision above quoted does not state whether the notice should contain a general statement of the grounds of the motion (such as is necessary in other cases) in addition to the particular specifications above mentioned. It would seem that the specification of the particular grounds would render the general statement of such grounds useless; and it is believed that it is not necessary to add the general statement in such cases. Nevertheless, the question is not entirely free from doubt, and until there is some decision in regard to it, the prudent practitioner will state the grounds both generally and specifically.

[8a] 86 Cal. 643, 25 Pac. 134.
[9] As to which see sections 149 and 150, *post*.

CHAPTER III.

GROUNDS OF THE MOTION—IRREGULARITIES.

§ 24. Scope of the statute—Contents of chapter.
§ 25. Irregularities may occur before and during, but not after, the trial.
§ 26. The irregularities must materially affect the substantial rights of the moving party—Presumption of injury.
§ 27. Necessity of opportunely calling the court's attention to the irregularity—Waiver.

§ 24. Scope of the Statute—Contents of This Chapter.—The first subdivision of the section specifying the grounds upon which a motion for new trial may be made is as follows: "Irregularity in the proceedings of the court, jury, or adverse party, or any order of the court or abuse of discretion by which either party was prevented from having a fair trial." The foregoing is a reproduction of the language of subdivision 1 of section 193 of the Practice Act of 1851,[1] which stood unchanged from 1851 to the adoption of the Code of Civil Procedure. As will be perceived, the scope of the subdivision is very wide. Irregularity of the court, irregularity of the jury, and irregularity of the adverse party are three separate subjects of considerable extent. While "any order of court or abuse of discretion," etc., is almost without limitations.

The present chapter will be devoted to a consideration of some of the rules which are applicable to all irregularities.

§ 25. Irregularities may Occur Before or During the Trial.—The "errors in law" on account of which a new trial may be granted are limited by the terms of the statute to those "occurring at the trial." But there is no such limitation as to irregularities. Most irregularities of the adverse party, tampering with witnesses for example, occur before the trial. And it is easy to imagine other instances of irregularities occurring previous to the trial. The design of the subdivision seems to be to afford relief against all irregularities by which a fair trial may have been prevented, whether occurring before or at the trial. But an irregularity occurring

[1] See California Laws of 1851, p. 81. Also, note 1, section 23, *ante*, for synopsis of laws of other states.

after the trial is not ground for a motion for new trial under this subdivision. For it is manifestly impossible that a fair trial could be prevented by something which did not occur until the trial had terminated. The "trial," however, would probably be considered as lasting until the verdict or decision was recorded or filed.[1]

§ 26. The Irregularity must be One Which Materially Affected the Substantial Rights of the Moving Party—Presumption of Injury.—The propositions embraced in the above heading will be considered separately.

1. *The Irregularity must be in a Material Matter.*—This is the express provision of the statute. Its language is as follows: "The former verdict or other decision may be vacated, and a new trial granted on the application of the party aggrieved, for any of the following causes, *materially affecting the substantial rights of such party:* 1. Irregularity in the proceedings of the court, jury or adverse party, or any order of the court or abuse of discretion *by which either party was prevented from having a fair trial.*" [1a]

2. *But if an Irregularity be Shown, Injury from It is Presumed Unless the Contrary Affirmatively Appears.*—It is shown in another place that where *error* is shown, injury is presumed unless there be sufficient in the record to rebut the presumption.[2] The same rule applies to irregularities. It is not necessary for the moving party to show that the irregularity complained of did in fact materially affect his substantial rights, or that it actually prevented a fair trial. It is sufficient for him to show an irregularity, in view of which it is impossible for the court to determine whether or not a fair trial was prevented. In other words, the burden is on the moving party to show an irregularity which

[1] See Hastings v. Hastings, 31 Cal. 95. The rule of "substantial injury" applies here, as elsewhere, and injury or a reasonable presumption thereof, must appear. Richardson v. Jones, 1 Nev. 405. A trial judge should set aside a verdict and grant a new trial if he is satisfied that substantial injustice has been done. Linderman v. Nolan, 16 Okl. 352, 83 Pac. 796. And if he is satisfied that, notwithstanding the misconduct or irregularity complained of, substantial justice has been done, it is not error to refuse to set the verdict aside and grant a new trial. Root v. Coyle, 15 Okl. 574, 82 Pac. 648; Lawton v. McAdams, 15 Okl. 412, 83 Pac. 429. But if there is a reasonable suspicion that the verdict has been the result of improper influence, it is error to refuse to set it aside and grant a new trial. Easterly v. Gater, 17 Okl. 93, 87 Pac. 853, 10 Ann. Cas. 888.

See, also, Berry v. Smith 2 Okl. 345, 35 Pac. 576.

[1a] Section 657, Code of Civil Procedure of California; see note 1, section 23, *ante*, for synopsis of laws of other states.

[2] Section 287, *post*.

might have prevented a fair trial; and when that is done, the burden is on the successful party to show that as a matter of fact the result was not affected by the irregularity. This rule is well established. The leading case on the subject is Commonwealth v. Roby.[3] In that case the irregularity complained of was alleged to have been committed by the jury. Chief Justice Shaw, delivering the opinion, said:

"The result of the authorities is that where there is an irregularity which may affect the impartiality of the proceedings, as where meat and drink or other refreshment has been furnished by a party, or where the jury have been exposed to the effect of such influence, as where they have improperly separated themselves, or have had communications not authorized there, inasmuch as there can be no certainty that the verdict has not been improperly influenced, the proper and appropriate mode of correction or relief is by undoing what is thus improperly, and may have been corruptly, done; or where the irregularity consists in doing that which may disqualify the jurors for proper deliberation and exercise of their reason and judgment, as where ardent spirits are introduced, then it would be proper to set aside the verdict, because no reliance can be placed on its purity and correctness. But where the irregularity consists in doing that which does not and cannot affect the impartiality of the jury, or disqualify them from exercising the powers of reason and judgment, as where the act done is contrary to the ordinary forms, and to the duties which jurors owe to the public, the mode of correcting the irregularity is by animadversion upon the conduct of the jurors or of the officers; but such irregularity has no tendency to impair the respect due to such verdict."

So in Hare v. State,[4] Sharkey, C. J., delivering the opinion of the court, after quoting the above extract from Commonwealth v. Roby, said: "To me it seems that the line of distinction is here so clearly drawn that it is impossible to mistake it, and so fortified by reason as to place it beyond doubt. It is briefly this: If the purity of the verdict might have been affected, it must be set aside; if it could not have been affected, it will be sustained. A verdict upon which doubts rest cannot be good." The doctrine of the

[3] 12 Pick. 496.

[4] 4 How. (Miss.) 187; and see to same effect, McCann v. State, 9 Smedes & M. 465; Keenan v. State, 8 Wis. 138; Wormley Case, 8 Gratt. 714; Boles v. State, 13 Smedes & M. 398; Organ v. State, 26 Miss. 78.

above cases, although not approved in all the states, prevails in California. It was first laid down in our courts in People v. Backus.[5] In that case there was a separation of the jury under such circumstances that they might have been influenced. For this the judgment was reversed, and Murray, C. J., delivering the opinion, said:

"How far this would vitiate the verdict is a disputed point among the courts of the various states of the Union; it is universally conceded that it is an irregularity. In New Hampshire, Connecticut, North Carolina, and Indiana it has been held that the mere separation of the jury is not of itself sufficient to authorize the court to set aside the verdict, but that the party must show facts and circumstances tending to establish improper influences; while in Virginia and Tennessee it has been held that if the separation was such that the juror might have been improperly influenced by others, the verdict would have been set aside. The latter rule we think is a correct one, because it would be impossible in almost every case for the prisoner to establish the fact of any corrupt or improper communications between the juror and others. This doctrine is substantially sustained by the supreme court of Massachusetts, in the case of Commonwealth v. Roby, 12 Pick. (469) 519."

In the subsequent case of People v. Bonney,[6] it was said of the People v. Backus, 5 Cal. 275, that it went "to the very verge of the true rule, if not beyond." But in People v. Bonney it appeared affirmatively that no injury had been done, and the remark of the court evidently relates to the application of "the true rule," and does not question the correctness of the rule itself. The subsequent case of People v. Boggs[7] seems to be in conflict with the rule above stated. There it was shown that the officer having charge of the jury left them alone for a short while, and that "some person outside the jury-room spoke to a juror, and that some of the jurors spoke to two persons outside, it not appearing what was said," nor who the persons were. This, under the rule in People v. Backus (which does not appear to have been cited), was enough to have set aside the verdict. But the court held otherwise on the authority of a passage in Graham and Waterman on New Trials, to the effect that "where the interference of strangers with the jury is

[5] 5 Cal. 275.
[6] 19 Cal. 426.
[7] 20 Cal. 432.

unattended with corruption in the latter, and *has not been prompted by a party*, and it does not appear that any injustice has thereby been done, the verdict will not be disturbed." This passage misses the whole point of the rule laid down in Commonwealth v. Roby, above quoted. It does not touch the question as to the presumption of injury where the circumstances are such that it may have occurred.[8] Whose duty is it to show that the interference of strangers "has not been prompted by a party" or "is unattended with corruption"? The opinion in People v. Boggs is no clearer as to the rule in hand than the authority upon which it relies; and if there were no other decision upon the question, the rule in this state might be considered doubtful. But in People v. Brannigan[9] the rule of Commonwealth v. Roby was distinctly affirmed. In that case a separation of the jury occurred under such circumstances that they might have been improperly influenced; for this the judgment was reversed, and Field, C. J., delivering the opinion, said:

"It would seem but reasonable where an irregularity has been committed which *may* have affected the jury, that the government seeking to uphold their action should be called upon to show that no injury to the prisoner has followed from the irregularity complained of. If this can be shown, their verdict will not be disturbed, for the end which the law contemplated by its provisions has been attained. The district attorney appears to have considered it incumbent upon the prisoner to show affirmatively injury to himself resulting from the separation, or at least reason to suspect such injury. There are authorities which support this view. Such are the cases cited from the New York courts. But there are authorities of equal weight the other way, and the latter we think are supported by better reasons."

[8] The passage is taken from Graham and Waterman on New Trial, volume 2, page 317. It is not easy to gather the opinion of these learned writers as to which party has the burden of proof to show injury from a proved irregularity which may have been injurious. In another place they say: "The rule extracted from the cases seems to be that however improper the conduct of a juror may have been, yet *if it does not appear* that it was occasioned by the prevailing party, or anyone on his behalf; if it do not *indicate* any improper bias upon the juror's mind, and the court cannot see that it either had *or might have had* an effect unfavorable to the party moving for a new trial, the verdict ought not to be set aside." Volume 2, pages 593, 594.

[9] 21 Cal. 337.

The same doctrine was laid down in People v. Turner.[10] In that case the defendant was on trial for unlawfully disposing of certain warrants, while mayor of Los Angeles. During the trial one of the jurors attended a public meeting at which the defendant was bitterly denounced. For this the verdict was set aside, and Sprague, J., delivering the opinion, said:

"Where it is shown either that a juror has engaged in a conversation with others on the subject of the charge upon which

[10] 39 Cal. 370. People v. Brannigan and People v. Boggs were cited in People v. Symonds, 22 Cal. 348, 353. The latter case was cited as deciding merely that the presumption of injury could be rebutted. It was cited to the point that it was necessary to show injury in People v. Colmere, 23 Cal. 631. But People v. Brannigan was not referred to, and the opinion is not clear. It is probable that the court did not consider the case as militating against the rule above discussed. The same may be said of People v. Hughes, 29 Cal. 207. The three cases of People v. Backus, People v. Brannigan, and People v. Turner seem conclusive. But see People v. Dunne, 80 Cal. 34, 21 Pac. 1130. And see People v. Wheatley, 88 Cal. 114, 26 Pac. 95, where the case of People v. Symonds, 22 Cal. 349, was cited as sustaining the position that although a jury might separate to the extent of one juror going to a toilet adjacent to the jury-room, where he remained about five minutes, no one speaking to him and no discussion or balloting taking place in the meanwhile, such separation was not ground for a new trial. The inference is deducible, however, that if it had been shown that the juror had been spoken to, or that the case had been discussed or ballots taken in his absence, the prosecution would have been required to make an affirmative showing that the defendant was actually not prejudiced by the conduct in question.

And see Beals v. Cone, 27 Colo. 473, 83 Am. St. Rep. 92, 62 Pac. 948, 20 Morr. Min. Rep. 591, where it was shown that a juror "was in a room *by himself*, and that during that *period* some unknown person was standing in the door of this room, who, upon seeing the affiant, turned and walked away." Also that the same juror was seen, upon several occasions, in company with a bailiff, who had originally been summoned as a talesman. The court seemed to regard these facts as without any prejudicial significance, and thus expressed the doctrine: "The mere separation of a jury after the submission of a cause is not *per se* sufficient for setting aside the verdict and granting a new trial. It must appear that by reason of such separation there is a strong probability that the jury has been tampered with, or improperly influenced to return the verdict which is sought to be set aside. Dozenback v. Rayner, 13 Colo. 451, 22 Pac. 787. There is nothing in the facts established by the affidavits to show that the jury or any member had been tampered with, or that any effort had been made in this direction. Citizens who are required to render services in the determination of disputes between litigants should not be charged with a disregard of their duty or their oath, nor will the courts assume that they have been guilty of such conduct, unless the facts upon which such a charge is based warrant that conclusion."

See State v. Jones, 7 Nev. 408, where the subject of presumption from such a separation as offers an opportunity for communication with a stranger is considered, and it was held that the presumption does not arise where the juror was all the time in the company of the proper officer. See, also, Carnaghan v. Ward, 8 Nev. 30; State v. Harris, 12 Nev. 414.

he is to pass, or has voluntarily listened to the remarks of others addressed to himself or to third parties, upon matters connected with the charge upon which as a juror he is called upon to pass, then such misconduct is *prima facie* established as to authorize the court for that reason to set aside the verdict. (People v. Brannigan, 21 Cal. 340.) 'The evil to be guarded against is improper influence, and when an exposure to such influence is shown, and it is not shown that it failed of effect, then the presumption is against the purity of the verdict.' (McCann v. State, 9 Smedes & M. 465; State v. Prescott, 7 N. H. 288.)"

All of the foregoing were criminal cases. But the reason of the rule applies to civil cases, and according to high authorities it is to be applied in all cases, civil as well as criminal. Thus in Johnson v. Root,[11] Clifford, J., delivering the opinion, said:

"Irregularity on the part of the party charged, or of the jury, must be satisfactorily proved in order to lay the foundation for the interposition of the court; but when the irregular conduct is established, it is not necessary that it should certainly appear that it influenced the jury. In that state of the case it is sufficient that the irregularity appears to be of a character that it might have affected the impartiality of the proceedings. Such was the rule laid down in Commonwealth v. Roby, 12 Pick. 496, and it appears to be correct. Any improper interference with the jurors may afford sufficient ground for granting such a motion, and it is necessary that the attempt to influence the jurors should be made by one of the parties, or even by his agent. It is sufficient that it was done in his behalf; and it is never necessary to show that the misconduct controlled or determined the verdict, provided it was of such a character that it might have had an undue influence."

The rule laid down by the foregoing cases, viz., that where an irregularity is shown which may have influenced the result, it is for the successful party to show that as a matter of fact it did not, rests upon sound principles. Corrupt and other improper actions are usually done in secret, and are carefully covered up; and it would always be difficult, and in many cases impossible, for the moving party to show that the irregularity was in fact followed

[11] 2 Cliff. C. C. 108, Fed. Cas. No. 7409; see to same effect May v. Ham, 10 Kan. 598; Williams v. McGrade, 18 Minn. 82; Merrill v. Nary, 10 Allen, 418, 419.

by some corrupt or otherwise improper influence, while it is comparatively easy for the juror to explain an apparently doubtful act if it be innocent. To require the moving party to show that the irregularity was followed by improper influence would lead to the keeping up of a system of espionage upon the jurors which cannot be consistent with sound policy. And where an act of doubtful propriety is shown to have followed the irregularity, it would be necessary to conduct an investigation into its effect on the juror's mind, which is manifestly impracticable. The rule above stated is sustained by high authority. The views of such jurists as Shaw, Sharkey, Field, and Clifford are not to be lightly put aside. In California the cases of People v. Backus, People v. Brannigan, and People v. Turner seem to conclusively settle the matter. The rule, however, like every other rule, is to have a reasonable and not a forced application. It does not apply where there is only a *bare possibility* of the result having been affected.[12] The case must be such that the court cannot determine with any reasonable certainty whether the result was affected or not.

§ 27. The Party Affected by an Irregularity Should Bring the Matter to the Attention of the Court in Time to Admit of Its Correction, if Possible; Otherwise It is Waived.

1. *The General Rule.*—The rule does not mean (at least in California) that there must be a formal objection or exception, such as is required for the review of "errors in law."[1] Its foundation is that where the consequences of an irregularity might have been avoided if the attention of the court had been called to the matter at the proper time, it would be unjust to permit the party to take his chances of a favorable verdict, keeping in reserve the power to obtain a new trial, if the verdict should be unfavorable. By silence after knowledge of the occurrence, the party is held to have impliedly consented to it, and to have waived all objections which

[12] Thomas v. Commonwealth, 2 Va. Cas. 479.

[1] It is true the proceeding is often referred to—particularly in the later decision—as "exceptions" and "objections." This is not believed, however, to be a departure from the fact as stated in the text, but to be merely an analogous form of expression. In People v. Shem Ah Fook, 64 Cal. 380, 1 Pac. 347, the court goes so far even as to quote the word "exception" to indicate that that which it is intended to describe is not really an "exception." While the court is not always careful to go this far, the wide use of the word "exception" in this connection in the later cases is believed to have no more serious significance than that here expressed.

may exist in connection with it. This principle is of extended operation, and it is applied in almost every stage of judicial proceedings. So infinitely numerous and complex are the possible combinations of circumstances during the progress of a cause, that without the healing operation of the rule in question there would be few verdicts that would stand. The rule is well established, and its operation is illustrated by numerous decisions. Thus in Davis v. Allen,[1a] where a new trial was moved for on the ground of the interest of a juror in the cause, Shaw, C. J., delivering the opinion, said: "We are of opinion, as the evidence now stands, that if the exception had been seasonably taken it ought to have been sustained and the juror withdrawn from the panel. But a party knowing of ground of exception who does not seasonably take it must be deemed to have waived it. It would be inconsistent with the plain rules of fair dealing to permit a party to take his chance for a verdict in his favor, knowing of a defect in the proceedings and meaning to avail himself of it to invalidate the verdict, if against him."

So in McCorkle v. Binns,[2] where a new trial was sought on the ground that one of the jurors had expressed an opinion as to the case previous to the trial, Tighlman, C. J., said: "It does not appear at what precise time this matter first came to the knowledge of the defendant, or his counsel; but it is very certain that it was *before the verdict*. Now, if the defendant supposed that he should not have a fair trial he ought to have laid the matter immediately before the court, and requested that the jury might be discharged. He ought not to have taken the chance of a verdict in his favor and kept his motion for a new trial in reserve, because the plaintiff and defendant were then placed upon an unequal footing."

The duty of calling the attention of the court to the irregularity or misconduct was thus expressed by Mr. Justice McKee, for the court, in People v. McCoy:[2a]

"Where a party in the trial of a criminal action sees or knows of an act of misconduct by a juror, which he does not bring to the attention of the court, or object to at the time, or at any other time during the trial, or on the hearing of the motion for a new trial, it will be too late to make it the basis of objection and excep-

[1a] 11 Pick. 466.
[2] 5 Binn. 340, 6 Am. Dec. 420.
[2a] 71 Cal. 395, 12 Pac. 272.

tion after the court has disposed of the motion and pronounced judgment."

So in Ipswitch v. Fernandez,[2b] where the appellant sought to escape the consequences of an unfavorable verdict on the ground that one of the jurors was intoxicated, upon a showing that the intoxication was patent to all parties, to such an extent that the court had taken judicial notice of the fact, the supreme court held that if such was the fact "patent to all parties" the appellant himself must have known it, and knowing it he could not keep quiet about it and take the chance of a verdict favorable to himself, and then, when an unfavorable verdict has been rendered, to seek to avail himself of the irregularity for the first time after defeat. The appellant stated, in his affidavit, that he did not know of the intoxication referred to until after the verdict, but the supreme court held that if, in the language of the trial court, the intoxication was patent to all parties, to such an extent that the court was bound to take judicial notice of it, the appellant could not put the court on the stand to say that the juror was intoxicated without also accepting his further statement that such intoxication was patent to all parties; that if it was patent to all parties, it was patent to him also, and he was estopped to deny it.

So in Wood v. Moulton,[2c] where the appellant sought an advantage from irregularities in an inspection by the jury of the locus, the court said:

"They knew of the irregularity at the time, and had ample opportunity to call the court's attention to it before the verdict was rendered. They chose, however, to remain silent and trust to the chance of a verdict, and that verdict having been unfavorable to them, they will not at this late day be allowed to urge the irregularity."

And so in other cases.[3]

2. *Knowledge of Counsel—Presumptive Knowledge.*—The general rule, then, is that if the losing party knew of the irregularity,

[2b] 84 Cal. 639, 24 Pac. 298. See, also, People v. Deegan, 88 Cal. 602, 26 Pac. 500; but see dissenting opinion.

[2c] 146 Cal. 317, 80 Pac. 92.

[3] Hallock v. Inhabitants of Franklin Co., 2 Met. (Mass.) 560; Fox v. Hazleton, 10 Pick. 275; Riley v. Monohan, 26 Iowa, 507; People v. Coffman, 24 Cal. 230; People v. Hobson, 17 Cal. 424; De Leon v. Higuera, 15 Cal. 483; People v. Shem Ah Fook, 64 Cal. 380, 1 Pac. 347; In re Cahill, 74 Cal. 52, 15 Pac. 364; Monaghan v. Rolling Mill Co., 81 Cal. 190, 22 Pac. 590; People v. Beaver, 83 Cal. 420, 23 Pac. 321; O'Callaghan v. Bode, 84 Cal. 489, 24 Pac. 269;

and had an opportunity to lay the matter before the court, but failed to do so, he will be deemed to have waived all objections on account of it. And for the purposes of the rule, the knowledge of the counsel is the knowledge of the party. Thus in Kent v. City of Charlestown,[4] where an irregularity of the jury was known to the counsel but not to the client, the court held that "the client is bound by the knowledge of his counsel, with whom the conduct of his cause was intrusted." So in Edmondson v. Wallace,[5] where it was shown that two of the trial jurors had sat upon a previous trial of the case, and that this circumstance was unknown to the losing party, a new trial was refused, the court saying: "If Edmondson himself did not know the fact referred to in this ground, it is to be presumed that his counsel did. It is to be presumed that they, at least, were present at the mistrial; and if they were so present they must have seen every member of the jury that made the mistrial. There is no affidavit from them of forgetfulness, or other thing, to relieve the case from this presumption." So in Orrok v. Commonwealth Ins. Co.,[6] where one of the jurors was a stockholder of the defendant, and this circumstance was brought to the knowledge of the junior counsel for the plaintiff, but no objection was made until after the trial had been proceeded with for some time, it was held that the irregularity was waived. So in Martin v. Tidwell,[7] where before the close of the trial one of the jurors said that he had made up his mind as to the case, and this circumstance was known to the counsel, who chose to take his chance of a verdict, it was held that the irregularity was waived.

And it is not essential to the operation of the rule that the party, or his counsel, should have had *actual* knowledge of the irregularity. If they had knowledge of facts which ought to have put them on inquiry, they will be presumed to have had knowledge of the irregularity itself. Thus in Fessenden v. Sager,[8] where a new trial was moved for on the ground that the plaintiff had made an un-

People v. Kramer, 117 Cal. 647, 49 Pac. 842; Doolin v. Omnibus Co., 140 Cal. 369, 73 Pac. 1060.

See, also, Bradshaw v. Degenhart, 15 Mont. 267, 39 Pac. 90; Golden v. Murphy (Nev.), 103 Pac. 394; Kinneberg v. Kinneberg, 8 N. D. 311, 79 N. W. 337; Tucker v. Salem Flouring Mills Co., 13 Or. 28, 7 Pac. 53; Osmun v. Winters, 30 Or. 177, 46 Pac. 780; Grantz v. City of Deadwood, 20 S. D. 495, 107 N. W. 832; Ewing v. Lunn, 22 S. D. 95, 115 N. W. 527; In re Jackson Street, Seattle, 47 Wash. 243, 91 Pac. 970.

[4] 2 Gray, 281; see, also, Jameson v. Androscoggin R. R. Co., 52 Me. 412.

[5] 20 Ga. 660.

[6] 21 Pick. 456, 32 Am. Dec. 271.

[7] 36 Ga. 345.

[8] 53 Me. 531.

authorized communication to the jury, and had visited the subject of the action with them, Danforth, J., delivering the opinion, said: "It seems from the testimony that during the progress of the trial defendant's counsel had notice of *some* communication between the plaintiff and some of the jurors. This was sufficient at least to have put him upon inquiry, and by consenting to go on with the trial without objection, he consented to abide the result, as the authorities cited for plaintiff abundantly show." So in Fox v. Hazleton,[9] Shaw, C. J., after laying down the general rule as to knowledge, said: "In the present case the evidence is quite sufficient to show that if the party was not fully apprised of the partiality of the referee before the hearing, he had ample notice to put him upon inquiry, which would have led to the full knowledge of the fact; and had the exception been taken at the hearing, and the referees had persisted in proceeding, it would have been strong ground of objection to the award. As he was content to proceed with the knowledge of the fact, relying upon the strength of his cause, or the capacity and firmness of the other referees, he must be deemed to have waived his exceptions." So parties must examine the jurors to see whether they are qualified; and if they do not, all disqualifications are waived.[10]

3. *It is Part of the Moving Party's Case to Show Want of Knowledge.*—The moving party must show affirmatively that neither he nor his counsel had knowledge of the irregularity in time to avoid its consequences, and that they were not guilty of negligence in failing to make proper inquiry. Thus in Byars v. City of Vernon,[11] where a motion to set aside the verdict was made upon an affidavit showing a previous expression of opinion by the juror as to the case, Scott, C. J., delivering the opinion, said: "The affidavit affords no ground for new trial. It is not shown that the juror was subjected to any examination touching his competency before he was sworn to try the cause." So in Jameson v. Androscoggin R. R. Co.,[12] where a new trial was moved for on the ground of the disqualification of a juror, the showing was held to be insufficient, and Appleton, C. J., delivering the opinion, said: "It does not appear that at the hearing any objection to the juryman on account of such interest was taken. For aught that is shown, the petitioners or their counsel might have been aware of the exist-

[9] 10 Pick. 275, 278.
[10] See section 44, *post*.
[11] 77 Ill. 67.
[12] 52 Me. 412.

ence of the alleged interest, on account of which they seek to set aside the verdict. It is true the motion filed denies knowledge on the part of the petitioner of such interest; but it omits to negative such knowledge on the part of his counsel. Nor is the motion verified by affidavit, nor is its truth established by any proof whatever." So in Craig v. Elliott,[13] where a new trial was moved for on the ground that one of the jurors had sat on a former trial of the case, the showing was held to be insufficient, Owsley, J., saying: "For aught that appears upon the record, the appellant may have known the fact before the latter jury was sworn, and if so he should have made his objection to them by challenge; but having failed to do so, a new trial for that cause ought not to be awarded." So in Rollins v. Ames,[14] where a new trial was moved for on the ground of the disqualification of a juror, the court, per Woodbury, J., said: "In this case one of the counsel, it appears, was unapprised of the cause of challenge till the trial had closed. But it did not appear that the other counsel or the party himself was ignorant of it; and consequently the motion for a new trial must be refused." So in Cogswell v. State,[15] where on motion for new trial it was proposed to show that one of the jurors was asleep during a portion of the trial, but it was not proposed to show that the defendant and his counsel were unaware of the circumstance, the motion was denied, the court saying, with reference to such want of knowledge: "This must appear affirmatively."

The case of Golden v. Murphy[15a] offers a more recent illustration of the principle under consideration, and one in which the above expressions are specifically approved. The action was one involving the right to extract ores from a certain locality claimed by both parties. At the conclusion of the testimony, by agreement, the court and jury were taken to view the premises in question, and a guide representing each party was appointed, for the purpose of pointing out such places referred to in the testimony as the court might direct. Upon the return from this trip the case was submitted to the jury, and a verdict for plaintiff rendered. Upon a motion for a new trial the defendant charged irregularity of the adverse party prejudicial to his right to a fair and impar-

[13] 4 Bibb. 272.

[14] 2 N. H. 349, 9 Am. Dec. 79.

[15] 49 Ga. 103, 106.

[15a] The court also quoted freely from the text in support of the decision, citing the case of Wood v. Moulton, 146 Cal. 317, 80 Pac. 92.

tial trial. This irregularity was alleged to consist in many statements and arguments made by plaintiff's guide, in the course of the inspection of the *locus in quo*. At a certain point in the inspection it was shown that this guide, and a portion of the jury, became separated from the judge and the remainder of the jury, including defendant's guide, but such separation was not of such a character that the latter was wholly unable to hear the remarks of his associate, and it was alleged that these were argumentative and referred to facts not in evidence. At another time, by reason of fatigue, the judge became separated from the jury, and while so separated, other statements and arguments, similar in character and effect, were made by the plaintiff's guide. There was no counter-affidavit, and these statements may be taken as true, and the right of the plaintiff to have a new trial for the cause stated may be said to rest entirely upon the sufficiency of the affidavit, and the facts outlined therein. Prior to the submission of the case to the jury, the attention of the court was not called to the irregularity complained of, nor until the motion was made. After the denial of the latter, counsel for defendant filed a supplementary affidavit to the effect that they had not been informed of the irregularity thus complained of until after the verdict, and therefore had had no opportunity to call the attention of the court thereto. This affidavit was not considered at the hearing of the new trial motion, and could not, of course, be reviewed on appeal. Even if it were otherwise, such an affidavit would, of itself, afford ample ground for denying the motion, inasmuch as it is an essential part of the moving party's case, as above stated, to show want of knowledge; whereas here is an affirmative showing of knowledge, together with a further showing of neglect to perform the plain duty of directing the court's attention to the irregularity. "The court does not hesitate to say that, if the statements were made by Boyle, as alleged in Murphy's affidavit, the same was improper, as also the drawing of the diagram, and it was the duty of the defendant Murphy, upon the return of the jury to the courtroom, to have called to the attention of the court the alleged misconduct of the said Boyle, in order that the court might have an opportunity to have called the same to the attention of the jury, and give them the proper instructions in reference to disregarding all such alleged statements or misconduct, and, if such statements and misconduct were true, to have adjudged the said Boyle in con-

tempt of court. However, the said defendant Murphy evidently chose to remain quiet and take the chance of a favorable verdict, and keep the misconduct of the said Boyle in reserve."

To these remarks of the trial judge were added the further suggestion that the statements of the affidavit that the jury were influenced by the misconduct prejudicially to the defendant were not supported by any other affidavits, and, moreover, were mere conclusions; that the statements alleged to have been made by Boyle were in conformity with his testimony as given during the trial, and "the parties failing to bring this matter to the attention of the court before the rendering of a verdict, which they had ample opportunity to do, in the opinion of the court it now becomes too late, and that they have waived their right to now complain in reference to the alleged misconduct of the witness Boyle."

And so in other cases.[16]

4. *Limitations and Exceptions to the Rule.*—The foundation of the rule is as above stated, that the consequences of the irregularity might have been avoided had attention been called to the matter at the proper time. It follows that if the irregularity be such that its consequences could not have been avoided had attention been called to it, the rule does not apply. And the rule suffers exception.[17] Thus where, after the jury had retired, the judge went to their room and communicated with them privately, it was held that the practice was so "dangerous and improper" that the failure to object ought not to prevent a new trial.[18] The true ground of not requiring a party to object in such a case would seem to be that where a judge deliberately commits an act which could not have been the result of mere inadvertence, there can be no use in requiring counsel to call his attention to the matter, for he is already fully aware of the fact, and must be presumed to know its impropriety. Although counsel may in some cases be required to call the attention of the judge to matters of law, it is no part of their duty to see that he is not deliberately guilty of irregularities.

Another exception seems to obtain where the party has good reason to suspect an irregularity on the part of the jurors, but

[16] See Gibson v. Williams, 39 Ga. 660; State v. Daniels, 44 N. H. 383. Also, Kinneberg v. Kinneberg, 8 N. D. 311, 79 N. W. 337; Berry v. Smith, 2 Okl. 345, 35 Pac. 576.

[17] Look at Oleson v. Meader, 40 Iowa, 662.

[18] Taylor v. Betsford, 13 Johns. 487; and look at People v. Backus, 5 Cal. 275, 277.

is not in a position to establish it by proof, and would probably incur the enmity of the jurors by charging them with it.[19] In such case it certainly would not be in furtherance of justice to make the want of objection a ground for sustaining the verdict, should the party after the trial be in a position to make good his accusation.

But the mere silence of the opposing counsel does not prevent the court from correcting the irregularity, or granting a new trial on account of the same, when the substantial rights of the parties are prejudiced, even though the losing party failed to call attention at the proper time to the facts constituting such irregularity.[20] It is the duty of a trial court to repress or rebuke improper conduct at the trial, where such conduct points to any kind of irregularity or misconduct, affecting or threatening the substantial rights of the party, without being specially requested so to do.[21]

[19] Look at May v. Ham, 10 Kan. 598.

[20] Cook v. Doud, 14 Colo. 483, 23 Pac. 906; and see Klink v. People, 16 Colo. 467, 27 Pac. 1062.

[21] See cases cited in note 20, *supra*.

CHAPTER IV.

GROUNDS OF THE MOTION—IRREGULARITY OF THE COURT.

§ 28. The term includes irregularities of any officer of court.
§ 29. What is an irregularity of the court.
§ 30. The court must be held at the appointed time.
§ 31. The court must be held at the appointed place.
§ 32. A judge must not act in a case when disqualified.
§ 33. Issues of fact should not be tried when issues of law remain undisposed of.
§ 34. Trial by jury should not be denied when the parties are entitled thereto.
§ 34a. Public trial in criminal cases.
§ 35. A general verdict in a suit in equity is irregular.
§ 36. Questions of law should be ruled on as they arise.
§ 37. The rulings of the court should not be changed to the prejudice of a party.
§ 38. The judge should not express any opinion concerning the character of a witness.
§ 39. After they have retired the judge should not hold communication with them, except in open court in the presence of counsel.
§ 39a. Neither the judge nor any officer should threaten the jury.
§ 40. Irregularities in receiving a verdict.
§ 41. Other irregularities.

§ 28. The Term "Irregularity of the Court" Includes Irregularity of Any Officer of the Court.—In strictness the term "court" is synonymous with "judicial tribunal." In this sense the jury is as much a part of the court as is the judge. In common usage among lawyers the word designates the judge. As used in the subdivision under consideration, the word has not yet received judicial construction. But it is believed that in said subdivision the word is not used in either of the above senses, but that it includes the other officers of the court as well as the judge. It cannot be used in the extended sense of judicial tribunal, for that would include irregularities of the jury, and these are referred to in the subdivision as a separate class. And it cannot be used to designate the judge alone; for it is difficult to suppose that it was the intention of the legislature, while prohibiting the judge and the jury and the adverse party from committing irregularities, to give to the sheriff and the clerk and the reporter full license in that

direction. It may easily happen that a fair trial is prevented by the act of some officer of the court other than the judge. Thus if the clerk should make away with or lose important documents introduced in evidence and intrusted to his keeping, or if the reporter should write in his report statements that had not been testified to, and they should be read to the jury as evidence in the case, or if the sheriff in charge of the jury should induce them to agree upon a verdict by threats as was done in Gholston v. Gholston,[1] a fair trial would be prevented. Yet in none of these cases could relief be had, unless as for an "irregularity of the court." It is submitted, therefore, in the absence of a decision upon the point, that the term "court" as used in the subdivision includes the other officers of the court as well as the judge. Attorneys, however, are not officers of the court in this sense. They are officers only in a qualified sense, and their irregularities are deemed to be irregularities of the "adverse party." Neither are jurors officers of the court in this sense. Their irregularities are "irregularities of the jury."

§ 29. **What is an Irregularity of the Court.**—It was stated by Crockett, J., delivering the opinion in Brumagim v. Bradshaw,[1] that each subdivision of section 193 of the old Practice Act (which corresponds to section 657 of the code) was intended to apply to a separate and distinct class of cases. And the statement seems, as a general proposition, to be correct;[2] for otherwise there is nothing to be gained by having so many subdivisions: one would have been sufficient. Nevertheless, some of the subdivisions are separated by a very indistinct line. Thus it is difficult to say upon what principle "irregularities" of the jury are to be distinguished from "misconduct" of the jury. Moreover, many occurrences have a double aspect. Under one aspect they may be reviewed under one subdivision, and under another aspect under some other subdivision. Thus irregularities within the meaning of the first subdivision may operate as "surprise" within the meaning of the fourth. It is therefore in many cases extremely difficult to say what is the determining feature which brings an occurrence within the operation of any particular subdivision. The foregoing observations apply to the class under consideration. It is impossible

[1] 31 Ga. 625.
[1] 39 Cal. 24.
[2] But look at Du Brutz v. Jessup, 54 Cal. 118.

to answer with precision the question, what is an irregularity of the court. But by the help of the principle stated in Brumagim v. Bradshaw, the question may be answered negatively. An irregularity of the court is not an "error in law" within the meaning of the seventh subdivision. Errors in law occur only where there are "rulings" made at the trial upon questions of law.[3] Such rulings can be reviewed only when a formal exception is taken. It is very certain that an error in law in admitting or rejecting evidence, or in giving or refusing instructions, or in granting or denying a motion for nonsuit, or admitting or overruling a challenge for actual bias or for cause,[3a] could not be reviewed as an irregularity of the court under the first subdivision. Nor does the term cover the cases designated by the phrase "any order or abuse of discretion"; for the statute seems to use the terms as referring to different classes of cases. Speaking generally, by an irregularity of the court is meant some conduct of the court other than orders or rulings. But no accurate classification of things which are irregular is possible. And all that will be attempted here is to give an enumeration of some of the occurrences which may be classed as irregularities of the court; and for this purpose it is not important to observe the distinction between things which are so "irregular" as to be absolutely void and things which are voidable only. For although it is true that a decision which is absolutely void may be expunged from the records at any time, the machinery of a motion for new trial on affidavits could be used for that purpose.

In a late case the supreme court undertook to define an irregularity as distinguished from an error of law, in the following language:

"As ordinarily understood, an error of law is committed when the court, either upon motion of one of the parties, or upon its own motion, makes some erroneous order or ruling on some question of law which is properly before it and within its jurisdiction to make. Here, however, the court was not called upon to rule or make an order upon any question of law, but the judge interrupted counsel

[3] See section 100, *post*.

[3a] In Silcox v. Lang, 78 Cal. 118, 20 Pac. 297, it was held that rulings of the court while impaneling the jury were, if erroneous, not irregularities, but errors of law occurring at the trial.

In Emeric v. Alvarado, 64 Cal. 529, 2 Pac. 418, it was said that an appearance for a minor defendant by a guardian *ad litem* without authority of an order of the court, was an irregularity under this section.

and undertook to and did in a very irregular way control the conduct of the case on the side of the defendant. The trial judge virtually threatened to prejudge the testimony of the defendant as a witness, and intimated that unless the daughter was withdrawn as a witness he would regard the fact of her having contradicted the mother in the father's interest as a matter seriously discrediting the latter's testimony."[4]

In a still later case, Angellotti, J., thus defined the term *irregularity* as used in the section under consideration:

"The language of the statute is sufficiently broad to include any departure by the court from the due and orderly method of disposition of an action by which the substantial rights of a party have been materially affected, where such departure is not evidenced by a ruling or order that may be made the subject of an exception."[5]

In the same case it was suggested that "personal misconduct" might be such an irregularity; as where it is made to appear that a judge has received a bribe, or is guilty of favoritism toward one of the parties; or where the use of intoxicants has rendered him incapable of properly exercising his judgment. At the same time it was "freely conceded that the 'personal habits, conduct, deportment, or statements of the judge,' having no relation to or effect upon the disposition of the cause, are not the proper subject of complaint upon a motion for a new trial. The question always is as to whether the acts were of such a nature, and done under such circumstances, as to afford reasonable grounds for the conclusion that by reason thereof the defeated party has not had a fair and impartial trial."

In the case of Hopkins v. Kitts,[6] it was held that erroneous remarks of a judge during the trial constituted an irregularity, and not an error of law.

[4] Pratt v. Pratt, 141 Cal. 247, 74 Pac. 742.

[5] Gay v. Torrance, 145 Cal. 144, 78 Pac. 540. And see Woods v. Jensen, 130 Cal. 200, 62 Pac. 473, where the court say: "It is quite evident that this ground for a new trial is intended to refer to matters which an appellant cannot fully present by exceptions taken during the progress of the trial, and which therefore must appear by affidavit."

See, also, Seehorn v. Big Meadows & B. W. R. Co., 60 Cal. 240, where the court, in response to a contention that an abuse of discretion was an irregularity, held otherwise on the ground that it could be presented by bill of exceptions.

[6] 37 Mont. 26, 94 Pac. 201.

§ 30. The Court must be Held at the Appointed Time.

1. *Proceedings Out of Term Time.*—The early cases were to the effect that a judgment could only be entered in term,[1] and that if entered in vacation it was void, and could be attacked collaterally.[2] These cases, however, ignored the express provisions of the statute,[3] and were afterward overruled; and it became well settled that findings could be filed, and a judgment thereon entered in or out of term time.[4] Nevertheless it was irregular to try a cause in vacation unless by consent of the parties. In the case of Bates v. Gage,[5] where the trial was had and the decision made and the judgment entered out of term, it was held that the proceedings were absolutely void, notwithstanding the written consent of the parties. It would seem, however, that the decision in this case, in so far as it is to the effect that the matter could not be cured by consent, was erroneous. At all events it would not hold under the system of express findings, for under that system the filing of the findings is the decision of the cause;[6] and it has long been settled that the findings may be filed and the judgment entered thereon in vacation.[7] And the entire absence of a trial does not render void a decision and judgment which are otherwise regular. In the language of Wallace, C. J., in Ex parte Bennett:[8] "Had the court itself rendered the judgment in question in open session at a regular term, without trial, without proof, and even without submission of the cause for decision, such judgment, however erroneous, would not be held void upon a mere collateral attack. To maintain that it would, would be to ignore the obvious distinction between a total want of authority upon the one hand, and the erroneous exercise of conceded authority upon the other." The general principle here stated that the absence of a trial does not

[1] Smith v. Chichester, 1 Cal. 409; Coffinberry v. Horrill, 5 Cal. 493; Peabody v. Phelps, 7 Cal. 53; Domingues v. Domingues, 4 Cal. 186. As to special terms, see Norwood v. Kenfield, 34 Cal. 329; People v. Riley, 16 Cal. 186; Keller v. Chapman, 34 Cal. 635.

[2] Wicks v. Ludwig, 9 Cal. 173.

[3] Section 144 of the act of 1851 provides, that "a judgment is the final determination of the rights of the parties in the action or proceeding, *and may be entered in term or vacation.*" Laws of 1851, p. 78. See note 4, section 16, *ante*, as to various statutory provisions as to entry of judgment.

[4] McMillan v. Richards, 12 Cal. 467; Hutchinson v. Bours, 13 Cal. 50; People v. Jones, 20 Cal. 50; Ex parte Bennett, 44 Cal. 84.

[5] 40 Cal. 183.

[6] See section 246, *post*, and note 7 to section 243, *post*.

[7] People v. Jones, 20 Cal. 50; and see cases cited in note 4 above.

[8] 44 Cal. 84; and look at City of San Jose v. Shaw, 45 Cal. 178.

render void a judgment and decision which are otherwise regular is undoubtedly correct; and as above stated, it is perfectly regular to file the findings (i. e., to decide the cause) and enter judgment thereon in vacation. Now if the cause can be decided, and the judgment thereon can be entered in vacation, and the want of a trial does not go to the extent of rendering the decision and judgment void, what is the step which ought to have taken place in term, failing which the entire proceedings are void? For the foregoing reasons it is believed that the case of Bates v. Gage, so far as it holds that the consent of the parties did not cure the objection that the proceedings were not in term, was erroneous. But so far as it holds that it is irregular to try a cause out of term, the decision is undoubtedly correct.[9]

In the states of California and Washington, by constitutional and statutory provisions couched in almost identical phraseology, terms of court have been abolished.[9a] In the first-named state, the Constitution of 1879 provides, with reference to the superior courts, that "they shall be always open (legal holidays and nonjudicial

[9] See, also, People v. Ah Ying, 42 Cal. 18.

[9a] As to terms of court in other jurisdictions, see section 1227, Revised Statutes of Arizona (section 18, Courts); section 435, Mills' Annotated Code of Colorado; section 3831, Revised Codes of Idaho; section 6272 et seq., Revised Codes of Montana; sections 2521, 2522, Cutting's Compiled Laws of Nevada (but see section 2521); section 908 et seq., Compiled Laws of New Mexico; sections 440, 442, 469 et seq., Revised Codes of North Dakota (Political Code); sections 1961, 1968, and 2007, Compiled Laws of Oklahoma; sections 902, 925, 2803 et seq., Lord's Oregon Laws; sections 22, 33, and 34, Code of Civil Procedure, and section 15, Probate Code of South Dakota; sections 658 and 672 et seq., Compiled Laws of Utah; section 908 et seq., Compiled Statutes of Wyoming.

In Norton v. Atchison T. & S. F. Co., 97 Cal. 388, 33 Am. St. Rep. 198, 30 Pac. 585, 32 Pac. 452, it was specifically held that terms of court did not exist. In Skagit Railway & Lbr. Co. v. Cole, 1 Wash. 330, 26 Pac. 535, in response to a contention that the cause had not been filed in time under section 460 of the code requiring appeals to be filed fifteen days before the first day of the term (see Haas v. Gaddis, 1 Wash. 89, 23 Pac. 1010), the supreme court, basing its conclusion upon provisions of the Constitution identical with the California provisions referred to in the text, held that there were no longer terms of court in the former sense, and the time for filing appeals must be governed by rules of the court.

See, also, as to superior courts, Edwards v. Territory, 1 Wash. Ter. 195, where it was held that the court was always open for the purpose of a cause submitted to a jury.

Also Krutz v. Batts, 18 Wash. 460, 51 Pac. 1054, where it was held that while terms of court were no longer in existence, a provision of the code (section 508, Code of Civil Procedure), providing for confirmation of sales of real estate "at the term next following," etc., was not, for that reason, nugatory, for the word "term" was said to be there used in the sense of session, which existed.

In State v. McHatton, 10 Mont. 370, 25 Pac. 1046, construing section

days excepted)."[10] The same language is embodied in the Code of Civil Procedure,[11] which further provides, that "adjournments from day to day, or from time to time, are to be construed as recesses in the session, and shall not prevent the court from sitting at any time."[12] Section 133 of the same code provides that "courts of justice may be held and judicial business transacted on any day, except as provided in the next section." This section remains unchanged since it was amended in 1880[13] to conform to the constitutional prohibition of article 6, section 5, of the Constitution of 1879, above quoted. Section 134, "the next section," however, has undergone constant change since 1880.[14] It was not until 1893 that the proviso as to the superior courts always being open for business was added, thirteen years after the adoption of the amendment of 1880, whereby the section was rendered consistent with the recently adopted Constitution; and it was fourteen years afterward stricken out. In the course of more than a quarter of a century of patching it is not surprising that the imperfections and self-contradictions of the section should have ultimately become so glaring "as to call loudly for a thorough revision," and this it received in 1907.[15] The section is now as follows:

17, article 8, Constitution of that state, in connection with a proposition that a judgment might be vacated, as being within the term of court, Chief Justice Blake said, for the court, "that a district court without terms is a legal impossibility, and that the Constitution and statutes recognized and sanctioned that proposition"; but in the subsequent case of Whitbeck v. Montana Cent. R. Co., 21 Mont. 102, 52 Pac. 1098, following the California decisions of In re Gannon, 69 Cal. 541, 11 Pac. 240, and others to the same effect, held that "it is very plain to us that under the present statutes there is no term of court in any judicial district of the state where a single county is a district by itself. Such district courts are in recess when not actually engaged in business, and they are in session when in fact holding court at the county seat and engaged in business."

[10] Article 6, section 5 (California); article 4, section 2 (Washington).

[11] Section 73, Code of Civil Procedure of California; section 18, Rem. & Bal. Code of Washington. As to the supreme court, see section 47, Code of Civil Procedure of California; section 4, Rem. & Bal. Code of Washington.

[12] Section 74, Code of Civil Procedure of California; section 26, Rem. & Bal. Code of Washington. As to supreme court, see section 48, California Code of Civil Procedure; section 5, Rem. & Bal. Code of Washington.

[13] Statutes of 1880, p. 37.

[14] See Statutes of 1880, p. 38; Statutes of 1889, p. 46; Statutes of 1893, p. 186; Statutes of 1897, p. 15; and Statutes of 1907, p. 681.

[15] Statutes of 1907, p. 681. See, also, sections 1274 and 2711, Revised Statutes of Arizona; sections 415 and 416, Mills' Annotated Code of Colorado; section 3866, Revised Codes of Idaho; section 6296, Revised Codes of Montana; section 2550, Cutting's Compiled Laws of Nevada; section 6750, Revised Codes of North Dakota; section 971, Lord's Oregon Laws; sections 700 and 701, Compiled Laws of Utah; section 64, Rem. & Bal. Code (section 4712, Bal. Code) of Washington. And see In re Smith, 152 Cal. 566, 93 Pac. 191.

"134. No court, other than the supreme court, must be open for the transaction of judicial business on any of the holidays mentioned in section ten, except for the following purposes:

"1. To give, upon their request, instructions to jury when deliberating upon their verdict;

"2. To receive a verdict or discharge a jury;

"3. For the exercise of the powers of a magistrate in a criminal action, or in a proceeding of a criminal nature.

"Injunctions and writs of prohibition may be issued and served on any day."

This section has been construed as a qualification of section 133,[16] and the two, together with the various other provisions of the code relative to the transaction of business on holidays and Sundays, comprise the legislative expression as to such matters within the limitations of the constitution.

The constitutional provision that superior courts "shall be always open (legal holidays and nonjudicial days excepted)" has been construed, not as a limitation upon the courts, but as a prohibition upon the legislature against the enactment of laws establishing terms of courts, during which only judicial business could be transacted. In other words, the Constitution does not prohibit, in terms, the transaction of judicial business on holidays, but leaves the legislature at liberty to allow or disallow such transaction of all or any class of judicial business on legal holidays.[17] To hold otherwise would, in effect, concede to the legislative branch of the government the right to say when and for how long courts might be open for the transaction of judicial business, and this, in turn, would be to concede to the legislature the power to discontinue the holding of courts in any event. Such construction would be obnoxious to the independent character of the judicial branch of the government, and cannot, of course, be entertained or tolerated for a moment. But even if this were not so, the construction would be the same under rules of logic and good reason.[18]

In recognition of this constitutional limitation, and of the constitutional exception as to injunctions and writs of prohibition, the legislature has thus prescribed (in section 134, Code of Civil

[16] See Reclamation District v. Hamilton, 112 Cal. 603, 44 Pac. 1074.

[17] See People v. Soto, 65 Cal. 621, 4 Pac. 664; In re Smith, 152 Cal. 566, 93 Pac. 191.

[18] In re Smith, 152 Cal. 566, 95 Pac. 191.

Procedure) what judicial business may be transacted on "legal holidays and nonjudicial days," and has attempted no further restriction upon the courts, as to the days upon which they might be open for the transaction of public business, beyond the provisions of the general laws as to such holidays and nonjudicial days. Courts cannot be open for any purpose other than those there outlined, and any judicial act not included in the exceptions specified done or attempted on a legal holiday or nonjudicial day is void. Proceedings on other days, however irregular, are not void.

Sunday was always, at common law, *dies non juridicus*, and judicial acts done on that day were void. But except as to such acts the common law makes no distinction between Sunday and any other day. Thus in MacKelly's Case, 5 Coke, 120, part 9. folio 66a, it was said that the rule is that no judicial act ought to be done on that day (Sunday), but ministerial acts may be lawfully executed, "for otherwise peradventure they can never be executed, and God permits things of necessity to be done on that day, and Christ says, in his gospel, *Bonum est benefacere in sabatho.*" Sunday was and is the "nonjudicial" day of the common law. To this day statutory enactment has added a large number of others, called "holidays," and invested such days with the judicial character of the common-law Sunday, and the courts have uniformly maintained as to such days the distinction between a judicial and a ministerial act.[19]

[19] Reclamation Dist. v. Hamilton, 112 Cal. 611, 44 Pac. 1074; Heisen v. Smith, 138 Cal. 216, 71 Pac. 180; People v. Loyalton, 147 Cal. 774, 82 Pac. 620; People v. Heacock, 10 Cal. App. 450, 102 Pac. 543. See, also, State v. Straub, 16 Wash. 111, 47 Pac. 227, where it was held that section 6, article 4, of the Constitution, applied only to judicial and not to ministerial acts, and hence that a verdict was not void because received and recorded on Sunday. The principle involved was thus expressed:

"The next error assigned is that the verdict and sentence are void because the verdict was received and recorded on a nonjudicial day, *viz.*, Sunday. It is admitted by the appellant that the weight of authority is to the effect that the receiving of a verdict is not a judicial, but merely a ministerial, act, which may be done on a nonjudicial day. It is also conceded that we have a statute in this state expressly authorizing courts to receive verdicts on nonjudicial days. But it is contended that section 6 of article 4 of the Constitution, which prescribes the jurisdiction of the superior courts, and especially that portion of the section which provides that 'they (such courts) shall always be open except on nonjudicial days,' and that 'injunctions and writs of prohibition and *habeas corpus* may be issued and served on legal holidays and nonjudicial days,' excludes the idea that anything else can be done by the court on nonjudicial days; and that the court cannot be open on nonjudicial days except in matters of

Section 10 of the Code of Civil Procedure provides, among other things, that holidays, within the meaning of the code, are ". . . . and every day appointed by the President of the United States, or by the governor of this state as a public fast, thanksgiving or holiday," etc. The question whether the legislature may empower the governor of the state or the President, to establish a holiday by mere proclamation, has not been decided by our courts. Such power is held to be in doubt.[19a]

The same section contains a provision establishing "every Saturday from twelve o'clock noon to twelve o'clock midnight," as a holiday. The district court of appeals of the third district, without construing the effect of this provision upon the progress of criminal trials, suggested in a recent case that it would be safer to treat Saturday afternoon as a holiday until the question shall have been determined.[20]

injunction, prohibition, and *habeas corpus*. We do not think that the constitutional provision is susceptible of this construction; but think, as contended by the respondent, that the provision that courts shall always be open, except on nonjudicial days in nowise affects the rule, which would obtain in the absence of any such provision, that they could properly be open on such days for the performance of nonjudicial acts, such as the reception of verdicts. The object of the Constitution undoubtedly was not to affect the law which already existed in relation to the disability of courts to transact business on nonjudicial days, but to make a provision that the courts should always be open for business except on nonjudicial days."

See also, State v. Lewis, 31 Wash. 515, 72 Pac. 121, where it was held that the court might discharge a jury in a criminal case on a holiday. But see Ex parte Tice, 32 Or. 179, 49 Pac. 1038, where it was held that the court could not discharge a jury on Sunday in consequence of their failure to agree, nor could the defendant consent. The discharge in such a case on Sunday was held to be a bar to further proceedings. See, also, to same effect, State v. Turpin, 54 Or. 367, 103 Pac. 438.

See, also, State v. California Min. Co., 13 Nev. 203, where it was held that the execution of an undertaking on appeal on Sunday was valid. The provisions of the Nevada statute (see note 15, *supra*), authorizing the court to receive a verdict and discharge the jury, was held, in State v. Rover, 13 Nev. 17, to carry with it the authority to have the verdict recorded, and to make such other orders as are necessary to carry the authority into effect. The Nevada statute provides also for the issuance of a writ of attachment, in addition to injunctions, writs of prohibition, *habeas corpus*, etc., and in Levy v. Elliott, 14 Nev. 435, it was held that suit might be commenced and the writ served on Sunday when the required affidavit is made.

See, also, Glendenning v. McNutt, 1 Idaho, 592, Havens v. Stiles, 8 Idaho, 250, 67 Pac. 919, and State v. Gilbert, 8 Idaho, 346, 69 Pac. 62, as to the doing of ministerial acts on Sunday and nonjudicial days.

[19a] See In re Smith, 152 Cal. 566, 93 Pac. 191.

[20] People v. Heacock, 10 Cal. App. 450, 102 Pac. 543. It is to be noted that the Saturday half-holiday amendment to section 10, here referred to, specifically excepts from its operation "the issuance, filing, service, execution or recording of any legal process or written instrument."

The supreme court in a recent case held the amendment of 1907 to section 135, Code of Civil Procedure, which provides that the courts shall be open for the transaction of all judicial business notwithstanding the special holidays established by the governor, "except the trial of an action or the rendition of a judgment based upon a contract, expressed or implied, for the direct payment of money," unconstitutional, as conferring a special privilege upon a class, not founded upon constitutional, rational or legal distinctions.[21]

2. *Proceedings at Irregular Times.*—Although under the law as it stands at present there are no terms in the old sense, yet there are some restrictions upon the courts. Section 73 of the code, as amended in 1880, provides that the superior courts "shall hold regular sessions commencing on the first Mondays of January, April, July, and October, and special sessions at such other times as may be prescribed by the judge or judges thereof; *provided*, that in the city and county of San Francisco the presiding judge shall prescribe the times of holding such special sesisons." This section does not provide how long the regular session shall continue, and therefore the judge may hold such "special sessions" as he pleases. But it would, undoubtedly, be irregular to exercise this power in such a way as to mislead litigants and their counsel, and practically to deprive them of an opportunity to be heard. If, for example, a judge should adjourn his court for the session, and then undertake to hold a special session, without any notice thereof, and without any knowledge by the parties or their counsel as to his proceedings, there can be no question but that a new trial ought to be granted for irregularity of the court. So if a particular case should be adjourned for the session, although the court could set aside the order upon reasonable notice to the parties, it ought not to do so without such notice; and if it should do so, its judgment would undoubtedly be irregular and subject to be set aside upon a proper motion. Such notice would have to be given of the change of program as, under all the circumstances of the case, is reasonable.

§ 31. The Court must be Held at the Appointed Place.

1. *A Superior Court must be Held at Some Place Within the County.*—It was provided by the old Constitution that the state

[21] Diepenbrock v. Superior Court, 153 Cal. 597, 95 Pac. 1121.

should be divided into districts, "in each of which there shall be a district court."[1] And the statute provided that "there must be a district court held in each of the judicial districts."[2] In view of these provisions, a district court could not be held outside of its district. And although one district judge could in certain cases hold court for another, he could not hold a court for that district while its own judge was holding court there.[3] And the district court for one county of a district was a different tribunal from the district court of another county of the same district.[4]

The Constitution of 1879 provides that "there shall be in each of the organized counties or cities and counties of the state a superior court,"[5] etc., and the same provision is in the code.[6] In view of this provision the judge of a superior court could not hold *his* court outside of the county, although he can in certain cases hold court for the judge of a county other than his own.[7]

What is said above applies to California, but similar provisions are to be found in the constitutions and statutes of most of the other states.

2. *The Court must be Held at Some Fixed Place Within the County.*—A suitable courtroom must be provided by the supervisors of the county. If they neglect to do so, the judge may direct his sheriff to provide one. In this regard the Code of Civil Procedure contains the following provision:

"Sec. 144. If suitable rooms for holding the superior courts and the chambers of the judges of said courts are not provided in any county by the supervisors thereof, together with the attendants, furniture, fuel, lights and stationery, sufficient for the transaction of business, the courts, or the judge or judges thereof, may direct the sheriff of the county to provide such rooms, attendants, furniture, fuel, lights and stationery; and the expenses incurred, certified by the judge or judges to be correct, are a charge against the county treasury, and must be paid out of the general fund thereof."[7a]

[1] Article 6, section 5 (California).
[2] Code of Civil Procedure of California, section 55, as it stood before 1880.
[3] People v. O'Neil, 47 Cal. 109.
[4] Bennett v. Southard, 35 Cal. 688.
[5] Article 6, section 6 (California).
[6] California Code of Civil Procedure, section 65.
[7] Constitution of 1879, article 6, section 8.
[7a] This section of the California code has its counterpart in the codes of most of the other states. See sections 1219 and 1227, Revised Statutes of Arizona; section 435, Mills' Annotated Code of Colorado; section 3872, Revised Codes of Idaho; section 6302,

The power given by this section applies not only in the first instance, but where the place first provided becomes, from any cause, unsuitable. This does not mean that, in a case where the supervisors have in course of preparation the necessary facilities for holding court properly, a judge may interfere with such preparation on the ground that such facilities are inadequate or unwholesome.[7b] Nor can the judge select his own room in the county courthouse, but he must accept that assigned him by the supervisors.[7c] If, however, the room or place so provided prove unsuitable or inadequate or unsanitary, he may order the sheriff to provide proper quarters elsewhere, if the supervisors neglect or refuse to provide another place, or render the former place suitable. The court cannot interfere with the supervisors in advance,[7d] but the power to change inadequate, unsuitable, or unsanitary quarters is expressly given by the code, in section 144, above quoted.

In the event of war, pestilence, etc., the place of holding court may be changed in the manner prescribed in section 142, as follows:

"Sec. 142. The judge or judges authorized to hold or preside at a court appointed to be held at a particular place in a city and county, county, city, or town, may, by an order filed with the city and county or county clerk, and published as he or they may prescribe, direct that the court may be held or continued at any

Revised Codes of Montana (section 142, Code of Civil Procedure); section 914, Compiled Laws of New Mexico; section 976, Lord's Oregon Laws; section 708, Compiled Laws of Utah; sections 3 and 68, Rem. & Bal. Code of Washington (sections 4652 and 4716, Bal. Code). This section does not authorize the court to compel payment of such charge. Its power is measured by the terms of the section. That is, it is the duty of the judge to "certify" the demand thus created. In other words, to audit the same, and when so audited it is not necessary for the board of supervisors to audit it. When so certified it is the duty of the treasurer to pay it out of the general fund of the county, and he may be compelled to do so by a writ of mandate issued in the regular manner. But when so audited the power of the judge is at an end. He cannot punish the auditor for contempt for refusing to pay the demand. He is not an officer of the court, nor a party to the proceedings, and his refusal to obey an order of the court to pay the demand, made without authority, is not contempt, and if he is imprisoned for contempt he will be released on *habeas corpus*. Ex parte Widber, 91 Cal. 367, 27 Pac. 733. See, also, State v. Hunter, 4 Wash. 712, 30 Pac. 105; Barnett v. Ashmore, 5 Wash. 163, 31 Pac. 466.

[7b] Los Angeles County v. Superior Court, 93 Cal. 380, 28 Pac. 1062. Also Barnett v. Ashmore, 5 Wash. 163, 31 Pac. 466.

[7c] San Joaquin County v. Budd, 96 Cal. 47, 30 Pac. 967.

[7d] Los Angeles County v. Superior Court, 93 Cal. 381, 28 Pac. 1062; San Joaquin County v. Budd, 96 Cal. 47, 30 Pac. 967.

other place in the city and county, county, or town than that appointed, when war, insurrection, pestilence, or other public calamity, or the danger thereof, or the destruction or danger of the building appointed for holding the court may render it necessary; and may in the same manner revoke the order and, in his or their discretion, appoint another place in the same city and county, county, city, or town for holding the court."[76]

But whatever may be the mode in which the place at which the court shall be held is determined, it must be held at such place, and not elsewhere. And where the place is changed, reasonable notice of the change must be given. In the cases mentioned in section 142, above quoted, it is provided that the order directing the change must be published as the judge may direct. There is no express provision requiring notice to be given where a place is provided or changed under section 144. But it cannot be doubted but that reasonable notice must be given. And if it were not given, and a party was misled thereby to his prejudice, a new trial would have to be granted, on proper application, as for an irregularity of the court.

3. *Power of the Judge at Chambers.*—A judge usually has a room at which he transacts such judicial business as may be transacted out of court. But he is at liberty to transact such business at any place he may happen to be. For the purpose of such business, therefore, any place outside of court is "chambers."[77] A judge at chambers may exercise such powers as are expressly conferred upon him by statute, and no others.[8] But the power

[76] Section 142, Code of Civil Procedure of California; section 3870, Revised Codes of Idaho; section 6300, Revised Codes of Montana (section 140, Code of Civil Procedure); section 975, Lord's Oregon Laws; section 707, Compiled Laws of Utah.

[77] In re Lux's Estate, 100 Cal. 593, 35 Pac. 341.

[8] Larco v. Casaneuava, 30 Cal. 566; Bond v. Pacheco, 30 Cal. 530. Section 176, California Code of Civil Procedure. As to what powers are expressly conferred, see sections 1229 and 1230, Revised Statutes of Arizona; sections 165, 166, 1108 and 1305, Code of Civil Procedure of California; section 436, Mills' Annotated Code of Colorado; sections 3890 et seq., 5000 and 5303, Revised Codes of Idaho; sections 6314 and 7392, Revised Codes of Montana (sections 171 and 2327, Code of Civil Procedure); sections 2523 and 2796, Cutting's Compiled Laws of Nevada; sections 958 and 969, Lord's Oregon Laws; sections 680, 682, 712, 3324, and 3777, Compiled Laws of Utah; sections 15, 1280, and 1414, Rem. & Bal. Code of Washington (sections 4663, 6077, and 6166, Bal. Code); sections 5401 and 5402, Compiled Statutes of Wyoming. Sections 3689 and 3746, Cutting's Compiled Laws of Nevada, provide for the issuance of various extraordinary writs in vacation; and sections 2774 and 2775, Compiled Laws of New Mexico, provide that for the purpose of such

to make an order out of court includes power to perform any act which is merely preliminary to such ultimate act.[9] An order made at chambers which should have been made in court is void,[10] and may be attacked collaterally.[11]

§ 32. A Judge must not Act as Such in a Case in Which He is Disqualified.—Section 170 of the Code of Civil Procedure prescribes the various grounds upon which the disqualification of justices, judges and justices of the peace is made to rest, and a trial judge who undertakes, notwithstanding disqualification under the provisions of that section, to preside at the trial of a cause in which he is disqualified, is guilty of an irregularity of the court for which a new trial will be granted, if the objection is properly raised and presented. The section reads:

"Sec. 170. No justice, judge, or justice of the peace shall sit or act as such in any action or proceeding,—

"1. To which he is a party, or in which he is interested;

"2. When he is related to either party, or to an officer of a corporation which is a party, or to an attorney, counsel, or agent of either party, by consanguinity or affinity, within the third degree, computed according to the rules of law; provided, however, that if the parties to the action, or the executor, or administrator of the estate, or the guardian of the minor or incompetent person, or the receiver, or the commissioner, or the referee, or the attorney for a party in all special proceedings of a civil or criminal nature, shall sign and file in the action or matter, a stipulation in writing waiving the disqualification herein, the judge or court

writs the courts shall be deemed to be always open. As to constitutionality of statutes conferring power of judges at chambers, see Flint v. Wilson, 36 Cal. 24, 28. Also Washington & I. R. Co. v. Coeur D'Alene R. & N. Co., 3 Idaho, 263, 28 Pac. 394, where it was held that condemnation proceedings could not be held in chambers; and Gaffney v. Piper, 5 Idaho, 490, 51 Pac. 99, where it was held that an order for attorney's fees against an insolvent estate could not properly be made in chambers. See, also, Gans v. Steele, 7 Idaho, 143, 61 Pac. 286; First Nat. Bank v. C. Bunting & Co., 7 Idaho, 387, 63 Pac. 694; Farleigh v. Kelly, 24 Mont. 369, 62 Pac. 496, 685; State v. Loud, 24 Mont. 428, 62 Pac. 497; State v. Justice Court, 31 Mont. 258, 78 Pac. 498; Murne v. Schwabacher, 2 Wash. Ter. 130, 3 Pac. 899; Kalb v. German Sav. etc. Co., 25 Wash. 349, 87 Am. St. Rep. 757, 65 Pac. 559.

[9] Warder v. Elkins, 38 Cal. 439.

[10] Bond v. Pacheco, 30 Cal. 530, 533; Larco v. Casaneuava, 30 Cal. 564; Loomis v. Andrews, 49 Cal. 239. But look at San Jose v. Shaw, 45 Cal. 179; Agard v. Valencia, 39 Cal. 292, 297.

[11] Turner v. McIlhany, 6 Cal. 287.

may proceed with the trial or hearing with the same legal effect as if no such disqualification existed.

"3. When, in the action or proceeding, or in any previous action or proceeding involving any of the same issues, he has been attorney or counsel for either party; or when he has given advice to either party upon any matter involved in the action or proceeding;

"4. When it appears from the affidavit or affidavits on file that either party cannot have a fair and impartial trial before any judge of a court of record about to try the case by reason of the prejudice or bias of such judge, said judge shall forthwith secure the services of some other judge, of the same or another county, to preside at the trial of said action or proceeding; provided, that in an action in the superior court of a county, or of a city and county, having more than one department, said action shall be transferred to another department thereof, and tried therein in the same manner as though originally assigned to such department. The affidavit or affidavits alleging the disqualification of a judge, must be filed and served upon the adverse party or the attorney, of such party at least one day before the day set for trial of such action or proceeding; provided, counter-affidavits may be filed at least one day thereafter, or such further time as the court may extend the time for filing such counter-affidavits, not exceeding five days, and for this purpose the court may continue the trial; and in no cause or proceeding can more than one such change of judges be had. But the provisions of this section shall not apply to the arrangement of the calendar, or to the regulation of the order of business, nor the power of transferring the action or proceeding to some other court, or the hearing upon such affidavits and counter-affidavits."[1]

[1] This is from the California provision. Similar provisions are to be found in the other states. See sections 1232 and 1374, Revised Statutes of Arizona; section 30, Mills' Annotated Code of Colorado; section 3900, Revised Codes of Idaho; section 6315, Revised Codes of Montana; section 2545, Cutting's Compiled Laws of Nevada; sections 7045, 7894, 7900 and 7901, Revised Codes of North Dakota; sections 45, 397, and 956, Lord's Oregon Laws; sections 13 and 28, Probate Code of South Dakota; sections 692, 693, and 694, Compiled Laws of Utah; sections 54 and 2019, Rem. & Bal. Code of Washington (sections 4697 and 6795, Bal. Code); section 5142, Compiled Statutes of Wyoming.

These sections do not all specify bias and prejudice as a disqualification. The Idaho code omits it, having been adopted prior to the Constitution of that state, which does, however, specify it as a disqualification. See section 18, article 1; and Day v. Day, 12 Idaho, 556, 86 Pac.,

This section has been frequently amended since its adoption into the code from the old Practice Act.[1a] Subdivision 1 is unchanged. Subdivision 2 has had added the clause with reference to "corporation, attorney, counsel or agent," and the entire proviso. Subdivision 3 has been considerably amplified. The provision as to previous actions and proceedings involving the same issues, and the clause with reference to advice given as attorney, have been added. Subdivision 4, except as to the provision with reference to the arrangement of the calendar, the regulation of the order of business and the power of transferring the action to some other court, is wholly new. It was not a part of the original section, and was not added until 1897. This subdivision is an illustration of the fact that the legislature, in enacting amendments to dependent clauses, sometimes overlooks the phraseology of the main clause of the section so amended. In reading the section, which purports to specify the various disqualifications of judicial officers, when we come to subdivision 4 we naturally expect to find a definition of another disqualification. On examination, however, we discover that its character as a dependent clause is only apparent, and not real, and that it is in fact a separate provision, defining a case where a presiding judge or justice may or may not be disqualified, and leaving the question wholly to his own discretion.[1b]

Under this section there can be no doubt but that if a judge should act in a case in which he is disqualified, a new trial would have to be granted;[2] and it would be no answer to the objection that the decision was correct,[3] or that the appellant had consented to the trial before the judge,[4] for the rule is founded in consideration of public policy. A judge who is disqualified should, on his own motion, decline to act, whether the parties object or not.[5]

The degrees of consanguinity are to be computed according to the rules of the common law.[6]

531, 10 Ann. Cas. 260. In general, however, the provisions of the California section, above quoted, are to be found in the codes of the other states.

[1a] It was amended in 1880 (Statutes of 1880, p. 42), 1893 (Statutes of 1893, p. 234), 1897 (Statutes of 1897, p. 287), and in 1905 (Statutes of 1905, p. 467).

[1b] See In re Miner's Estate, 143 Cal. 194, 76 Pac. 968.

[2] See generally People v. De La Guerra, 24 Cal. 77; In re White's Estate, 37 Cal. 190; Tracy v. Colby, 55 Cal. 67.

[3] Estate of White, 37 Cal. 192.

[4] Oakley v. Aspinwall, 3 N. Y. 547.

[5] People v. De La Guerra, 24 Cal. 77.

[6] This was held in People v. De La Guerra, 24 Cal. 76. At that time, as stated in People v. De La Guerra, the degrees of consanguinity were.

Until the adoption of subdivision 4 of this section a judge was not disqualified from acting because of the exhibition of partisan feeling, or because he is biased in favor of one side. This was held in McCauley v. Weller,[7] in which case the court, per Terry, C. J., said: "The law establishes a different rule for determining the qualifications of judges from that applied to jurors. The reason of this distinction is obvious. The province of the jury is to determine from the evidence the issues of fact presented by the parties; and their decision is final in all cases where there is a conflict of testimony. Therefore, the expression of an unqualified opinion on the merits of a controversy, which evinces such a form of mind as renders him less capable to weigh the evidence with entire impartiality, is sufficient to exclude a juror. The province of a judge is to decide such questions of law as may arise in the progress of a trial. His decisions on these points are not final; and if erroneous, the party has his remedy by bill of exceptions and appeal."

The above reasoning does not seem satisfactory; for the majority of civil cases are tried by the court sitting without a jury, and the decision of the judge as to the facts stands upon the same footing as the verdict of a jury. And even in cases tried by a jury, a large number of important questions rest in the discretion of the judge, and the exercise of such discretion is rarely interfered with. The true reason of the rule, in McCauley v. Weller, that bias does not disqualify a judge, is that such ground is not specified in the statute as a ground of disqualification.[8] The rule was followed in other cases.[9]

Since the rule itself has disappeared by reason of the adoption of subdivision 4, above quoted, it is no longer needful to inquire into its reasons; except, perhaps, for purposes of study and com-

for the purposes of succession, computed according to the rules of the civil law, as they are at present. Sections 1389, 1390, 1391, 1392, 1393, Civil Code. The rule in People v. De La Guerra, therefore, applies at the present time unless it is changed by the words "computed according to the rules of law," in subdivision 2 of section 170, above quoted. These words, however, do not seem definite enough to change the rule previously established. But the question is not altogether free from doubt.

[7] 12 Cal. 500.

[8] This ground was adverted to in McCauley v. Weller, 12 Cal. 524.

[9] People v. Williams, 24 Cal. 31; People v. Shuler, 28 Cal. 490, 495; People v. Mahoney, 18 Cal. 180. Also, In re Guerrero, 69 Cal. 88, 10 Pac. 261; Bulwer Con. Min. Co. v. Standard Con. Min. Co., 83 Cal. 617, 23 Pac. 1109; In re Jones, 103 Cal. 398, 37 Pac. 385.

parison. Under that subdivision, as now framed, bias or prejudice, once properly shown, disqualifies a judge from trying a cause.

The statute, of course, applies to all judicial officers alike; that is to say, to justices, judges and justices of the peace. It is not such a novel modification of the rule of the common law as that we are left entirely without precedent in finding the proper construction for it. Similar statutes have been in force in other states for a long time, and even in California a somewhat similiar provision with reference to justices of the peace has long been on our statute books.[9a] Under that provision, however, no discretion was left to the justice of the peace, who must transfer the cause upon the filing of the proper affidavits.[9b] It appears to have been the purpose of the legislature in this provision to relieve the justice of the delicate and trying duty of passing upon the question of his own bias or prejudice. It is otherwise with the provision under consideration, which gives to the judge himself, whose bias or prejudice is brought in question, not only the power, but the duty, of determining the same.

But it must be determined solely upon the affidavits and counter-affidavits submitted.[9c] The judge's belief upon the subject will

[9a] Subdivision 2 of section 833, Code of Civil Procedure, formerly section 582 of the Practice Act.

[9b] People v. Hubbard, 22 Cal. 34. Also, Ritzman v. Burnham, 114 Cal. 522, 46 Pac. 379. Compare People v. Compton, 123 Cal. 403, 56 Pac. 44, and cases there cited.

[9c] In People v. Compton, 123 Cal. 403, 56 Pac. 44, regarded as the leading case upon this point, the court said:

"But one thing at least is certainly clear, that the provision contemplates that the question shall be determined upon affidavits, and that the facts found are to be found from the affidavits, and that the judge is neither to be called upon nor to be permitted to use his own knowledge of the matter. If in fact he knows himself not to be disqualified, it is not for him to deny the motion if the contrary 'appears from the affidavit or affidavits on file.' In this case the defendant brought himself within the letter and the meaning of the provision. He made it appear by the facts set up in his affidavit (however ill-founded the affidavit may have been in truth) that the judge was biased and prejudiced against him. No counter-affidavits were filed. There was, then, not even a conflict upon the facts. The duty of the trial judge was plain. The defendant having made it appear by affidavit in conformity with the requirements of the statute that the judge was biased or prejudiced against him, his motion should have been granted. (McGoon v. Little, 7 Ill. 42; Witter v. Taylor, 7 Ind. 110; Rines v. Boyd, 7 Wis. 155; Walsh v. Ray, 38 Ill. 30; Cass v. State, 2 Greene (Iowa), 353; Griffin v. Leslie, 20 Md. 15; Mix v. Kepner, 81 Mo. 93.)"

See, also, Talbot v. Pirkey, 139 Cal. 326, 73 Pac. 858; Hoyt v. Zumwalt, 149 Cal. 381, 86 Pac. 600; Swan v. Talbot, 152 Cal. 142, 94 Pac. 238, 17 L. R. A., N. S., 1066n.

See, also, People v. Findley, 132 Cal. 301, 64 Pac. 472; and compare Higgins v. San Diego, 126 Cal. 303, 58 Pac. 700, 59 Pac. 209, and Lam-

not be permitted to control his action.[9d] Nor can he make use of his personal knowledge in regard to the matter. He is thus placed in the somewhat anomalous attitude of being required to exercise his judgment uninfluenced by his personal knowledge of the facts.[9e] It is true a judge is as competent a witness as any other, and if the facts happen to be exclusively or peculiarly within his personal knowledge, it is entirely proper that he should state them;[9f] but his statement should take the form of an affidavit, which should be filed with the other counter-affidavits, and receive the like attention. The unverified statement of a judge is not entitled to any greater consideration than that of anyone else in a matter of this kind.[9g] Nor is an affidavit based upon information or belief entitled to any weight.[9h]

But while the trial judge will not be permitted to make use of his own knowledge or belief, otherwise than in the form of an affidavit, based, as other affidavits, upon actual knowledge of the facts, and filed in the case as a counter-affidavit upon the motion,

berson v. Superior Court, 151 Cal. 458, 91 Pac. 100, 11 L. R. A., N. S., 619n.

See, also, Lander v. Miles, 3 Or. 35; State v. Kline, 50 Or. 426, 93 Pac. 237.

[9d] See Adams v. Minor, 121 Cal. 372, 53 Pac. 815. This rule is to be understood as resulting strictly from the provision under consideration. Subdivision 4, section 170, Code of Civil Procedure. Prior to its adoption it was well settled that where disqualification was alleged, as resulting from interest the judge himself was regarded as the best judge as to whether he was or was not so far interested in the result of the proceeding as to be disqualified. See Southern Cal. M. R. Co. v. San Bernardino Nat. Bank, 100 Cal. 316, 34 Pac. 711.

[9e] See cases cited in note 9c, above; and compare People v. Blackman, 127 Cal. 248, 59 Pac. 573; People v. Rodley, 131 Cal. 240, 63 Pac. 351, and Morehouse v. Morehouse, 136 Cal. 332, 68 Pac. 976.

[9f] See Hoyt v. Zumwalt, 149 Cal. 381, 86 Pac. 600. "In opposition to this view it is urged that the judge will necessarily find the fact as he has averred it, and this would be to make him judge his own cause. But the proposition is entirely unfounded. The cause is not his; he has no interest, pecuniary or otherwise, in trying it—and if he had he would be disqualified on other grounds—and where he has no interest in a cause he has a right to consider probative facts within his own knowledge, if put in the form of an affidavit, in determining the ultimate fact of bias or indifference." But see People v. Compton, 123 Cal. 403, 56 Pac. 44, and Talbot v. Pirkey, 139 Cal. 326, 73 Pac. 858. See, also, People v. Blackman, 127 Cal. 248, 59 Pac. 573.

[9g] See Morehouse v. Morehouse, 136 Cal. 332, 68 Pac. 976.

[9h] See Higgins v. San Diego, 126 Cal. 303, 58 Pac. 700, 59 Pac. 209; People v. Findley, 132 Cal. 301, 64 Pac. 472. In the last-cited case it was held that the affidavit of the moving party that he believes he cannot have a fair and impartial trial by reason of the bias or prejudice of the trial judge is not sufficient to establish the fact. It must be established like any other fact, and must appear from all the affidavits on file to the satisfaction of a reasonable mind.

it is his duty, as above stated, to determine the fact of bias or prejudice as any other question of fact presented for his decision; and when so determined his decision thereon will not be interfered with unless it is clearly contrary to the evidence. Such decision will be treated the same as any other decision upon a question of fact, and will be governed by the same rules.[9k] Objections to affidavits cannot be raised for the first time on appeal.[9l]

The making of a motion for a transfer of the cause, such as is contemplated here, whereby a judge is charged with bias or prejudice so as to render him incapable of giving to the moving party a fair and impartial trial, has been described, and truly is, "a delicate and trying duty." An attorney should be sure of his ground before making it, and should, in the presentation of the motion and the preparation and presentation of the affidavits in support thereof, be governed solely by his duty to his client, without losing sight of the respect he owes the presiding judge of the court. In the strict performance of his duty he cannot, in any legal sense, be guilty of a contempt of the court.[9m] Nor are those who make the necessary affidavits subject to official persecution on the same charge.[9n] When, however, either attorney or affiant passes from the strict performance of professional duty to a wanton interference with the performance by a judge of his official duty, or an affiant crosses the line which separates a statement of fact upon knowledge from a mere averment upon information and belief of matters of mere scandal, a contempt of court may readily be committed. Thus, in Lamberson v. Superior Court,[9p] Henshaw, J., for the court, after outlining with great particularity and detail the delicate relations which exist between a judge, on the one hand, and an attorney for a litigant, on the other, made use of the following language with reference to charges of corrupt and improper motives against a trial judge in connection with a cause pending before him:

". . . . Let it be here understood that we are not here declaring that if a judge has in fact indulged in corrupt practices, or

[9k] See People v. Findley, 132 Cal. 301, 64 Pac. 472.

[9l] People v. Rodley, 131 Cal. 240, 63 Pac. 351.

[9m] Works v. Superior Court, 130 Cal. 304, 62 Pac. 507. Also see Lamberson v. Superior Court, 151 Cal. 458, 91 Pac. 100, 11 L. R. A., N. S., 619n, and cases cited.

[9n] Works v. Superior Court, 130 Cal. 304, 62 Pac. 507. See, also, Lamberson v. Superior Court, 151 Cal. 458, 91 Pac. 100, 11 L. R. A., N. S., 619n.

[9p] 151 Cal. 458, 91 Pac. 100, 11 L. R. A., N. S., 619n.

has in fact given a ruling or decision through a corrupt motive, those facts may not be stated. They may be. And they would be prepotent evidence of bias and prejudice. But it may not for one moment be countenanced that, without supporting facts, lawyer or litigant may wantonly charge a judge with corrupt and improper motives, and seek protection from the just consequences of such outrage under the shield of the code provision. (McCormick v. Sheridan (Cal.), 20 Pac. 24; In re Philbrook, 105 Cal. 471 (45 Am. St. Rep. 59, note, 38 Pac. 511, 884); People v. Brown, 17 Colo. 431 (30 Pac. 338); In re Mains, 121 Mich. 603 (80 N. W. 714); Hughes v. People, 5 Colo. 436; In re Snow, 27 Utah, 265 (75 Pac. 741); Harrison v. State, 35 Ark. 458; In re Pryor, 18 Kan. 72 (26 Am. Rep. 747).) So, while it is true that matters which are pertinent to the consideration, and which are charged as facts, are admissible, without reference to their effect upon the reputation of the judge, or anyone else, it is equally true that neither attorney nor litigant has any right to present such degrading accusations under the guise of mere belief, without the aid of a single supporting fact. (May v. Ball, 24 Ky. Law Rep. 241, 67 S. W. 257, 68 S. W. 398.)"

Further:

"Under his oath to maintain the respect due to courts, every attorney stands responsible, not only for his own individual conduct in court, but for every paper which, knowingly, he presents on behalf of his client."

As above stated, it is the duty of the trial judge to determine the question of his disqualification by reason of bias or prejudice, and he should not permit an undue sensitiveness to inspire him to free himself from the responsibility of acting in a case where he is not disqualified. As was suggested by Mr. Justice Harrison in the case of Heinlen v. Heilbron,[94] the desire to be faithful to his office should cause him to decline to act in a case where he is disqualified and be his reason for insisting upon acting where he is disqualified. "He has no more right to refuse to act in a matter before him where he is not disqualified, than he has to act in a cause in which he is disqualified." At the same time, he must not permit himself to be guided in his decision otherwise

[94] 97 Cal. 101, 31 Pac. 838. Compare Southern California M. R. Co. v. San Bernardino Nat. Bank, 100 Cal. 316, 34 Pac. 711.

than by the affidavits and counter-affidavits on file in support of the motion.

Strained personal relations between the judge and the attorneys in a cause, though placing the latter at some disadvantage, perhaps, does not necessarily disqualify the former on this ground.[9r]

Disqualification from bias or prejudice is wholly distinct from disqualification from interest.[9s] The distinction between these two phases of judicial disqualification was fairly drawn in Lassen Irr. Co. v. Superior Court,[9t] where the court, by Shaw, J., said:

". . . . The interest in an action which disqualifies a judge who possesses it from trying the cause is a property or personal interest, an interest, in the event of the suit, in the judgment which may be rendered therein. It must affect him, either in person or property, directly or indirectly. A mere sentimental interest, or an interest in the facts which the issues make it necessary for him to determine, which may tend to induce him to give more weight to the evidence for one party than to the evidence for the other, respecting such facts, is not the interest which will disqualify him. It may tend to show his bias or prejudice, and he may be disqualified on that ground, but it will not be sufficient to disqualify him on the ground that he is interested in the action, or in the result thereof, or on the ground that he is of kin to other persons in a similar situation, or that he had been the attorney for such persons."

So in the Oakland Water Front Case,[9u] the court said that the word *interest* as used in the provision under consideration "em-

[9r] Higgins v. San Diego, 126 Cal. 303, 58 Pac. 700, 59 Pac. 209.

[9s] Higgins v. San Diego, 126 Cal. 303, 58 Pac. 700, 59 Pac. 209.

[9t] 151 Cal. 357, 90 Pac. 709.

[9u] 118 Cal. 252, 50 Pac. 268. See, also, Scadden etc. Co. v. Scadden, 121 Cal. 33, 53 Pac. 440.

A judge who is a taxpayer may in some cases be disqualified. In Meyer v. San Diego, 121 Cal. 102, 66 Am. St. Rep. 22, 53 Pac. 434, the trial judge was disqualified because as the owner of property and a taxpayer in the municipality his property might or might not become liable for the burden of a special tax for a period of forty years, "as he shall decide." See State v. Noyes, 25 Nev. 31, 56 Pac. 946, to same effect. And see Higgins v. San Diego, 126 Cal. 303, 58 Pac. 700, 39 Pac. 209, where the distinction was clearly drawn. And see Los Angeles v. Pomeroy, 133 Cal. 529, 65 Pac. 1049, where it was held that the mere ownership of taxable property in a city was an interest too remote and indistinct to disqualify a judge from presiding at the trial of a condemnation suit by such city against certain lands therein; but that it would be otherwise where the suit directly involved the validity of a tax affecting the property of such judge. In such a case he might bring an action himself. In the first-named case he could neither bring the action, nor defend it, unless the suit

braces only an interest that is direct, proximate, substantial, and certain, and does not embrace such a remote, contingent, uncertain and shadowy interest as that asserted as a disqualification in the case at bar." The interest here was that of a taxpayer, and it was contended that because of the fact that the superior judges were all residents and taxpayers in the community, they were so far disqualified from interest as to be prevented from sitting at the trial of a case which involved the control of the city's waterfront. In reply to this contention the supreme court said:

"The whole theory of the administration of justice in our courts contemplates that judges are persons specially educated to habits of impartiality and fairness, and it is a necessary quality of judicial proceedings that a judge shall, in his official conduct, be presumed to be above all improper considerations and motives. Nevertheless, in contemplation of the truth that in extreme cases human frailty might not be overcome by trained habits and acquired faculties, it is declared by the law that 'no man shall be a judge in his own cause.' But surely that means a cause which is really his own cause; not that he must be a formal party to the record, but that it must be such a cause that a judgment rendered therein would necessarily and directly and substantially affect his personal rights. We cannot conceive that the legislature meant to declare that a mere contingent possibility that some future supposable financial condition of a municipality might, in a slight decree, affect a judge as a taxpayer, would strip him of all his judicial qualities."

In a suit in equity to establish confused boundaries, the appointment by the judge of his son as commissioner to run the lines does not disqualify the judge from acting further in the case.[10]

was brought against his own property.

So a judge who is a stockholder in a bank which holds the bonds of an irrigation district is "interested" within the meaning of the statute so as to disqualify him from sitting in a cause involving the validity of such bonds. See Adams v. Minor, 121 Cal. 372, 53 Pac. 815.

In Stevens v. Hall, 8 Idaho, 549, 69 Pac. 282, it was held that in an action on a judgment a judge who had been an attorney in the original action was not disqualified. It was said:

" The only issues involved in this suit are the entry of the judgment which is sought to be revived, and the payment thereof, and Judge Rich has not been the legal adviser to either of the parties to said suit as to these issues, hence he has not been the attorney of either party on the issues involved in this action, and for that reason is not disqualified. "

[10] Beatty v. Dixon, 56 Cal. 619. Nor is a judge disqualified from trying a contempt charge. Township of Noble v. Aasen, 10 N. D. 264, 86 N. W. 742.

A judge who has been attorney in the cause,[11] or who is in the same situation as one of the parties,[12] is disqualified.

As to where the judge of the court in which the action is pending is disqualified, but another judge is called in, see Paige v. Carroll.[13]

A study of the cases discloses the fact that appellate courts do not readily overrule the conclusions of trial courts upon the subject of their own disqualification; but if it should appear that a trial judge had erroneously refused to grant a change of venue or a change of judges on account of his own disqualification, and had thereafter proceeded to the trial of the cause, any judgment rendered in said cause will be without validity.[14]

A disqualification, either from interest, bias or prejudice, or other statutory cause, once shown, it is the duty of the trial court to transfer the cause at once.[15] He should not exact conditions;[16] nor should he continue the cause with a view to obtaining a judge who would not be disqualified.[17] But if the judge who is holding

[11] Hancock v. Burton, 61 Cal. 70. But he must be the actual attorney of record. It is not sufficient that he should make a temporary appearance in the case, as for instance, as a partner of a firm whose name appears as attorneys on an affidavit where no signature was required, in association with the attorneys of record. Benton v. Budd, 120 Cal. 329, 52 Pac. 851. The rule that the interest must be real, direct, proximate and substantial applies here as well as elsewhere. See Stevens v. Hall, 8 Idaho, 549, 69 Pac. 282. See note 9u, above.

[12] North Bloomfield G. M. Co. v. Keyser, 58 Cal. 315.

[13] 61 Cal. 211.

[14] Meyer v. San Diego, 121 Cal. 114, 102, 66 Am. St. Rep. 22, 53 Pac. 434. In Frevert v. Swift, 19 Nev. 363, 11 Pac. 273, and State v. Noyes, 25 Nev. 31, 56 Pac. 946, it was held that such a judgment would be void.

[15] See Livermore v. Brundage, 64 Cal. 299, 30 Pac. 848. And compare the following: Remington etc. Co. v. Cole, 62 Cal. 311; Heald v. Hendy, 65 Cal. 321, 4 Pac. 27; Sayward v. Houghton, 82 Cal. 628, 23 Pac. 120; McKenzie v. Barling, 101 Cal. 459, 36 Pac. 8; Bailey v. Cox, 102 Cal. 333, 36 Pac. 650; Brady v. Times-Mirror Co., 106 Cal. 56, 39 Pac. 209; Santa Cruz Bank of Savings v. Taylor, 125 Cal. 249, 57 Pac. 987; Gordon v. Conor, 5 Idaho, 673, 51 Pac. 747; Frevert v. Swift, 19 Nev. 364, 11 Pac. 273; State v. Noyes, 25 Nev. 31, 56 Pac. 946; Gunn v. Lauder, 10 N. D. 389, 87 N. W. 999; Orcutt v. Conrad, 10 N. D. 431, 87 N. W. 982; Perkins v. McDowell, 3 Wyo. 203, 19 Pac. 440. See, also, the following Washington cases: Barnett v. Ashmore, 5 Wash. 163, 31 Pac. 466; State v. Board of Education, 19 Wash. 8, 67 Am. St. Rep. 706, note, 52 Pac. 317, 40 L. R. A. 317; State v. Strodemier, 40 Wash. 608, 82 Pac. 915. While it is sometimes said that a motion for a change of venue is addressed to the discretion of the trial judge, this is never the case where the ground of the motion is his own disqualification. See Edwards v. State, 2 Wash. 291, 26 Pac. 258; State v. Hawkins, 23 Wash. 289, 63 Pac. 258. The law is mandatory, as the above decisions establish, and the question for determination is one of fact. See *supra*, note 9c et seq.

[16] See Hennessy v. Nicol, 105 Cal. 138, 38 Pac. 649.

[17] Livermore v. Brundage, 64 Cal. 299, 30 Pac. 848.

court at the time the motion is heard be qualified, although not the judge who was presiding when the motion was filed, it should be denied.[18] The object and purpose of the statute is to secure the presence of a judge who is not disqualified, and when this is accomplished the purpose of the law is met.[19]

If, notwithstanding disqualification, a trial judge shall proceed with the trial of the cause, his action in this respect becomes an irregularity of the court such as is referred to in the first subdivision of section 657, Code of Civil Procedure, for which, if properly presented for review, a new trial will be granted. The record for such review is that prescribed for other irregularities, and is elsewhere considered.[20] It is sufficient here to note the principle involved.

§ 33. The Court Should not Try Issues of Fact While Issues of Law Remain Undisposed of.—It has been supposed that this was decided in Hestres v. Clements.[1] But such is not the case. In Hestres v. Clements there was no issue of fact at all. The judgment was by default, and "when the judgment was entered there was a demurrer on file which had not been disposed of." Acceptance of service of the demurrer after default was held to be a waiver of the default, and of course it was irregular to enter a judgment by default against a party whose pleading was regularly on file. Nevertheless, in a subsequent case[2] Hestres v. Clements was cited by the court as deciding the proposition that it was irregular to try the issues of fact while issues of law were undisposed of. It was distinguished, however, on the ground that the provision of the Practice Act was that "when there are issues both of law and fact *to the same complaint*, the issues of law shall be first disposed of," and that in the case then before the court the demurrer was to the answer; and the court was of opinion that the failure to dispose

[18] See Paige v. Carroll, 61 Cal. 215. But see Krumdick v. Crump, 98 Cal. 117, 32 Pac. 800.

[19] Upton v. Upton, 94 Cal. 26, 29 Pac. 411. And see Paige v. Carroll, 61 Cal. 215. But see Krumdick v. Crump, 98 Cal. 117, 32 Pac. 800.

Most of the statutes cited in note 1, *supra*, contain a provision excepting such orders and acts as the arrangement of the calendar, the regulation of the order of business and the transfer of the cause. Where a cause has been fully tried, and nothing remains but some formal act, not involving an exercise of discretion, such act may be performed by the disqualified judge upon his return to the bench. See Hazard v. McAndrews, 18 Wash. 392, 51 Pac. 1064.

[20] See chapter 20, *post*.

[1] 21 Cal. 425.

[2] Calderwood v. Tevis, 23 Cal. 335

of the demurrer to the answer was not such an irregularity as prevented a fair trial. The Code of Civil Procedure has not retained the words "to the same complaint." The provision of the code, as amended in 1874, is as follows:

"Sec. 592. In actions for the recovery of specific, 'real,' or personal property, with or without damages, or for money claimed as due upon contract, or as damages for breach of contract, or for injuries, an issue of fact must be tried by a jury unless a jury trial is waived, or a reference is ordered as provided in this code. Where *in these cases* there are issues both of law and fact, the issue of law must be first disposed of. In other cases issues of fact must be tried by the court, subject to its power to order any such issue to be tried by a jury or to be referred to a referee, as provided in this code."[2a]

It is apparent that the restriction of the requirement that issues of law must be first disposed of, to "these cases," was the result of mere carelessness. As to the cases mentioned, it would undoubtedly be an irregularity to proceed to try issues of fact before the issues of law; as to other cases, it would seem to be an irregularity even in the absence of a statutory provision. But the party must

[2a] Corresponding provisions in other states are for the most part in slightly different language, thereby obviating the criticism of the text. Section 1390, Revised Statutes of Arizona (section 181, Civil Practice), is as follows:

"When a case is called for trial, the issues of law arising on the pleadings, and all pleas in abatement, and other dilatory pleas remaining undisposed of shall be determined, and it shall be no cause for the postponement of the trial of the issues of law that a party is not prepared to try the issues of fact. When juries are demanded, all issues of law, and all pleas which do not go to the merits of the case shall be disposed of by the court before the case is called for trial on the merits. "

Section 4369, Revised Codes of Idaho, is the same as the California section quoted in the text. So also is section 6724, Revised Codes of Montana (section 1034, Code of Civil Procedure); and section 3128, Compiled Laws of Utah.

Section 3252, Cutting's Compiled Laws of Nevada (section 157, Civil Practice), prescribes: " Where there are issues, both of law and fact, to the same complaint, the issue of law shall be first disposed of."

Section 2685, subsection 108, Compiled Laws of New Mexico, is as follows:

"Issues, both of law and of fact, may arise upon different parts of the pleadings in the same action. In such cases the issues of law must be first tried, unless the court otherwise directs."

Section 7007, Revised Codes of North Dakota, is identical with the New Mexico section here quoted. So also is section 112, Lord's Oregon Laws; section 5784, Compiled Laws of Oklahoma; section 242, Code of Civil Procedure of South Dakota. Section 174, Mills' Annotated Code of Colorado, provides merely that "when there are issues both of law and fact to the same complaint, the issues of law shall be first disposed of."

make his objection in the court below at the proper time.[3] And if the record does not show the contrary, the supreme court will presume, on appeal, "that the issue of law was disposed of previously by an order overruling the demurrer, or that the demurrer has been waived or withdrawn."[4]

The rule here stated does not apply to trials in equity.[5]

§ 34. A Trial by Jury Should not be Refused in Cases Where the Parties are Entitled to It.—A refusal of a trial by jury, in a case where the party was entitled to it, is ground for new trial.[1] It is proper, therefore, to inquire as to what are the cases in which a jury may be demanded, and how the right may be waived.

1. *Right to a Jury Trial.*—The Constitution of the United States provides that "in suits at common law, where the value in controversy shall exceed twenty dollars, the right of trial by jury shall be preserved; and no fact tried by a jury shall be otherwise re-examined in any court of the United States than according to the rules of the common law." But this provision has been held by the supreme court of the United States to apply only to the federal courts.[2] In state courts the right to a trial by jury depends upon the state constitution and laws. The provision of the Constitution of California, as adopted in 1849, was that "the right of trial by jury shall be secured to all and remain inviolate forever, but a jury trial may be waived by the parties in all civil cases in the manner to be prescribed by law."[3] The provision of the Constitution of 1879 is as follows:[4] "The right of trial by jury shall be secured to all and remain inviolate; but in civil actions three-fourths of the jury may render a verdict. A trial by jury may be waived in all criminal cases not amounting to felony, by the consent of both parties, expressed in open court; and in civil actions by the consent of the parties, signified in such manner as

[3] De Leon v. Higuera, 15 Cal. 483; and see section 27, *ante*.

[4] Brooks v. Douglass, 32 Cal. 208.

[5] See Brady v. Yost, 6 Idaho, 273, 55 Pac. 542.

[1] Cahoon v. Levy, 5 Cal. 294; Shaw v. Kent, 11 Ind. 80; Porter v. Burleson, 38 Ala. 343; Hine v. Sweney, 3 G. Greene (Iowa), 511. Refusal of a jury trial when demanded in a proper case is error. Goldthwait v. Lynch, 9 Utah, 186, 33 Pac. 699. It is not clear whether such refusal would be an "irregularity of the court" or an "error in law." It is believed it would be the former; but the prudent practitioner will move on both grounds.

[2] Walker v. Sauvinet, 92 U. S. 90, 23 L. ed. 678; Edwards v. Elliott, 21 Wall. 557, 22 L. ed. 487.

[3] Article 1, section 3.

[4] Article 1, section 7.

may be prescribed by law. In civil actions and cases of misdemeanor the jury may consist of twelve, or of any number less than twelve upon which the parties may agree in open court."

As will be observed, neither of the foregoing provisions of the state Constitution specifies the cases in which a "trial by jury shall be secured." According to the decisions, however, the language of the Constitution refers to the cases in which a jury trial could be had at common law. This was stated in Russell v. Elliott,[5] and more fully in Koppikus v. State Capitol Commissioners,[6] in which case Field, C. J., delivering the opinion, said:

"The provision of the Constitution, that 'the right of trial by jury shall be secured to all and remain inviolate forever,' applies only to civil and criminal cases in which an issue of fact is joined. The language was used with reference to the right as it exists at common law. It is true the civil law was in force in this state at the time of the adoption of the Constitution, but its framers were, with few exceptions, from states where the common law prevails, and where the language used has a well-defined meaning. The people who, by their votes, adopted the Constitution—at least a vast majority of them—were also from countries where the common law is in force, and they looked upon the right secured as the right there known and there held inviolate. It is in this common-law sense that the language has always been regarded by the courts of this state. It is a right 'secured to all' and 'inviolate forever' in cases in which it is exercised, in the administration according to the course of the common law as that law is understood in the several states of the Union. It is a right, therefore, which can only be claimed in actions at law or criminal actions, where an issue of fact is made by the pleadings. It cannot be claimed in equity cases unless such issue be specially framed for a jury under the direction of the court. It cannot be asserted upon an issue at law, for that is a matter purely for the court. The fact, therefore, that property and rights of property may be involved in the disposition of a particular case or proceeding does not determine the right to a trial by jury. There must be an action at law as contradistinguished from a suit in equity, and from a special proceeding, or a criminal action, and an issue of fact joined therein upon the pleadings before a jury trial can be claimed as a constitutional right."

[5] 2 Cal. 245.

[6] 16 Cal. 248. See, also, People v. Powell, 87 Cal. 348, 25 Pac. 481, 11 L. R. A. 75, and Cassidy v. Sullivan, 64 Cal. 266, 28 Pac. 234, to the same effect.

The legislature may enlarge the right of trial by jury beyond that practiced at the common law, but it cannot abridge the same in any manner. Thus with respect to the action to quiet title to land provided for in section 738, Code of Civil Procedure, prior to the amendment of 1895 which permits jury trials thereunder, a jury trial upon the issues of fact having been requested and refused on the ground that the procedure was equitable, the supreme court in Donahue v. Meister[6a] said:

"It is quite clear that the legislature, by the mere device of adding new cases to those of a class to which former equitable remedies were applicable, cannot encroach upon that provision of the state Constitution which says that 'the right to trial by jury shall be secured to all, and *remain* inviolate.' And section 738 of the code must not be construed as intending to violate the provision of the Constitution unless such construction be unavoidable. Issues about titles to land, such as those presented by the answer in the case at bar, were triable at law at the time the Constitution was adopted, and therefore either party has the right to have such issues tried by a jury."

The court in the later case of Maddux v. Walthall[6b] declined to pass upon the constitutionality of the sections of the Code of Civil Procedure prescribing the method of trying election contests, no provision having been made therein for trial by jury, holding that the appellant had waived the right even if it did exist, but it practically conceded the point upon the authority of the case of Kennard v. Louisiana, 92 U. S. 480, 23 L. ed. 478.

But the legislature may authorize summary trials without juries in cases of violations of municipal police regulations, and such petty offenses as were thus provided for in certain early English statutes, and cases which are intrinsically of a similar nature and degree to those mentioned in such statutes. Thus vagrancy has been held to be an offense of this description, which may be disposed of by a procedure which does not include a jury trial.[6c] In all other cases, however, where the offense falls within the legal or common-law notion of a crime or misdemeanor, and is embraced

[6a] 88 Cal. 121, 22 Am. St. Rep. 283, 25 Pac. 1096. See, also, Taylor v. Ford, 92 Cal. 419, 28 Pac. 441; Landregan v. Peppin, 94 Cal. 465, 29 Pac. 771; Gillespie v. Gouly, 120 Cal. 515, 52 Pac. 816; Reiner v. Schroeder, 146 Cal. 411, 80 Pac. 517. Compare Johnson v. Mina Rica Gold Co., 128 Cal. 521, 61 Pac. 76.

[6b] 141 Cal. 412, 74 Pac. 1026.

[6c] In re Fife, 110 Cal. 8, 42 Pac. 299.

in the criminal code of the state, the constitutional right to trial by jury cannot be evaded.[64]

Nor will the trial court itself be permitted, where the cause suggests legal as well as equitable defenses, under the rule requiring it to pass upon the equitable issues first, to ignore the defendant's demand for a jury trial, and dispose of the legal as well as the equitable issues. Thus in Swasey v. Adair,[65] the court said:

"It has been stated by this court in many cases that when the defendant interposes equitable and legal defenses to the complaint, the proper rule of procedure for the court is to hear and dispose of the equitable defense before proceeding to try the issues of law. Arguello v. Edinger, 10 Cal. 150; Estrada v. Murphy, 19 Cal. 273; Weber v. Marshall, 19 Cal. 248; Lestrade v. Barth, 19 Cal. 660; Martin v. Zellerbach, 38 Cal. 300, 99 Am. Dec. 365; Fish v. Benson, 71 Cal. 434, 12 Pac. 454. By making an equitable defense in such an action the defendant does not, however, lose any right which he would otherwise have to have the issues of law tried by a jury, nor does the court by virtue of being called upon, under the above rule, to first hear and dispose of the equitable defense, acquire the right to pass upon all the issues in the case without a jury. The trial may dispose of all the issues in the case, or the equitable relief granted may be such as to prevent the trial of the issues of law. But whenever the trial of the equitable defense does not have such result, and the issues of law remain undisposed of, those issues are to be tried in the same manner as if no equitable defense had been interposed."

Nor does the fact that the *form* of the action is equitable determine the right in question. If the real issues of fact arise from common-law rights, such issues must be tried by a jury unless there is a waiver of such trial by the parties, whether the remedy sought is legal or equitable. Of course, a chancellor has the right to determine whether he will grant a legal or equitable remedy, but his determination cannot affect the right to have the legal issues tried by jury, if there are legal issues in the action. A judge sitting as a chancellor, in an action in form equitable, but involving issues of fact arising from common-law rights, cannot set aside the verdict of a jury upon such facts, and make findings

[64] Taylor v. Reynolds, 92 Cal. 573, 28 Pac. 688; Ex parte Wong You Ting, 106 Cal. 296, 39 Pac. 627.

[65] 88 Cal. 179, 25 Pac. 1119.

of his own thereon, on the ground that the verdict of the jury is advisory. It is only upon issues of fact arising from equitable rights that the verdict of a jury is advisory and requires to be adopted by the chancellor before it becomes binding. Where the issue is legal the verdict is itself effectual, and cannot be vacated or set aside without granting a new trial. Thus in Hughes v. Dunlap,[64] which was an action for an injunction to restrain a threatened trespass upon land, and to recover damages for past trespasses, the issue as to past trespasses was tried by a jury and a special verdict rendered. The court set aside the verdict as being advisory merely, and made findings of its own. On appeal the supreme court held that such action was erroneous; that such verdict was not advisory, being a verdict upon a common-law issue, which could not be vacated or set aside without granting a new trial of such issue. McFarland, J., for the court, said:

"If the plaintiff had merely asked for damages caused by the alleged acts of defendant, the action would have been the common-law action of trespass, in which defendant, of course, would have been entitled to a jury; does the fact that he also prayed for an injunction take away from him the right to have the real issue of fact tried by a jury?"

So in Mills v. Fletcher,[65] which was an action in ejectment, defendants filed a cross-complaint asking affirmative relief in the quieting of their title. A special issue arising therein was presented to a jury. The court, upon the theory that the filing of the cross-complaint raised an equitable issue, disregarded the special verdict, and made findings of its own. The supreme court reversed the ruling, and declared the verdict conclusive, upon the ground that the facts stated in the cross-complaint constituted a mere answer and not a cross-complaint, and that the defense was therefore only a legal one.

If, however, the issue is purely equitable, and there is no question of its having been raised for the purpose of avoiding a jury trial, no right to a jury trial can be said to exist. Thus where, in a suit in ejectment, the defendants in possession, by their answer, set up a purely equitable defense; to wit, that they were the successors in interest of parties who were in possession under a contract of purchase, and that "they are now ready, able, and willing to make to plaintiffs herein the payments," etc., specifically

[64] 91 Cal. 385, 27 Pac. 642.

[65] 100 Cal. 142, 34 Pac. 637.

disclaiming title, ownership, or even the right to the possession; the court held that the issue was purely equitable, and that the defendants could not demand a jury trial.[6h]

In the case of Koppikus v. State Capitol Commissioners, above cited, it was held that a jury trial was not a matter of constitutional right in a special proceeding;[7] and it is well settled that the provision does not apply to equity cases;[8] nor, it would seem, to probate cases.[8a] But the court may in its discretion submit special issues to a jury in an equity case.[9] Although the constitutional guaranty of a jury trial applies only to the cases in which it was proper at common law, there is nothing to prevent the legislature from conferring the right in other cases. There is a constitutional and there is also a merely statutory right of jury trial, the latter being subject to be revoked at the pleasure of the power which created it. The provision of the California code is quoted in a previous section;[9a] and similar provisions are to be found in other codes.[9b]

[6h] Crocker v. Carpenter, 98 Cal. 418, 33 Pac. 271. And see Mesenburg v. Dunn, 125 Cal. 222, 57 Pac. 887, to same effect. Also Brady v. Yost, 6 Idaho, 273, 55 Pac. 542.

[7] See, also, People v. Blake, 19 Cal. 579; Dorsey v. Barry, 24 Cal. 449.

[8] La Societe Francaise v. Selheimer, 57 Cal. 623; Lorenz v. Jacobs, 59 Cal. 262; Still v. Saunders, 8 Cal. 281; Cahoon v. Levy, 5 Cal. 294; Walker v. Sedgwick, 5 Cal. 192. See, also, McLaughlin v. Del Re, 64 Cal. 472, 2 Pac. 244; Curnow v. Blue Gravel Co., 68 Cal. 262, 9 Pac. 149; Pacific Ry. Co. v. Wade, 91 Cal. 449, 25 Am. St. Rep. 201, 27 Pac. 768, 13 L. R. A. 754; Churchill v. Bauman, 104 Cal. 369, 36 Pac. 93, 38 Pac. 43; Santa Cruz etc. Co. v. Bowie, 104 Cal. 286, 37 Pac. 934; Loftus v. Fischer, 113 Cal. 286, 45 Pac. 328; Ashton v. Heydenfeldt, 124 Cal. 14, 56 Pac. 624; Cauhape v. Security Savings Bank, 127 Cal. 197, 59 Pac. 589; Ashton v. Heggerty, 130 Cal. 516, 62 Pac. 934; Noble v. Learned, 153 Cal. 245, 94 Pac. 1047. See, also, Newman v. Duane, 89 Cal. 597, 27 Pac. 66.

Nor does the provision apply to the commitment of a minor to the industrial school. Ex parte Ah Peen, 51 Cal. 280.

[8a] See In re Moore, 72 Cal. 335, 13 Pac. 880 (settlement of accounts); In re Sanderson, 74 Cal. 199, 15 Pac. 753; In re Herteman, 73 Cal. 545, 15 Pac. 121; Leach v. Pierce, 93 Cal. 614, 29 Pac. 235; In re Westerfield, 96 Cal. 113, 30 Pac. 1104; Estate of Dolbeer, 153 Cal. 652, 96 Pac. 266. In this last-cited case the court discussed the question of trial by jury in probate cases exhaustively, and it was there held that "only in those probate proceedings where the statute expressly confers the right to a trial by jury, does the right exist," the right being exclusively statutory.

[9] Smith v. Rowe, 4 Cal. 6; Still v. Saunders, 8 Cal. 281; and see cases cited in note 8, *supra*.

See, also, Warring v. Freear, 64 Cal. 54, 28 Pac. 115; McLaughlin v. Del Re, 64 Cal. 472, 2 Pac. 244; Swasey v. Adair, 88 Cal. 179, 25 Pac. 1119; Newman v. Duane, 89 Cal. 597, 27 Pac. 66; Schultz v. McLean, 109 Cal. 437, 42 Pac. 557; Johnson v. Mina Rica G. M. Co., 128 Cal. 521, 61 Pac. 76; Reiner v. Schroeder, 146 Cal. 411, 80 Pac. 517.

[9a] See note 2a, section 33, *ante*.

[9b] Section 1389, Revised Statutes of Arizona, provides for the submission of all issues of fact to a jury;

2. *Waiver of Jury Trial.*—The Constitution of California [9c] expressly provides that a trial by jury may be waived. The provision of the old Constitution was that it could be "waived by the parties in all civil cases in the manner to be prescribed by law." The provision of the Constitution of 1879 is that it may be waived "in civil actions by the consent of the parties, signified in such manner as may be prescribed by law." These provisions are substantially the same, unless possibly the latter is more restricted than the former. There can be no doubt that the legislature may prescribe the manner in which the consent of the parties may be signified. Thus it has several times been held that the provision that the failure to appear at the trial shall operate as a waiver is binding.[10] So in Doll v. Anderson,[11] it was said of the provision of the act of 1863, to the effect that "a jury shall be deemed waived unless the parties, or one of them, to the action or proceeding shall, at least six days before the commencement of the term at which the same may be tried, file with the clerk a notice that a jury will be required"—that there could be no doubt that a jury could be waived in that

section 3252, Cutting's Compiled Laws of Nevada provides that "an issue of fact shall be tried by a jury, unless a jury trial is waived." Section 2685, subsection 110, Compiled Laws of New Mexico, provides, "An issue of fact in an action for the recovery of money only, or specific real or personal property, where the right of trial by jury existed at common law must be tried by a jury, unless a jury trial be waived, or a reference be ordered. But this shall not be construed to limit the power of the court to administer all remedies and grant equitable relief which it could heretofore do under its general chancery jurisdiction." Section 7009, Revised Codes of North Dakota, is as follows: " An issue of fact in an action for the recovery of money only, or of specific real or personal property must be tried by a jury unless a jury trial is waived as provided in section 7038 or a reference is ordered as provided in sections 7046 and 7047." Section 114, Lord's Oregon Laws provides that "An issue of fact shall be tried by a jury, unless *tried* by the court or referred," etc. Reference is made to the two chapters on the subject of trial by the court and trial by a referee. The usual provision as to waiver of a jury trial is to be found in section 157. Section 314, Rem. & Bal. Code of Washington (section 4967, Bal. Code), is practically the same as the Oregon law. So, also, are sections 4453 and 4454, Compiled Statutes of Wyoming. The Idaho and Montana laws are the same as that of California. See note 2a, section 33, ante. See, also, section 173, Mills' Annotated Code of Colorado; sections 5785 and 5786, Compiled Laws of Oklahoma; sections 244 and 245, Code of Civil Procedure of South Dakota; and section 3128, Compiled Laws of Utah.

[9c] Similar provisions are to be found in the constitutions of other states.

[10] Zane v. Crowe, 4 Cal. 112; Doll v. Feller, 16 Cal. 433; Waltham v. Carsan, 10 Cal. 178; but see Gillespie v. Benson, 18 Cal. 409.

[11] 27 Cal. 248. In this case, however, the court below ordered a jury trial notwithstanding the waiver, which action was held correct.

manner. So in Russell v. Elliott,[12] it was held that the provision of the act of 1850, that the damages of a defendant in an injunction suit for the wrongful suing out of the injunction should be assessed by a referee, was not unconstitutional, the court being of opinion that when the plaintiff in the injunction suit resorted to the extraordinary remedy by injunction suit, he must be deemed to have done so with reference to the statute, and therefore to have impliedly consented to its provision that in case the injunction was improperly issued the damages should be assessed by a referee. The correctness of the application of the principle in the case last cited may perhaps be doubted. But the principle itself, viz., that the legislature may prescribe what shall be deemed a waiver by the parties, is beyond question. The provision of the Code of Civil Procedure in this regard is as follows:[12a]

"Sec. 631. Trial by jury may be waived by the several parties to an issue of fact in actions arising on contract, or for the recov-

[12] 2 Cal. 245.

[12a] Sections 4405, Revised Codes of Idaho, 6762, Revised Codes of Montana (section 1110, Code of Civil Procedure), 3276, Cutting's Compiled Laws of Nevada, 7038, Revised Codes of North Dakota, 157, Lord's Oregon Laws, section 275, Code of Civil Procedure of South Dakota, and 4514, Compiled Statutes of Wyoming, prescribe the same method of waiver, except that the Wyoming section contains an additional subdivision, as follows:

"4. It shall be the duty of all persons desiring a jury trial to demand a jury as their cases are reached upon the formal call of the docket, and a failure to make such demand, accompanied with a deposit of twelve dollars, as a jury fee, shall be deemed a waiver of a trial by jury at that time, and a jury shall not thereafter be allowed or called in such case during that term. " Section 1389, Revised Statutes of Arizona (section 180, Civil Practice), provides that "On the first day of the term, or on such day as may be fixed by the court, the docket shall be called, and if a jury is demanded by either party, such demand shall then be made, and if not then made, the right to a trial by jury shall be regarded as waived," etc. No other method of waiver is suggested by statute.

In the New Mexico laws the subject of waiver of a jury trial is more than once referred to but the manner of such waiver is not specifically stated.

The section of the Washington code corresponding with that of California, and other states, here considered, was repealed by the act of 1903. Section 5028, Bal. Code, repealed by section 3, Statutes of 1903, p. 50. Section 316, Rem. & Bal. Code (Statutes of 1903, p. 50, sec. 1; Statutes of 1909, p. 715, sec. 1), requires the party who desires a trial by jury to file a statement with the clerk to that effect, accompanied by a payment of twelve dollars, and provides that a failure in this respect shall be deemed a waiver of the right.

Section 178, Mills' Annotated Code of Colorado, is the same as the California section quoted in the text, with the addition of the following sentence to subdivision 3: "The court may prescribe by rule what shall be deemed a waiver in other cases."

Section 5808, Compiled Laws of Oklahoma is substantially the same as the California section.

The Constitution of Utah (article 1, section 10) provides that a jury shall be deemed to be waived unless the same be demanded; and sections 3129 and 3167, Compiled Laws, prescribe the time and mode of demanding.

ery of specific, real, or personal property with or without damages, and with the assent of the court in other actions in manner following:

"1. By failing to appear at the trial;

"2. By written consent, in person or by attorney, filed with the clerk;

"3. By oral consent, in open court entered in the minutes."

Although the legislature may prescribe what shall be deemed to be a waiver, it has been held that it cannot delegate this power to *nisi prius* courts. This was decided in Exline v. Smith.[13] The statute considered in that case, after specifying a number of ways in which a jury could be waived, contained the following: "The court may prescribe by rule what shall be deemed a waiver in other cases." This provision was held to be unconstitutional, and Murray, C. J., delivering the opinion, said: "The Constitution has imposed the power as well as the necessity upon the legislature of determining in what cases a jury trial may be waived, which cannot be transferred or delegated to any other department of government. The words 'prescribed by law' look to actual legislation upon the subject, and in no just sense can be extended to a permission of the exercise of this power to others. The right of trial by jury is too sacred in its character to be frittered away, or committed to the uncontrolled caprice of every judge or magistrate in the state. Besides, the power to 'prescribe by law' is legislative, and cannot be conferred on judicial officers, as was decided in Burgoyne v. Supervisors."[14] This case, so far as the point in hand is concerned, does not appear to have been questioned; and since the words "prescribed by law" are used in the Constitution of 1879, they may well be taken to have been used by the convention, and ratified by the people, in the sense given to them in Exline v. Smith.

There was at one time some uncertainty as to whether participation in the trial of a case without demanding a jury trial would operate as a waiver thereof. Indeed, this was but a part of the larger question as to whether actual waiver could be accomplished otherwise than in the manner provided by the statute. The answer to both is well settled in the negative. The case of Smith v. Po-

[13] 5 Cal. 112.

[14] But Burgoyne v. Supervisors has been overruled. See People v. Provines, 34 Cal. 520.

lack [15] is the first case in our reports in which the point is decided. In that case the appeal was from an order of reference. The record showed that "the appellant was in court by his counsel at the time the order was entered, and made suggestions as to the form, etc., of the order," but made no express waiver. The supreme court reversed the order on the ground that there had been no waiver of a jury trial, and Murray, J., delivering the opinion, said:

"The mere silence of an attorney cannot amount to a waiver of a constitutional right. The act concerning 'references' requires the consent to be entered in the minutes. This waiver must appear affirmatively, and not by implication. Neither is the appellant concluded by this act of his counsel. The act concerning attorneys and counselors gives an attorney or counsel power to bind his principal by an agreement in writing, filed with the clerk, or entered in the minutes of the court. No such agreement appears in the record of this case."

It will be observed of this case that the party did not wait until after the trial before making the objection, but appealed at once from the order directing the reference, and had proceedings upon the order stayed. The general language of the opinion, therefore, must be construed with reference to this fact. What is said in regard to the ways in which an attorney may bind his client is applicable only to agreements which were not performed. It is not applicable to *executed* agreements; and it would seem that where an agreement is made by an attorney not in the way specified in the statute, but such agreement is performed, it falls under the general rule as to agreements which are within the statute of frauds, but which have been executed. The opinion in the case of Smith v. Brannan [16] is in harmony with this view. In Smith v. Brannan the record contained a statement that there had been an express waiver. The statement was contradicted by an affidavit of the judge. The supreme court held that the statement in the record could not be contradicted in that way, but said: "But if we disregard this point it by no means follows that a party can go on and try his case before a judge without objection, and after he has lost it complain that the case was not tried by a jury." The foregoing, in view of the facts, does not amount to more than

[15] 2 Cal. 92. [16] 13 Cal. 107.

a *dictum*. It was cited as authority in Baker v. Joseph,[17] in which case, however, there was a jury trial on both counts, the contention being that one count was for equitable relief. In neither of the foregoing cases was any reference made to Smith v. Polack.

In Boston Tunnel Co. v. McKenzie [17a] the objection that the court erred in trying the case without a jury was urged for the first time on appeal. The court said:

"The cause was by consent of counsel set down for trial on a day certain. On that day counsel for defendants appeared and the cause was tried by the court without objection, and without a jury having been demanded. The jury was *thereby waived.*" Citing a number of New York cases.

So in Montgomery v. Sayre [17b] the court said:

"If the question were, did the defendant waive his right to a trial by jury—the record being silent on the question, and the cause having been tried and determined by the court—there would be no difficulty, for the authorities are explicit to the end that such would be the *presumption.*" Citing Boston Tunnel Co. v. McKenzie, and Smith v. Brannan, *supra*.

Again, in Maddux v. Walthall,[17c] which was an election contest instituted under section 1111 et seq., Code of Civil Procedure, the court said:

" In this particular instance the refusal of the court to grant such a trial was perfectly proper. In the first place, the demand was not made until after the trial had commenced, and, in the second place, as appears by the stipulation of the parties, and by the record in the cause, no question of fact was involved."

In none of these cases was the case of Smith v. Polack, above cited, mentioned. In Swasey v. Adair,[17d] although Smith v. Polack was not cited, nor, for that matter, any of the above cases, the court held that the right to a trial by jury was secured to litigants by the provisions of section 592 of the Code of Civil Procedure, and that it was error to refuse a jury trial in a case in which it was authorized unless waived in one of the modes prescribed in section 631 of the same code. It is true the court, in this case, expressly

[17] 16 Cal. 173.
[17a] 67 Cal. 485, 8 Pac. 22.
[17b] 91 Cal. 206, 27 Pac. 648. The presumption was refused in this case; and compare Shepherd v. Jones, 71 Cal. 223, 16 Pac. 711.
[17c] 141 Cal. 412, 74 Pac. 1026.
[17d] 88 Cal. 179, 25 Pac. 1119.

denied the right on the ground that it was an equitable proceeding; but it was contended that the defendant had waived her right by not demanding a jury when the fact at issue was about to be heard and determined by the court without a jury.

In Platt v. Havens[17e] the court held, upon the authority of Smith v. Polack and Swasey v. Adair, above cited, that the right of trial by jury could not be waived by implication. There are also other decisions which support this doctrine.[17f]

The true rule, it is submitted, rests upon the distinction between proof of the fact of waiver, whether express or implied, and the presumption of that fact. Presumption can only be indulged where proof of the fact itself is wanting. Applying this principle, therefore, it is clear that waiver of the right of trial by jury can be accomplished solely in one or the other of the three modes specified in section 631 of the Code of Civil Procedure. The legislative intent is undoubtedly to exclude all other modes. To hold otherwise would be to violate the fundamental rules of statutory construction.

But waiver may be presumed. If a record shows that the court itself tried the cause, without a jury, and fails to explain why a jury was not called, it will be presumed that a jury was waived in one of the ways in which a jury might be waived under the code. Neither party will be allowed to contest this presumption, which rests upon the broad principle of the correctness and validity of the proceedings of the trial court. The appellate court will indulge all proper intendments necessary in support of those proceedings.[17g]

In none of the above-cited cases does the court take a position inconsistent with the one here assumed. On the contrary, they all, almost without exception, sustain it; notwithstanding the fact that sometimes the above distinction is lost sight of in the use of the terms waiver and presumption of waiver. In Boston Tunnel Co. v. McKenzie, the court really decided nothing more than that, the

[17e] 119 Cal. 244, 51 Pac. 342.

[17f] See Biggs v. Lloyd, 70 Cal. 447, 11 Pac. 831; Farwell v. Murray, 104 Cal. 464, 38 Pac. 199; In re Robinson, 106 Cal. 493, 39 Pac. 862; and compare Pfister v. Dascey, 65 Cal. 403, 48 Pac. 393; Adams v. Crawford, 116 Cal. 495, 48 Pac. 488; Ferrea v. Chabot, 121 Cal. 233, 53 Pac. '689, 1092; Napthaly v. Rovegno, 130 Cal. 639, 63 Pac. 66, 621. Compare McGuire v. Drew, 83 Cal. 225, 23 Pac. 312.

[17g] See section 285, *post*.

Where record shows trial by jury without jury being demanded, on appeal waiver of trial by jury will be presumed. Perego v. Dodge, 9 Utah, 3, 33 Pac. 221.

record being silent as to the reason for a trial by the court in a cause where the right to have a jury existed, it was too late to raise the question for the first time on appeal, and it would be presumed that the right to a jury trial was waived; although the court made use of the explicit statement that the jury was waived by the failure of the appellant to ask for one. The word "presumption" is made use of in Montgomery v. Sayre, although *upon the authority of Boston Tunnel Co. v. McKenzie.* In Maddux v. Walthall the right (there being an agreed statement of facts) did not exist, and therefore could not be waived, notwithstanding the dictum of the court that it was waived by the failure to demand a jury.

So in Leadbetter v. Lake [17h] the court again made use of the phrase "the presumption is that the jury was waived," citing all the above cases in support of the principle.

The right of trial by jury, expressly guaranteed by the Constitution, as it is, has always been held of such sanctity that it could not be waived otherwise than under the solemn forms of law. In the absence of legislative provision it is doubtful if there might be waiver of the right. The courts seem to be of the opinion that it could not be done by stipulation—private stipulation, as distinguished from the consent evidenced by the minutes of the court. In Griffith v. Life Ins. Co.,[17k] the supreme court said:

"Such provisions as the law prescribes for the advantage and protection of individuals may, as a rule, be waived by them, where not inhibited by public policy. 'Where no principle of public policy is violated parties are at liberty to forego the protection of the law.' (Sedgwick on Statutory and Constitutional Law, 109.) Where, however, 'the object of the statute is to promote great public interests, liberty, or morals, it cannot be defeated by any private stipulation.' " Citing same, page 110, and referring to section 631, Code of Civil Procedure, among others.

Obviously the court had in mind the right of trial by jury as one that could not be waived by private stipulation. So, if one may not waive the right by express stipulation, it is clear such waiver cannot be held to follow a stipulation resting solely upon implication.

The importance of the doctrine of presumptive waiver here outlined rests upon cases where the record is silent upon the subject,

[17h] 118 Cal. 515, 50 Pac. 686.

[17k] 101 Cal. 627, 40 Am. St. Rep. 96, 36 Pac. 113.

and parties attempt to raise the question for the first time on the appeal. Every consideration of justice and fair dealing, however, requires that a party should not be permitted to take the chances of a trial by the court, and when he finds that the decision is against him, object for the first time that the trial should have been by jury.[171] It can hardly be contended that a judgment rendered upon a trial by the court, had in the absence of an express waiver of a jury, is absolutely void.[18] If not void it must be irregular merely, and if merely irregular, it is difficult to perceive why the party should not be required to object to the course taken, as he is required to do in the case of other irregularities.[19] The only difficulty about this is that it appears to add a mode of waiver

[171] The decisions of other states substantially agree with those of California. In the following cases the doctrine of waiver was considered: Dooley v. Burlington G. M. Co., 12 Ariz. 332, 100 Pac. 797; Duncan v. Whedbee, 4 Colo. 143; Leahy v. Dunlap, 6 Colo. 552; Cerussite Mining Co. v. Anderson, 19 Colo. App. 307, 75 Pac. 158; Frank v. Bauer, 19 Colo. App. 445, 75 Pac. 930; Lindstrom v. Lumber Co., 12 Idaho, 14, 88 Pac. 92; Montana etc. P. Co. v. Boston & M. Co., 27 Mont. 288, 70 Pac. 1114; King v. Allen, 29 Mont. 5, 73 Pac. 1107; Chessman v. Hale, 31 Mont. 577, 79 Pac. 254, 68 L. R. A. 410, 3 Ann. Cas. 1038; Murray v. Hauser, 21 Mont. 120, 53 Pac. 99; Cons. G. & S. M. Co. v. Struthers, 41 Mont. 565, 111 Pac. 153; Haley v. Eureka County Bank, 21 Nev. 127, 26 Pac. 64, 12 L. R. A. 815; Territory v. Ortiz, 8 N. M. 154, 42 Pac. 87; Erickson v. Bank, 9 N. D. 81, 81 N. W. 46; Yankton etc. Ins. Co. v. Ry. Co., 7 S. D. 428, 64 N. W. 514; Meldrum v. Kenefick, 15 S. D. 370, 89 N. W. 863; Queenan v. Territory, 11 Okl. 261, 71 Pac. 218, 61 L. R. A. 324; In re McQuown, 19 Okl. 347, 91 Pac. 689, 11 L. R. A., N. S., 1136; Wilkes v. Cornelius, 21 Or. 341, 23 Pac. 473; Johnston v. Shofner, 23 Or. 111, 31 Pac. 254; American etc. Co. v. Hutchinson, 19 Or. 334, 24 Pac. 515; Puffer v. American Ins. Co., 48 Or. 475, 87 Pac. 523; Patty v. Salem Flouring Mill Co., 53 Or. 350, 96 Pac. 1106, 98 Pac. 521, 100 Pac. 298; Gibson v. McGurrin (Utah), 106 Pac. 669; Stetson etc. Co. v. McDonald, 5 Wash. 496, 32 Pac. 108; Keane v. Brygger, 3 Wash. 338, 28 Pac. 653; Frye v. Hill, 14 Wash. 83, 43 Pac. 1097; Johnson v. Goodtime, 1 Wash. Ter. 484; King Co. v. Hill, 1 Wash. 404, 25 Pac. 451; Meeker v. Gilbert, 3 Wash. Ter. 369, 19 Pac. 18; Park v. Mighell, 7 Wash. 304, 35 Pac. 63; State v. Neterer, 33 Wash. 535, 74 Pac. 668; Zilke v. Woodley, 36 Wash. 84, 78 Pac. 299; State v. Packenham, 40 Wash. 403, 82 Pac. 597; Oregon etc. Co. v. McCormick, 46 Wash. 45, 89 Pac. 186; Grimm v. Pacific etc. Co., 50 Wash. 415, 97 Pac. 297; Fruitland etc. Co. v. Smith, 54 Wash. 185, 102 Pac. 1031.

See, also, Lemon v. Ward, 3 Ariz. 219, 73 Pac. 443; Meeker v. Gilbert, 3 Wash. Ter. 369, 19 Pac. 18; Baker v. Prewitt, 3 Wash. Ter. 595, 19 Pac. 149; Hollibaugh v. Hehn, 13 Wyo. 269, 79 Pac. 1044; Pointer v. Jones, 15 Wyo. 1, 85 Pac. 1050.

The case of Chessman v. Hale, 31 Mont. 577, 79 Pac. 254, 68 L. R. A. 410, 3 Ann. Cas. 1038, and the more recent one of Consolidated etc. Co. v. Struthers, 41 Mont. 565, 111 Pac. 153, are particularly interesting as presenting the doctrine of the text in an exhaustive manner.

[18] A judgment rendered without a trial is not absolutely void. Ex parte Bennett, 44 Cal. 84.

[19] See section 27, *ante*.

to those specified in the statute. This difficulty, however, is not insuperable.[20]

Failing to appear at the call of the term calendar is not a waiver of a jury trial;[21] but it has been held that failure to appear and deposit fees for a jury trial within five days after demanding such a trial, no demand having been made until the parties announced themselves ready for trial, was a waiver of the right, the court holding that a rule requiring such appearance and deposit was a reasonable one, the practical operation of which was merely to require a litigant to make his demand for a jury trial five days prior to the date set for trial.[22] In the case of Biggs v. Lloyd,[23] the court held that neglecting to demand a jury at the time the case is called to be set for trial was not a waiver of a jury trial, although a rule of court provided that a jury should then be demanded. Nor is it a waiver of the right to a jury trial to fail to ask for a jury when a continuance is granted at defendant's (appellant's) request.[24] Nor is it waiver to go to trial, after refusal of a jury trial, before the court.[25]

Denial of the right to a jury trial cannot be reviewed collaterally, as by *habeas corpus,* in any case where the jury is not a constituent part of the court, or in which the right to a jury might be waived. The remedy is by appeal.[26]

[20] In this connection see People v. King, 28 Cal. 265. In that case it was held that where a demurrer to an indictment was overruled, and thereupon the prisoner refused to plead, it was proper for the court to enter a judgment of guilty against him. The statute authorizing this was held to be constitutional, although there was no provision in the Constitution then in force, that a jury could be waived in criminal cases.

[21] Sweeney v. Standford, 60 Cal. 362.

[22] Adams v. Crawford, 116 Cal. 495, 48 Pac. 488. See, also, Napthaly v. Rovegno, 130 Cal. 639, 63 Pac. 66, 621.

In at least two states (see note 12a, *supra*), specific provision for the deposit of jury fees is made, and it is said that failure to comply with this requirement shall be deemed waiver of the right. The following Colorado cases illustrate the law in that state. See Woods v. Tanquary, 3 Colo. App. 515, 34 Pac. 737; Commissioners v. Brown, 2 Colo. App. 473, 31 Pac. 525.

For other cases to same effect, see note 171, *supra.*

[23] 70 Cal. 447, 11 Pac. 831. In Sholin v. Skamania etc. Co., 56 Wash. 303, 105 Pac. 632, it was held that the court might, in its discretion, permit a demand for a jury to be made after the case is called to be set for trial. And see cases there cited.

[24] Farwell v. Murray, 104 Cal. 464, 38 Pac. 199.

[25] In re Robinson, 106 Cal. 493, 39 Pac. 862. In the cases cited in the last three notes the supreme court held specifically that waiver of jury trial could be accomplished only in the modes specified in section 631, Code of Civil Procedure.

[26] Ex parte Miller, 82 Cal. 454, 22 Pac. 1113. In this case the writ was refused on the ground that the offense charged, the violation of an ordinance, was not one requiring a jury trial and that the denial of a trial

§ 34a. Public Trial.—The constitutional right to a public trial in criminal prosecutions is guaranteed in section 13 of article 1 of the California Constitution of 1879.[1] A public trial has been held to include open doors and the free admission of the general public so far as such admission is consistent with

by jury was merely an error which might be reviewed on appeal.

See Powelson v. Lockwood, 82 Cal. 613, 23 Pac. 143, where prohibition was denied to restrain a trial without a jury of an offense of vagrancy, and for like reasons.

And see In re Fife, 110 Cal. 8, 42 Pac. 299, where *habeas corpus* was denied in a similar case and for a like reason.

At first blush the cases of Taylor v. Reynolds, 92 Cal. 593, 28 Pac. 688, and Ex parte Wong You Ting, 106 Cal. 296, 39 Pac. 627, decide the point otherwise; but in those cases the point was really not raised, and all objections to the writ were expressly waived in order to reach a decision on the merits as to whether the defendant was or was not entitled to a jury trial. In the Fife case the court said:

" The denial of a trial by jury is merely error to be corrected on appeal, and does not go to the jurisdiction of the court, so that it may be inquired into on *habeas corpus*, except in those cases where a jury cannot be waived, and therefore is a necessary constituent part of the court. A jury may be waived in any civil case, and it is not contended by anyone that the refusal of a demand for a jury in a civil case affects the jurisdiction, or is anything more than error; and, as a jury may, under the Constitution, be waived 'in all criminal cases not amounting to a felony,' a jury is not a necessary constituent part of a court for the trial of a misdemeanor, and the refusal of a court to allow a jury on such a trial is mere error."

See cases cited in note 171, *supra*, for illustrations of acts accepted, as well as those not accepted, as evidence of waiver of right to a jury trial.

[1] See, also, section 645, Arizona Criminal Code, Revised Statutes of 1901; article 2, section 16, Constitution of Colorado; article 1, section 13, Constitution of Idaho; article 2, section 16, Constitution of Montana; section 3995, Cutting's Compiled Laws of Nevada (section 10, Criminal Practice); article 1, section 13, Constitution of North Dakota; article 2, section 20, Constitution of Oklahoma; article 1, section 11, Constitution of Oregon; article 6, section 7, Constitution of South Dakota; article 1, section 12, Constitution of Utah; article 1, section 22, Constitution of Washington.

The Constitutions of Oklahoma, Oregon, South Dakota, Utah, Washington and Wyoming, also contain provisions for "open" courts, and the administration of justice openly. Article 1, section 10, Constitution of Oregon; article 1, section 10, Constitution of Washington, and article 1, section 8, Constitution of Wyoming. It is probable, however, that the word is used here in the sense of "available"; that is, that courts are open to all alike for the defense of personal and property rights; but the Oregon provision contains the expression, "no court shall be secret, but justice shall be administered openly," etc. The Wyoming Constitution, however, doubtless refers to the availability of courts, rather than to the public character of the trials, and contains no reference to the latter. The provision under consideration was adopted from the sixth amendment to the Constitution of the United States, and is to be found in nearly all the state Constitutions.

In some instances, as by the North Dakota code (section 6749), statutory provision is made for the exclusion of persons "not necessarily present as parties or witnesses," and the courts are, in such cases, sometimes called upon to determine whether the scope of the constitutional provisions is thus affected.

the size of the courtroom, the conveniences of the court, the right to exclude objectionable characters and youth of tender years, and to do all things that may facilitate the proper conduct of the trial. Quoting from Judge Cooley, the court in People v. Hartman [1a] said:

"The requirement of a public trial is for the benefit of the accused; that the public may see that he is fairly dealt with and not unjustly condemned, and that the presence of interested spectators may keep his triers keenly alive to a sense of their responsibility, and to the importance of their functions; and the requirement is fairly observed if, without partiality or favoritism, a reasonable proportion of the public is suffered to attend, notwithstanding that those persons whose presence could be of no service to the accused, and who would only be drawn hither by a prurient curiosity, are excluded altogether."

The court, in the same case, also held that the purposes contemplated by the Constitution were not met by the presence of the officers of the court, "men whom, it is safe to say, were under the influence of the court," and their presence made the trial no more public than if they, too, had been excluded.

The cases of People v. Swafford,[2] and People v. Kerrigan,[3] were not in conflict with the constitutional provision, and the case cited above. In the former the defendant entered no objection to the action of the court in excluding all but the witnesses, officers and counsel, and it was said that *non constat* such order was made at his express request. In People v. Kerrigan, the doors were not closed, and the friends of the defendant were permitted to come and go as they pleased.

The requirement of a public trial applies also to a preliminary examination. This was held in People v. Tarbox,[4] where the court said:

"There can be no question that the defendant has the 'right' to a public examination before the committing magistrate, but under the provisions of the Penal Code, above quoted [sec. 868], he may waive that right whenever he deems it to his interest to do so."

§ 35. A General Verdict in an Equity Case is Irregular.—As has been stated, it is in the discretion of the judge in an equity case

[1a] 103 Cal. 242, 42 Am. St. Rep. 108, 37 Pac. 153.
[2] 65 Cal. 223, 3 Pac. 809.
[3] 73 Cal. 222, 14 Pac. 849. See, also, State v. Osborne, 54 Or. 289, 103 Pac. 62, where the subject is treated exhaustively, and the cases collected.
[4] 115 Cal. 57, 46 Pac. 896.

to submit special issues to the jury.[1] But a general verdict in any equity case is irregular, and may be set aside even after it has been approved by the court.[2]

In many cases legal and equitable causes of action or defense are united in one pleading. In such cases the court should pass upon the equitable portion of the case first, and when that is done the legal portion may be submitted to a jury.[3] It is irregular to take a general verdict on both branches of the case together. Nor should special issues involving the various issues be framed, and all submitted to the jury together.[4]

But irregularities in this regard, like other irregularities, are waived by failing to object at the trial in proper season.[5]

Where an answer has a legal and an equitable aspect, and the latter only is passed upon, and the defendants take the equitable relief only, there is no injury from denying a jury trial.[6]

§ 36. The Court Should Rule on Questions of Law as They Arise.—It is the function of the judge to decide questions of law;[1] and it is the right of the parties to have such questions decided as they arise; for the subsequent conduct of the trial may depend upon the decision. In practice, however, it is very common for the judge to relieve himself from the necessity of deciding a point, by receiving the evidence "subject to objection," or "subject to exception," or the like. When this is done it is sometimes required that the party shall renew his objection at a subsequent stage of the trial, as is explained in another place.[2] In cases where the objection is properly made and is taken under advisement, it is not necessary for the party to renew it, but it is the duty of the judge to rule upon the question before the trial terminates, and it is an irregularity to fail to do so. The practice for receiving evidence

[1] See section 34, and notes 8 and 9, *ante*.

[2] Wingate v. Ferris, 50 Cal. 105; Brandt v. Wheaton, 52 Cal. 430, 1 Morr. Min. Rep. 145.

[3] Arguello v. Edinger, 10 Cal. 150; Estrada v. Murphy, 19 Cal. 248; Lestrade v. Barth, 19 Cal. 660; Martin v. Zellerbach, 38 Cal. 300, 99 Am. Dec. 365; Weber v. Marshall, 19 Cal. 447; Fish v. Benson, 71 Cal. 428, 12 Pac. 454; Swasey v. Adair, 88 Cal. 179, 25 Pac. 1119.

[4] Weber v. Marshall, 19 Cal. 447.

[5] Baker v. Joseph, 16 Cal. 173; Lestrade v. Barth, 19 Cal. 660; Schieffery v. Tapia, 68 Cal. 184, 8 Pac. 878.

[6] Bodley v. Ferguson, 30 Cal. 511.

[1] It is error to submit questions of law to the jury. See section 120a, and Carpentier v. Thirston, 24 Cal. 268; People v. Ivey, 49 Cal. 56.

[2] See section 104, *post*.

in that manner has been condemned. Thus in Sharp v. Lumley,[3] Sawyer, C. J., delivering the opinion, said:

"We here take occasion to remark that whenever a district judge receives evidence in the progress of a trial, and reserves the question of its admissibility for further consideration, when his conclusion is attained he should distinctly and expressly rule upon it one way or the other, so that the party against whom the ruling is made can have the benefit of a specific objection. We often find in records evidence received in this manner, subject to be finally received or rejected after more mature consideration, without any clue to the final ruling, other than such as is to be inferred from the general result. It may also be added that questions should not be so reserved without the consent of parties in cases where the consequences of the ruling might be obviated by other evidence on the part of the party against whom the ruling is finally made."

So in Mayo v. Mazeaux,[4] Crockett, J., delivering the opinion, said: "We cannot too strongly condemn the practice adopted in this case, and which is of frequent occurrence in the district courts, of admitting testimony subject to exceptions, and reserving the ruling upon it until a later stage of the case, and afterward omitting to decide the point, or failing to state upon what ground the evidence is rejected, if it be excluded. This loose practice often leaves it doubtful whether the particular evidence was excluded or not, or was considered by the court as an element in its decision. If rejected it may have been on a point which the party might have supplied if the decision had been made at the proper time. Without intending to lay down an inflexible rule on the subject, we deem it the better practice to decide upon the admissibility of evidence when offered; but if the rule be departed from, it is clearly the duty of the court at a subsequent stage of the case to rule upon the point distinctly, and if the evidence be excluded to state upon what ground."

In each of the foregoing cases the supreme court could see from the record what the decision upon the objection was, so that the remarks quoted are merely *dicta*. But it is believed that they are in the main correct. It cannot be doubted that where a question is taken under advisement the court should not fail altogether to rule upon it;[4a] and it seems as clear that where the consequences

[3] 34 Cal. 611.
[4] 38 Cal. 442.
[4a] City of Stockton v. Dunham, 59 Cal. 609.

of the ruling could be avoided by the introduction of other evidence, the ruling should be made in time to permit such other evidence to be introduced. It is believed, too, that, as a general rule, a decision upon the admissibility of evidence should not be reserved against the objection of the parties, at least if the trial is to proceed. There are many points of such difficulty that the court may properly take them under advisement; but if in such case it be shown by the affidavit of counsel (or probably by his simple assurance) that the subsequent conduct of his side of the case depends, in a material degree, upon the way the point is decided, and that he cannot tell what course to adopt until he knows what the ruling is, it is believed that the judge would not be justified in forcing him to proceed in the absence of the ruling.

This is practically the view taken by the supreme court in the case of Martin v. Lloyd,[4b] where it was said:

"The better practice is, no doubt, to rule upon questions involving the admissibility of evidence as they arise; but it happens sometimes that the determination of the merits of the case turns upon a question touching the relevancy or incompetency of certain evidence offered, and in such event it would be entirely proper for the court to take the question under advisement, where neither party could be prejudiced by such a course. On the other hand, the practice, which seems nowadays to be too freely indulged in, might in some cases seriously embarrass a party who, not knowing what the final ruling would be, could not determine what further evidence he should introduce. Therefore, whether such practice would be ground for reversal in any given case would depend upon the particular circumstances of that case."

The failure to rule upon an objection properly made and not waived is an "irregularity of the court," and should be reviewed as such.[5]

If the evidence in question is admissible, or, if inadmissible, its admission would in the state of the case be harmless error, failure to rule thereon, even if an irregularity of court, would be injury without prejudice, and governed by the rule.[6]

[4b] 94 Cal. 195, 29 Pac. 491. See, also, Raymond v. Glover, 122 Cal. 471, 55 Pac. 398.

See People v. Westlake, 62 Cal. 303, as to presumed waiver of ruling, where one was not asked.

[5] Dewey v. Frank, 62 Cal. 343; Estate of Brooks, 54 Cal. 471.

[6] See Ramboz v. Stowell, 103 Cal. 588, 37 Pac. 519. See, also, section 286, *post*.

§ 37. The Court Should not Change Its Rulings to the Prejudice of a Party.—The rule as to the law of the case does not apply to lower courts;[1] and therefore such courts may change their rulings. But a ruling should not be changed in such a way as to mislead a party or prejudice his rights. This was held in Monson v. Cooke.[2] In that case the referee admitted testimony against objection. After the case was submitted the referee undertook to exclude from his consideration the testimony, on the ground of incompetency. For this the judgment was reversed, the supreme court, per Heydenfeldt, J., saying: "The referee should have held to his first decision, and given the defendants the benefit of it upon appeal, or after arriving at the conclusion that the witness was incompetent, he should have ordered a rehearing of the cause, so that the plaintiff might have had the opportunity of otherwise supplying the excluded testimony of Cooke."

The same rule was applied in Carpentier v. Small.[3] The action was ejectment; the defendants undertook to set up in their answer a claim for improvements, and at the trial offered evidence in support of such claim. Objection was made that the evidence offered was inadmissible under the answer, but the objection was overruled and the evidence admitted. In the decision of the case, however, it appeared that the court decided that the answer was insufficient to permit the defendants to be allowed for their improvements. For this change of opinion a new trial was granted, and Sawyer, C. J., delivering the opinion, said:

"This change of opinion may have worked great injustice to the defendants. They made an attempt to set up a valid claim for improvements in their answers. The plaintiff did not demur for insufficiency, but did raise the question on that ground by objection to the introduction of evidence under it. The court then deemed the answer sufficient, and admitted the evidence. The ruling was with the defendants on that point. There was, therefore, in view of the ruling of the court, no occasion to amend, and no leave to amend was asked. Had the ruling been the other way, the defendants might have obviated the objection by amendment. But relying on the ruling, the subsequent change in the view of the court has deprived them of an opportunity to correct the defect in their pleadings, and they may lose the value of their im-

[1] Lawrence v. Ballou, 37 Cal. 518.
[2] 5 Cal. 436.
[3] 35 Cal. 346.

provements in consequence of the action of the court, when it was too late to remedy it. We think the defendants were entitled to rely upon the ruling, and since a different view finally prevailed, that they should have an opportunity to obviate the defect in the pleadings. Otherwise great injustice may result."

The foregoing case was approved and followed in Hartson v. Hardin.[4] In that case evidence of the value of services sued for was admitted against objection as "tending in some degree, however remotely, to establish the value of plaintiff's services"; but in the decision the court held that there was no proof whatever of the value of the services. For this the judgment was reversed.

The same doctrine was applied in Tennant v. Pfister.[5] In this case a demurrer to the complaint on the ground of misjoinder of parties was overruled. At the trial the question was again raised by objection to any evidence under the complaint, which objection was sustained, and the plaintiffs declining to amend, the action was dismissed. The supreme court did not consider the question as to the sufficiency of the pleading, but reversed the judgment for the irregularity of the court to the prejudice of the plaintiff. On a subsequent appeal it was held that the objection as to the misjoinder was well taken.[6]

The foregoing cases sufficiently establish the rule and show its reason and application.

§ 38. The Judge Should not Express Any Opinion Concerning the Character of a Witness.—This is the effect of the provision of the Constitution that judges must not charge juries with respect to matters of fact. That provision, as is explained in another place,[1] not only prevents the judge from charging directly as to a fact, but also from assuming a fact, and from intimating any opinion concerning the way the jury ought to find, or concerning the credibility of a witness; and the prohibition operates not only during the formal charge to the jury, but also during other stages of the trial. The judge, however, may rebuke a witness for improper demeanor. Thus where the judge, in the presence and hearing of the jury, said to a witness, who was constantly laughing, "that his manner of testifying was very unbecoming, and that he was surprised to see him manifest so much levity in

[4] 40 Cal. 264.
[5] 45 Cal. 270.
[6] Tennant v. Pfister, 51 Cal. 511.
[1] See section 121, *post*.

a case of so much solemnity," it was held that there was nothing improper or censurable in the proof.[2]

It is somewhat doubtful whether a violation of the provision above mentioned should be reviewed as an error in law or as an irregularity. Where it occurs during the charge it is the practice to proceed as for an error in law.

§ 39. After the Jury have Retired the Judge Should not Hold Any Communication With Them, Except in Open Court in Presence of Counsel.—Communications from the judge to the jury after they have retired may be of two kinds, viz., when they come back into court for further instructions, and when the judge goes to their room and makes some private communication to them. These will be considered separately.

1. *Where the Jury Come Back into Court for Further Instructions.*—The code provides for this contingency as follows:[1]

"Sec. 614. After the jury have retired for deliberation, if there be a disagreement between them as to any part of the testimony, or if they desire to be informed of any point of law arising in the cause, they may require the officer to conduct them into court. Upon their being brought into court, the information required must be given in the presence of, or after notice to, the parties or their counsel."

This provision has been in force since 1851.[1a] It gives the jury the right to come back for further instructions, and makes it the

[2] Thomas v. State, 27 Ga. 287; and look at Sarah v. State, 28 Ga. 576. The subject is further treated in section 121, *post*.

[1] Code of Civil Procedure of California; section 192, Mills' Annotated Code of Colorado; section 4390, Revised Codes of Idaho; section 6751, Revised Codes of Montana (section 1085, Code of Civil Procedure); section 3265, Cutting's Compiled Laws of Nevada (section 170, Civil Practice); section 7027, Revised Codes of North Dakota; section 5799, Compiled Laws of Oklahoma; section 144, Lord's Oregon Laws; section 262, Code of Civil Procedure of South Dakota; section 3156, Compiled Laws of Utah; section 352, Rem. & Bal. Code of Washington (section 5005, Bal. Code); section 4503, Compiled Statutes of Wyoming. These sections are couched in practically identical language.

Section 1400, Revised Statutes of Arizona, is as follows: "When the jury wish to communicate with the court they shall make their wish known to the officer having them in charge, who shall inform the court thereof, and they may be brought into open court, and, through their foreman, shall state to the court, either verbally or in writing, what they desire to communicate." But section 1410 provides that no further instructions may be given after the argument begins, and it is doubtful if the scope of the section quoted is strictly in line with the section under consideration.

[1a] Laws of 1851, p. 77.

duty of the court to give such instructions. This is to be done, however, "in the presence of, or after notice to, the parties or their counsel." To violate this provision is undoubtedly an irregularity; but it is believed that such irregularity is not productive of injury unless the instruction be erroneous. In the case of Redman v. Gulnac,[2] after the jury had retired they came back for further instructions, and the court instructed them "in the absence of the parties or their counsel." But in this case the record on appeal did not show what the instructions were, and the court had therefore no means of determining their correctness. It said that "such instructions will be considered important, if the contrary be not shown, from the fact that the jury have asked for them," and directed a new trial. This is in accordance with the general rule with reference to irregularities, viz., that if an irregularity be shown it will be presumed to have been injurious, unless the contrary appear from the record.[3] The case does not touch the question of what is to be done where the record shows what instructions were given. As above stated, it is undoubtedly irregular where the jury return to instruct them without notice to, and in the absence of, the parties or their counsel. But no reason is perceived why the general rule should not apply, viz., that where the court can see that no injury resulted from the irregularity, the verdict will not be disturbed.[4] And it would seem that where the instruction is manifestly correct no injury can result from it. It is true that in the case supposed the losing party had no opportunity to except to the instruction. But what good would an exception have done him? The correctness of the instruction may be examined upon motion for new trial on the ground of the "irregularity of the court." Such inquiry is not for the purpose of seeing whether an "error in law" was committed, and therefore no exception is required. It is for the purpose of seeing whether an irregularity, which is shown to have occurred, *was injurious to the moving party*. But the inquiry is precisely the same for the one purpose as for the other; that is to say, it is directed in both cases to the correctness or incorrectness of the instruction. All that the losing party can claim is that the correctness of the instruction should be inquired into, and

[2] 5 Cal. 148.
[3] See section 26, *ante*.
[4] See section 26, *ante*.

that is all he would have gained had he been present and taken an exception to it.[5]

It would seem, therefore, that the rule may be stated to be this: If upon the return of the jury *erroneous* instructions (or instructions which are not shown or explained by the record) are given in the absence of, and without notice to, the parties or their counsel, a new trial must be granted; but if the instructions so given are correct and applicable, the irregularity is not productive of injury, and a new trial should be refused.

The section under consideration makes no distinction between an instruction upon an entirely new phase or theory of the litigation, and one intended merely to elucidate some point already covered by instructions given prior to the retirement of the jury. It is to be assumed that no distinction of this kind exists, and that the judge is at liberty to give an entirely new instruction upon some point of law concerning which the jury desires information when they come into court for further instructions. The supreme court in People v. Stouter,[5a] however, held that an instruction which permitted them to find the defendant guilty of an attempt to commit the crime charged, given for the first time to the jury after they had been out twenty-four hours, and had announced their views in the matter, was, under the circumstances of that case, "a most dangerous interference with the right of the defendant to a fair trial." It is not clear whether the court placed its decision upon the ground that the instruction was too late, or whether the circumstances were such as to render it prejudicial, or whether it was otherwise erroneous. Doubtless each of these grounds had its weight in determining the court's opinion. But even so, the principle is clear that there is a limit to instructions that may be given to a jury, particularly in a criminal case, after retirement.

What would constitute reasonable notice within the meaning of section 614, above quoted, must be determined from the circumstances of each case.

2. *Private Communications from the Judge to the Jury.*—It sometimes happens that a judge will go to the jury-room, either of his own accord or in response to a request from the jury, and

[5] This would seem to be too clear to admit of discussion. But look at Emerson v. Santa Clara County, 40 Cal. 543. The reasons given by Crockett, J., are unanswerable.

[5a] 142 Cal. 146, 75 Pac. 780.

make some communication to them. The authorities are not in accord as to the effect of such a communication. Some of the cases say that a new trial should be granted, without regard to the character of the communication. Thus in Sargent v. Roberts,[6] where such a communication was made the ground of a motion for new trial, Parker, C. J., delivering the opinion, said: "As it is impossible, we think, to complain of the substance of the communication, the only question is whether any communication at all is proper, and if it was not the party against whom the verdict is rendered is entitled to a new trial. And we are all of opinion, after considering the question maturely, that no communication whatever ought to take place between the judge and the jury after the cause is committed to them by the charge of the judge, unless in open court, and, where practicable, in presence of counsel in the cause. The oath administered to the officer seems to indicate this as the proper course. 'He is to suffer no person to speak to them, nor to speak to them himself, unless to

[6] 1 Pick. 337, 11 Am. Dec. 185. See, also, State v. Wroth, 15 Wash. 621, 47 Pac. 106, where it was shown that after the jury had retired for deliberation, they requested to see the judge, and thereupon the latter left the bench and went into the jury-room and closed the door. Thereafter, upon returning to the court-room, he stated to counsel for the prosecution and defense that the jury desired to be further instructed on the subject of reasonable doubt. There arose a question as to the facts in making up the record of the motion, and it was finally made to appear that the judge, instead of going into the jury-room, stood in the doorway, the door being partially open, but this was held to be such misconduct as warranted a new trial. The following language expresses the principle:

"It is contended by the appellant's counsel that this constituted such misconduct on the part of the trial judge as required a reversal, and we think the contention must be sustained. In the discharge of his official duties, the place for the judge is on the bench. As to him, the law has closed the portals of the jury-room, and he may not enter. The appellant was not obliged to follow the judge to the jury-room in order to protect his legal rights, or to see that the jury was not influenced by the presence of the judge; and the state cannot be permitted to show what occurred between the judge and the jury at a place where the judge had no right to be, and in regard to which no official record could be made. But learned counsel for the state insist that the judge said nothing to the jury, and hence his conduct could not have been prejudicial to the defendant. But the law does not subject parties litigant to the disadvantage of being required to accept the statement of even the judge as to what occurs between himself and the jury at a place where the judge has no right to be, and where litigants cannot be required to attend. It is the lawful right of a party to have his cause tried in open court, with opportunity to be present and heard in respect to everything transacted. It is his right to be present, and attended by counsel whenever it is found necessary or desirable for the court to communicate with the jury, and he is not required to depend upon the memory or sense of fairness of the judge as to what occurs between the

ask them whether they are agreed';[7] and he is not to suffer them to separate until they are agreed, unless by order of the court. When the court is adjourned the judge carries no power with him to his lodgings, and has no more authority over the jury than any other person; and any direction from him, either verbal or in writing, is improper. It is not sufficient to say that this power is in hands highly responsible for the proper exercise of it; the only sure way to prevent all jealousies and suspicions is to consider the judge as having no control whatever over the case, except in open court in presence of the parties and their counsel. The public interest requires that litigating parties should have nothing to complain of or suspect in the administration of justice, and the convenience of jurors is of small consideration compared with this great object. It is better that everybody should suffer inconvenience than that a practice should be continued which is capable of abuse, or at least of being the ground of uneasiness and jealousy."

The same doctrine was very clearly stated in Crabtree v. Hagenbaugh,[8] where a new trial was moved for on similar grounds. In that case Caton, C. J., delivering the opinion, said: "In this case, after the jury had retired to consider of their verdict, they sent for the judge, who repaired to their room, and there had intercourse with them on the subject of the instructions which had been given them. This was manifestly done with no improper motive on the part of the judge, and it may be that it had no influence with them in the formation of their verdict. Indeed, the most that the judge did was to decline to explain the meaning of the written instructions which had been given to the jury. We

judge and the jury at any time or place when he has no lawful right to be present. His right in this respect goes to the very substance of trial by jury. Aside from the rights of the parties, public policy will not sanction any departure from the rule that requires that all such communications shall be public, and in the presence of the parties or their counsel." Then follows an excerpt from the case of Sargent v. Roberts, referred to in the text, and other cases founded upon a similar state of facts, and decided similarly.

In State v. Garrand, 5 Or. 216, it was suggested that it was proper for the judge and jury to communicate back and forth concerning the possibility of arriving at a verdict in a short time, and as to the advisability of the judge waiting and keeping the court open to receive the verdict; but even communications of this innocent character should be publicly made.

[7] The oath in California is not materially different. Section 613, Code of Civil Procedure.

[8] 23 Ill. 349, 76 Am. Dec. 694; look also at Taylor v. Betsford, 13 Johns. 487.

choose to assume that what was said and done by the judge while in the jury-room did not influence the jury in their deliberations, for we think that independent of the effect upon the jury the judgment should be reversed, for the simple reason that such an interview did take place. If in this case no harm was actually done, and for that reason the verdict is allowed to stand, we open the door to inquiry in all such cases as to whether the party has been injured by the interview. Such an inquiry should not be tolerated. The policy of the law requires that all the proceedings of the court should be open and notorious, and in the presence of the party, so that if he is not satisfied he may take exceptions to it in the mode pointed out by the law, and not be put to extraneous proof to show that an error has been committed in a secret proceeding, and in fact out of court."

The doctrine of the foregoing cases does not prevail in all the states. Thus in Goldsmith v. Solomons,[9] where a new trial was moved for, on the ground that the judge had communicated with the jury as to the form of their verdict, in the absence of the parties and their counsel, O'Neal, J., delivering the opinion, said:

"The administration of justice in a court necessarily demands a large share of discretion, unregulated by precise rule, from the presiding judge. His choice to the position which he holds, his continuance in it, his learning, experience, and impartiality, are supposed to be grounds enough against its improper exercise. The intercourse between the jury and the bench is, in many respects, very confidential. Often the communications from the jury are of that kind which ought not to be communicated to the bar. The case before us is an illustration of that. To have communicated the foreman's inquiry would have been to announce the result of the case before the verdict was published. This is so irregular that it would have furnished a much better ground of appeal from that under consideration. So, too, the foreman of the jury often says to the judge: 'We are divided, ten to two; we can't agree, what are we to do?' Is that to be communicated to counsel? Certainly not. There can be but one proper rule upon the subject—that is, to trust all these matters to the discretion of the judge. When it is proper that the attention of the bar should be called to the doubts of the jury, *it will be done.*

[9] 2 Strob. (S. C.) 296.

From the first organization of our judicial system we have gone on without difficulty under this discretionary system. The confidence of the bar in the bench has prevented anything in the shape of suspicion from doubting the propriety of the administration of justice daily administered in their presence. The case from Pickering, 1st vol., 337 [11 Am. Dec. 185], Sargent v. Roberts et al., seems to have given occasion to the second ground. That case is, I think, of very questionable propriety. For even to hold after the jury is sent out, and a constable sworn in charge of them, and the court is adjourned over to the next day, that the judge should have no communciation with them, is, I think, pushing judicial coyness to the very verge of mere prudery. Honesty in everything goes upon the motto 'think no evil.' Whenever a man begins to think that he is suspected of dishonesty, there is great danger of his being dishonest. In this state we have never pursued any such practice. Here we have been willing to leave it where it should be left—*to the discretion of the judge.* But that case from Pickering is not at all like this. There the communication was after adjournment—here it was *sedente curia:* there it was a written charge. Here it was merely a direction as to the form of the verdict on which the jury had already agreed. The motion is dismissed."

The foregoing cases give the reasoning upon both sides of the question. It is believed, however, that no one of them is entirely correct in its statement of the rule. The opinion in the case from South Carolina is to the effect that the judge may hold private communications with the jury, and may reveal such communications or withhold them from counsel in his discretion. This is contrary to the weight of authority, and does not seem to be a wholesome rule. The other cases cited are to the effect that the judge must hold no communication with the jury after they have retired, except in open court, and that if he does so, the verdict will be set aside *without regard to the character of the communication.* This seems to go too much to the other extreme. As already shown, the general rule with respect to irregularities is that they are presumed to have been injurious unless the record shows the contrary; but that where the court can see from the record that no injury resulted, the verdict will not be disturbed.[10] And there seems to be no good reason why this rule should not

[10] See section 26, *ante.*

be applied to irregular communications from the judge to the jury. The only reasons that have been, or can be, given for the extreme rule laid down by the cases above cited, viz., that the verdict must be set aside without regard to the character of the communication, are the following:

(a) That the losing party is deprived of his exception. But as above explained,[11] with reference to instructions given in the absence of counsel, an exception would be of no service to the party where the communication appears in the record, and is entirely correct and applicable. The propriety of the communication can be examined upon the motion to set aside the verdict for the irregularity, and that is all that would be accomplished by an exception, and all that the losing party is entitled to.

(b) The dangerous tendency of such communications, and the difficulty of inquiring into their effect. This can only mean that there would usually be difficulty in proving what the communication was, and what was its effect upon the jury. The objection, however, loses sight of the general rule as to irregularities.[12] That rule does not require the losing party to show what the communication was, or what its effect was, unless it be a matter within his knowledge.[12a] All that he is required to show is that *some* private communication occurred. The difficulty of showing this is not an element of the question, because it must be shown in any aspect of the rule. When it is shown, the general rule as to irregularities requires the successful party to show what the communication was. This ought not to be difficult, for the affidavits of the jurors may be received in support of the verdict. Unless it is shown the verdict must be set aside. If, however, the character of the communication clearly appears, then the court must consider its effect. And under the general rule as to irregularities, if the communication be such that it *may* have had an effect upon the jury, the verdict must be set aside; but if the court can see that it *could not* have had any effect whatever, it is not easy to see why a new trial should be granted. The rule stated involves no dangerous tendency or difficulty of inquiry; by its terms it protects a verdict only where all the facts and their effects clearly appear; whatever doubt is cast upon the verdict it

11 See first subdivision of the present section.

12 As to which, see section 26, *ante*.

12a The moving party would probably be required to negative any presumption arising from his silence on a matter within his knowledge.

must be set aside. This is placing communications from the judge upon the same footing with communications from other persons,[13] and with irregularities generally.

(c) It is said, however, that to permit any communications from the judge to the jury after they have retired would tend to excite suspicions and jealousies, and therefore would destroy confidence in the administration of justice. But it must be a very suspicious mind that would be disturbed by a communication which clearly appears to be perfectly harmless, and it is only in such case that the rule stated would apply. Such a mind would suspect most things occurring in the administration of justice; as, for example, the decision of the judge of the court below upon questions of fact, and upon questions resting in his discretion, and decisions of the court of last resort upon questions of law. It is simply impossible to satisfy such persons. This objection is without force.

The question does not appear to have been passed upon in California, and in spite of the high authorities in favor of the extreme rule of setting aside the verdict without regard to the character of the communication, it is believed that the only sound rule is as follows, viz.: That where the losing party shows that some private communication was made by the judge to the jury, it devolves upon the successful party to show what the communication was, and that unless he does this the verdict must be set aside; that where it clearly appears what the communication was, then if it be of such a character that it *may* have affected the jury, the verdict must be set aside; but that if the court can see from the record that it *could not* have had any effect, the verdict should stand.

§ 39a. **Neither the Judge nor Any Officer of the Court Should Threaten the Jury.**—In the case of People v. Hughes,[1] the facts were that the sheriff, after the jury had been out for several hours, informed them that if they did not agree in five minutes they would have to stay out all night. The foreman, in reply, requested him to ask the judge to wait fifteen minutes, and before the lapse of that time the jury brought in a verdict of guilty. A new trial was applied for on the ground of the communication; but the supreme court, without adverting to the threatening nature of the communication, said that the point was "answered

[13] As to which, see section 68, *post*. [1] 29 Cal. 257.

by the cases of People v. Boggs, 20 Cal. 432, and People v. Symonds, 22 Cal. 348." In those two cases the communications to the jury were not from officers of the court, but were from third persons, and were not of a threatening character, and the decisions simply affirmed the general rule that when the court could see that no injury was done the verdict would not be disturbed. It would seem, therefore, that People v. Hughes simply goes to the general rule stated; this rule is well settled, but its application in the above case may perhaps be questioned.

It cannot be open to doubt that there might occur instances of threats from the judge or officer in charge which would prevent a fair trial. In other states verdicts have been set aside for such threats. Thus in Green v. Telfair,[2] the verdict was set aside for remarks of the judge to the effect that if the jury did not agree he would have to go into the country and would keep them deliberating until his return. So in Thomas v. Chapman,[3] the verdict was set aside because the officer in charge of the jury had stated to them "that the court had adjourned and left orders for him to lock up the jury and keep them all night unless they agreed upon a verdict; that the case was clear for the plaintiff, and that the jury had better agree and go home; that if they did not soon he should lock the jury up for the night." So in the case of Gholston v. Gholston,[4] a new trial was granted because of threats made to the jury by the officer in charge. What the officer told the jury was that unless they agreed the judge would carry them into the adjoining county and that he was making preparations for that purpose. Jenkins, J., delivering the opinion of the appellate court, said:

"The conduct of the sheriff was a gross and flagrant violation of his official duty. And moreover, it cannot be lightly regarded in considering the validity of the verdict. It is an inflexible rule of law that after a jury shall have been charged with a cause, having had the law or the evidence placed before them, by or under the supervision and direction of the court, all communication between them and the rest of mankind shall be suspended, except by permission of the court, until they have been discharged from the case. It is of the last importance that this rule should be rigidly enforced to the end that the administration of justice may be both pure

[2] 11 How. Pr. 260.
[3] 45 Barb. 98.
[4] 31 Ga. 625; see, also, Taylor v. Jones, 2 Head, 565.

and free from suspicion of impurity. The ascertainment that some unauthorized communication had been had with the jury, the nature and purport of which was unknown, ought to vitiate a verdict. How much more a known communication, calculated to intimidate jurors, to unsettle resolution based upon fixed and well-settled opinion, to produce conflict between a sense of duty and personal comfort, convenience, or interest. Here were men withdrawn from their families and their occupations for the discharge of a public duty, with the confident expectation of being restored to their usual associations and employments at the close of the week. Being required to render a verdict in a cause submitted to them with unanimity, and being unable to agree in opinion until that week had been spent and another had been commenced—whilst in this state (for such is the evidence) the above communication is made to them by the ministerial officer of the court who professes that he '*understood* (it) *from the judge and others.*' It matters not that the communication was untrue. Dare we assume that the jury received it as untrue? Dare we speculate upon the probable influence it exerted? They were threatened by an officer of the court (for that is the nature of the communication), who, in aid of the threat, purports to have for it the high sanction of the judge, with being carried away from their homes, their county, and their business, and confined for an indefinite period in another county unless they speedily agree upon a verdict. There are many men who would be more easily moved from an opinion or a purpose by such a threat than by the offer of a pecuniary bribe. We cannot be assured that the agreement subsequently made, but unattainable before, was not affected by this communication. The communication was clearly illegal; it was calculated to influence the jury or some of them, and therefore the verdict is not free from taint. We are reluctantly constrained for this reason to reverse the judgment of the court below refusing a motion to set aside the verdict, and to grant a new trial." But it must be borne in mind that the communications in these cases are very like that in People v. Hughes, adverted to at the beginning of the section.

If there be "no officious intermeddling on the part of the officer, nor any attempt or purpose on his part to hasten the jury to an agreement as to their verdict, ... and no design on the part of the officer to favor either party," and no influence upon the jury resulted from the communication, the verdict will not be disturbed.[5]

[5] Leach v. Wilbur, 9 Allen (Mass.), 212.

In this connection it is proper to note that threats may be communicated in many different forms, and may be said to include every irregular attempt to influence the verdict of a jury through fear or natural timidity; and when coming from an officer of the court ought to be, and doubtless are, regarded as more than usually reprehensible. Officers of the court, and more particularly the presiding judge of the court, possess opportunities, as they also possess power, not within the reach of the general public, and their conduct in this regard is properly subjected to more than the usual degree of suspicion attaching to the performance of governmental functions. Moreover, for a like reason, that which, coming from an ordinary individual, would be far from prejudicial would on the part of a court official, and particularly the judge who presides, be in the highest degree injurious to the interests of the litigant against whom the acts in question were directed.

Thus in People v. Kindleberger,[6] where the judge of the trial court so far forgot himself as to practically reprimand the jury for their failure to arrive at a verdict, and in such a way as clearly to prejudice the right of the defendant to a fair and impartial trial, the supreme court reversed the judgment, saying: "In thus addressing the jury the learned judge of the superior court committed an error, to the prejudice of the defendant."

So in Mahoney v. San Francisco Ry. Co.,[7] where there was an attempt, no doubt an unconscious one, to irregularly influence the verdict of the jury, on the part of the trial judge, the latter, learning that only a single juror was needed to secure a verdict for the plaintiff, called the jury's attention to the fact that the trial was an unusually expensive one, that plaintiff was a poor man who would have to meet the expenses of the trial in the event the jury failed to agree, and then sought to present his instructions in an argumentative light on behalf of the plaintiff. The supreme court ordered a new trial.

So the sheriff may also be guilty of attempting to influence improperly the verdict of a jury, by similar conduct, which, with-

[6] 100 Cal. 367, 34 Pac. 852. It is sometimes difficult to distinguish between irregularities of this kind and improper instructions. In this case, however, the occurrence took place after the jury had retired, and as there was no question as to an improper charge, it is believed to be merely an irregularity.

See, also, State v. Chambers, 9 Idaho, 673, 75 Pac. 274; State v. Ivanhoe, 35 Or. 150, 57 Pac. 317; State v. Crotts, 22 Wash. 245, 60 Pac. 403; State v. Thield, 36 Wash. 365, 78 Pac. 919.

[7] 110 Cal. 471, 42 Pac. 968. See, also, State v. Fisher, 23 Mont. 540, 59 Pac. 919.

out being threatening in character, operates similarly upon the juror's pont of view, and is equally prejudicial. Thus in People v. Myers,[8] where the sheriff, pending the trial of the case, conducted the jurymen to public saloons, and furnished them with intoxicating liquors at his own expense, it appearing that a reward for the conviction of the defendant had been offered, which the officer hoped to receive, the supreme court held that the conduct of the sheriff was, under the circumstances, a sufficient irregularity to warrant a new trial, and it was so ordered.

So where a sheriff conversed with members of the jury while they were deliberating, it was held prejudicial misconduct, and was not excused by the fact that he had been directed to inquire when they would probably agree upon their verdict.[9]

But mere presence in the jury-room of a bailiff in charge of the jury is not misconduct constituting an irregularity of this kind; but the question would be within the discretion of the trial court. There might be circumstances of a suspicious character in connection with such presence which would justify a different view.[10]

The rule requiring the interested party to call the court's attention, and the doctrine of waiver, where he fails to do so, applies here, as in other cases of prejudicial misconduct, amounting to an irregularity of the court.[11] But, as a matter of course, if it occurs at a time when the court could not effectively interfere, there would be no waiver.[12]

§ 40. Irregularities in Receiving a Verdict.—As shown in another place, the judge may in certain cases direct the jury to render a certain verdict.[1] But the assent of the jury is necessary. Thus where the judge directed the jury to render a specified verdict, and they refused to obey him, and the judge thereupon ordered the clerk to enter the verdict, a new trial was granted. The appellate court said that the judge could have kept the jury deliberating as long as he saw fit, and if they brought in a different

[8] 70 Cal. 582, 12 Pac. 719. See, also, People v. Mitchell, 100 Cal. 328, where the sheriff was shown to have made a remark which might be construed as an attempt to influence the jury by fear, the supreme court held it prejudicial, and a new trial was ordered.

[9] Peterson v. Siglinger, 3 S. D. 255, 52 N. W. 1062.

[10] Williams v. Chicago etc. Co., 11 S. D. 463, 78 N. W. 949.

[11] Peterson v. Siglinger, 3 S. D. 255, 52 N. W. 1060.

[12] Peterson v. Siglinger, 3 S. D. 255, 52 N. W. 1060.

[1] See section 121, *post*, subhead (b).

verdict from the one directed could have set it aside; but that he himself had no power to render a verdict.[2] So if a juror dissents from the verdict announced by the foreman, such verdict must not be recorded. But jurors cannot dissent from a verdict merely because they mistook its effect. Thus where the jury brought in a general verdict for the plaintiff, and a special verdict inconsistent with the general one, and the judge remarked that he supposed judgment would have to be entered for the defendant upon the special verdict, and the jury thereupon withdrew their special verdict and reported to the court that they adhered to the general verdict, but could not agree as to the special one, and the court thereupon accepted the general verdict and withdrew the special issues from their consideration, a new trial was granted, the supreme court saying: "While it is undoubtedly competent to a juror to declare, even at the last moment, that the verdict as presented is not his verdict, his dissent must proceed upon the question of fact determined by the verdict. He is not at liberty to dissent merely because he mistook the legal effect of his verdict, or ascertains from the remark of the court that the judgment to be rendered upon the verdict will be other than he had supposed."[3]

Where a verdict is regular in point of form, it should be received; the judge should not send the jury out again. In Marquard v. Wheeler,[4] the jury brought in a verdict for a certain sum in gold coin. The gold-coin clause being wholly unauthorized, the judge sent out the jury and they brought in a verdict for a larger amount, the increase being the difference between gold and legal tender notes. For this a new trial was granted, the court saying that the first verdict was good with the exception of the words "gold coin," and that those words, being outside the issues, should have been disregarded as surplusage. If a portion of the verdict be outside the issues, it may be treated as surplusage.[5]

"When a verdict is announced, if it is informal or insufficient in not covering the issue submitted, it may be corrected by the jury under the advice of the court, or the jury may be again sent out."[6] But the judge should not make the correction himself.[7]

[2] Hine v. Robbins, 8 Conn. 342.

[3] Fitzpatrick v. Himmelmann, 48 Cal. 589.

[4] 52 Cal. 445.

[5] See section 235, *post*.

[6] Section 619, Code of Civil Procedure, and look at People v. Dick, 34 Cal. 663; People v. Marquis, 15 Cal. 38; People v. Bonney, 19 Cal. 446.

[7] Patterson v. Butterworth, 4 Yerg. 159; Ross v. Austill, 2 Cal. 192. But as to purely clerical errors, see Perkins v. Wilson, 3 Cal. 139. See, also, Marine Savings Bank v. Young, 5 Wash. 394, 31 Pac. 864.

There are some defects which are waived by failure to object to them when the verdict is brought in.[8]

§ 41. Other Irregularities.—The following are instances of other irregularities of the court:

1. Trying a case while proceedings are stayed by an appeal.[1]

2. Trying a case in disobedience to the mandate of the supreme court. But the proceedings in such case are absolutely void.[2]

3. Refusing to permit a party to inspect papers introduced in evidence by his adversary.[3] But *quaere:* Is this an irregularity of the court or of the adverse party, or is it an error in law?

4. Allowing the jury to have law books while deliberating upon their verdict.[4] If the jury should obtain law books without the permission of the court, it would constitute an "irregularity of the jury."

5. Giving the jury in charge of a person not sworn as required by law.[5]

6. The officer in charge of the jury leaving them alone.[6]

7. Failure of the trial judge to accompany the jury during their view of the *locus in quo*.[7]

8. Questioning witnesses in a leading and suggestive manner, so as to give the jury the impression that the judge thought the defendant guilty.[8]

9. Abuse of discretion in limiting counsel to an unreasonably short time in their summing up.[9]

[8] Algier v. Str. Maria, 14 Cal. 167; Paige v. O'Neall, 12 Cal. 493; Gonzales v. Leon, 31 Cal. 98; Mitchell v. Hockett, 25 Cal. 539.

[1] Ford v. Thompson, 19 Cal. 119.

[2] Argenti v. San Francisco, 30 Cal. 459; and see section 299.

[3] Pope v. Dalton, 40 Cal. 638.

[4] Merrill v. Nary, 10 Allen, 416; State v. Smith, 6 R. I. 34; Newkirk v. State, 27 Ind. 3.

[5] See Jones v. State, 2 Blackf. 475; McCann v. State, 9 Smedes & M. 466; Commonwealth v. Shields, 2 Bush, 82, 83.

[6] Wormley's Case, 8 Gratt. 714; Boles v. State, 13 Smedes & M. 402; but see People v. Kelly, 46 Cal. 357; People v. Moore, 41 Cal. 238.

[7] People v. Yut Ling, 74 Cal. 569, 16 Pac. 489; People v. White, 5 Cal. App. 329, 90 Pac. 471, and cases there cited, where the court held that the error might be cured by a second view, if the jury should be properly instructed to disregard the impressions received on the first. See cases cited in note 10, below.

[8] People v. Bowers, 79 Cal. 415, 21 Pac. 752. But see Woods v. Jensen, 130 Cal. 200, 62 Pac. 473.

[9] People v. Green, 99 Cal. 564, 34 Pac. 231. This was in a felony case. By section 1095, Penal Code, the court may restrict the argument to two of counsel in capital cases, and in other criminal cases may, in its discretion, restrict the argument to one. It is certainly within the discretion of the court to limit oral argument in civil cases, even to the point of dispensing with it entirely.

10. Absence of the judge during the argument, being out of sight and hearing of the proceedings for twenty minutes.[10]

Golden Gate etc. Co. v. Sahrbacher, 105 Cal. 114, 38 Pac. 635.

See section 50, *post*, as to irregularities in the argument. See section 51, *post*, as to abuse of discretion.

[10] People v. Tupper, 122 Cal. 424, 68 Am. St. Rep. 35, 55 Pac. 125. "The judge is a component part of the court. There can be no court without the judge, and all that was done in the absence of the judge was done in the absence of the court. A defendant convicted under such circumstances has been deprived of his liberty without due process of law." See, also, People v. Blackman, 127 Cal. 248, 59 Pac. 573. Also cases cited in note 7, above.

CHAPTER V.

GROUNDS OF THE MOTION—IRREGULARITY OF THE JURY.

§ 42. Irregularity of jury—Contents of chapter.
§ 43. Necessity of challenge to juror—Waiver.
§ 44. Jurors must be examined to ascertain competence; otherwise, not ground for new trial.
§ 45. If a juror answers falsely, when examined, a new trial will be granted.

§ 42. What is Irregularity of the Jury—Contents of Present Chapter.—As has been stated, the different subdivisions of the section specifying the grounds upon which a motion for new trial may be made were intended to embrace separate and distinct classes of cases.[1] But the lines of demarcation between such classes are so interlaced and overlapped, and so faint in places, that it is often impossible to trace them. And it has been found impracticable to distinguish upon any intelligible principle cases of irregularity of the jury from cases of misconduct of the jury. Until some light is thrown upon the question by an authoritative exposition, the prudent practitioner will make his motion under both subdivisions.

For convenience of arrangement, improper acts committed by jurors after they have been accepted and sworn will be considered under the head of misconduct.[2] In this chapter nothing will be attempted beyond giving a few of the rules which govern where a new trial is moved for on the ground of irregularity in the formation of the jury. But it is not proposed to enter into an examination of the grounds of challenge to a juror,[3] that not being within the scope of this treatise.

[1] See section 29, *ante*.

[2] As to which, see chapter 10, herein.

[3] The grounds of challenge are given in sections 198, 199, 602, California Code of Civil Procedure. And see generally the following cases: Sampson v. Schaffer, 3 Cal. 107; People v. Peralta, 4 Cal. 175; People v. Reyes, 5 Cal. 347; People v. Stonecifer, 6 Cal. 405; People v. Plummer, 9 Cal. 298; White v. Moses, 11 Cal. 69; Paige v. O'Neall, 12 Cal. 483; Algier v. Steamer Maria, 14 Cal. 167; Thompson v. Paige, 16 Cal. 77; People v. Reynolds, 16 Cal. 128; People v. Williams, 17 Cal. 142; People v. Chung Lit, 17 Cal. 320; Grady v. Early, 18 Cal. 108; People v. Mahoney, 18 Cal. 180; People v. Symonds, 22 Cal. 348; Watson v. Whitney, 23 Cal. 375; Spencer v. Doane, 23 Cal. 418; People v. Jenks, 24 Cal. 11; People v. Coffman, 24 Cal. 230; People v. King, 27 Cal. 507, 87 Am. Dec. 95; People v. Henderson,

§ 43. If the Losing Party Knows of the Irregularity He must Challenge the Juror, and if He Fails to Do This the Irregularity is Waived.—This rule is well settled. In People v. Coffman,[1] the names of the jurors were not placed in the jury-box and drawn therefrom as should have been done, but were called directly from a list of special jurors. No objection to this course was interposed on behalf of the prisoner. On appeal the court, per Rhodes, J., said: "He will not be permitted to take the chances of a trial before a jury that he knows has not been impaneled in strict conformity to law, and after an adverse verdict, to move to set aside on account of an irregularity that he can fairly be deemed to have assented to." So where one of the trial jurors was on the grand jury which found the indictment, but the prisoner was aware of the fact, a new trial was refused.[2] So where a juror who was challenged by the prisoner was afterward sworn as a talesman, but the prisoner knew that such was the case and made no objection, a new trial was refused.[3] So where one of the jurors had sat upon a former trial of the case, but the counsel was aware of the circumstances, a new trial was refused.[4] So where one of the jurors had

28 Cal. 465; People v. Woods, 29 Cal. 635; People v. Arceo, 32 Cal. 40; People v. Thompson, 34 Cal. 671; People v. Dick, 37 Cal. 277; People v. Hardin, 37 Cal. 258; People v. Scoggins, 37 Cal. 676; McFadden v. Wallace, 38 Cal. 51; People v. Weil, 40 Cal. 268; People v. Coyodo, 40 Cal. 586; People v. Renfrow, 41 Cal. 37; People v. McGungill, 41 Cal. 429; People v. Edwards, 41 Cal. 640; People v. Sanford, 43 Cal. 29; People v. Fair, 43 Cal. 137; People v. Voll, 43 Cal. 166; People v. Brotherton, 43 Cal. 530; Taylor v. W. P. R. R. Co., 45 Cal. 323; People v. Devine, 46 Cal. 45; People v. Mortimer, 46 Cal. 114; People v. Johnston, 46 Cal. 79; People v. Russell, 46 Cal. 121; People v. Davis, 47 Cal. 93; People v. Ah You, 47 Cal. 121; People v. Brotherton, 47 Cal. 388; People v. Brown, 48 Cal. 254; People v. McCarty, 48 Cal. 557; People v. Cotta, 49 Cal. 166; People v. Welch, 49 Cal. 174; People v. Buckley, 49 Cal. 241; Trenor v. C. P. R. R. Co., 50 Cal. 222; People v. Vasquez, 49 Cal. 560; People v. Colson, 49 Cal. 679; People v. Atherton, 51 Cal. 495; People v. Chin Mook Sow, 51 Cal. 597; People v. Montgomery, 53 Cal. 576; People v. Ah Chung, 54 Cal. 398; People v. Riley, 65 Cal. 107, 3 Pac. 413; People v. Fong Ah Sing, 70 Cal. 8, 11 Pac. 323, 13 Pac. 496; Lawlor v. Linforth, 72 Cal. 205; People v. Boling, 83 Cal. 380, 23 Pac. 421; People v. Bemmerly, 87 Cal. 117, 25 Pac. 266; People v. Wong Ark, 96 Cal. 125, 30 Pac. 1115; Johnson v. Visher, 96 Cal. 310, 31 Pac. 106; People v. Wells, 100 Cal. 227, 34 Pac. 718; People v. Owen, 123 Cal. 482, 56 Pac. 251; People v. Fredericks, 106 Cal. 554, 39 Pac. 944; Baker v. Borello, 136 Cal. 160, 68 Pac. 591; People v. Boren, 139 Cal. 210, 72 Pac. 899; Quill v. Southern Pacific Co., 140 Cal. 268, 73 Pac. 991; Graybill v. De Young, 146 Cal. 421, 80 Pac. 618; People v. Warner, 147 Cal. 546, 82 Pac. 196; Fitts v. Southern Pacific Co., 149 Cal. 310, 117 Am. St. Rep. 130, 86 Pac. 710.

1 24 Cal. 230; see, also, People v. Stonecifer, 6 Cal. 405; People v. Chung Lit, 17 Cal. 320; Spencer v. Doane, 23 Cal. 418.

2 Barlow v. State, 2 Blackf. 114.

3 Jordan v. Meredith, 1 Binn. 27.

4 Bourke v. James, 4 Mich. 336.

sat upon a former trial of the case, and the record did not show whether the party knew of this fact or not, a new trial was refused.[5] So where one of the jurors had sat upon a former trial of the cause, and the losing party made affidavit that he did not know of the fact until after the verdict, the court held that it was necessary for him to show that his counsel did not know it, and denied the motion for new trial.[6] So where the officer before whom some depositions in the case were taken was on the jury, but it was not shown that this circumstance was unknown to the party, a new trial was refused.[7] So where one of the jurors was hostile to the plaintiff, but the plaintiff knew this and made no objection at the trial, a new trial was refused.[8]

The rule applies to objections to the entire panel equally as to objections to single jurors. Thus in People v. Ah Lee Doon,[9] where objection was made to the jury on the ground of the disqualification of the judge who ordered the panel drawn, no objection being made at the time the jury was selected, the supreme court said:

"The statute [section 1059, Penal Code] is broad enough to have given the defendant good ground of challenge to the panel. And that was the regular and only way to raise the objection. If it had been made at that time, and sustained, a special venire could at once have been issued. Raised for the first time after verdict, it comes too late."

§ 44. The Parties must Examine the Persons Called as Jurors to Ascertain Their Competency; if They Neglect This the Question of Competency cannot be Made on Motion for New Trial.—The parties have the right to examine the persons called as jurors, touching their competency to act as such; and it is their duty to do so. If they neglect to perform their duty in this regard, they cannot afterward complain of the incompetency of the jurors.

[5] Craig v. Elliott, 4 Bibb, 272.

[6] Edmondson v. Wallace, 20 Ga. 660. A party and his counsel are presumed to know what jurors sat on the former trial. Fitzpatrick v. Harris, 16 B. Mon. (Ky.) 561. But this presumption may be rebutted. Where more than three years elapsed between the first and second trial, and only one of the counsel present at the first trial was present at the second, it was held that the presumption did not apply and a new trial was granted. Williams v. McGrade, 18 Minn. 82.

[7] Rollins v. Ames, 2 N. H. 349, 9 Am. Dec. 79.

[8] Haskell v. Becket, 3 Greenl. 92; see, also, Lisle v. State, 6 Mo. 426; State v. Tuller, 34 Conn. 280.

[9] 97 Cal. 171, 31 Pac. 933.

Thus in People v. Chung Lit,[1] where one of the jurors was an alien, and the fact was unknown to the defendant, a new trial was refused, the supreme court, per Cope, J., saying: "The objection that one of the jurors was an alien could not be taken for the first time upon the motion for a new trial. The defendants might have examined him on the subject and exercised their right of challenge before he was sworn, but having failed to do this they must suffer the consequences of their own neglect. The authorities upon the question are collected by Graham and Waterman in their work on New Trials. There is some conflict in the cases, but the weight of authority is largely in favor of the rule as we have stated it." So where one of the jurors was not a taxpayer, but was not examined concerning his qualifications, a new trial was refused, the appellate court saying "that which was a cause of challenge to a juror shall not be made the ground of a new trial."[2] So where a juror was not a householder, but no inquiry was made of him concerning the fact, a new trial was refused although the prisoner was not aware of the disqualification until after the verdict.[3] So where the juror was a nonresident, but the fact was not developed when the jury was selected, and no objection made until after the verdict.[3a] So

[1] 17 Cal. 320; see, also, People v. Sanford, 43 Cal. 29; Greenup v. Stoker, 3 Gilm. (9 Ill. 202) 222; State v. Quarrel, 2 Bay, 150, 1 Am. Dec. 637. See, also, People v. Evans, 124 Cal. 206, 56 Pac. 1024. And compare People v. Ah Lee Doon, 97 Cal. 171, 31 Pac. 933.

See, also, Turner v. Hahn, 1 Colo. 23; Jones v. People, 2 Colo. 351; State v. Pritchard, 15 Nev. 74. In the case of Jones v. People, the rule was thus stated: "Parties have the right to interrogate persons called to sit as jurors, for the purpose of ascertaining their qualifications before they are sworn, and if this is not done the right to challenge is waived." The juror had volunteered the information that he was an alien, but neither party paid any attention to the statement, or objected to the juror serving.

[2] State v. Fisher, 2 Nott & McC. 261.

[3] Croy v. State, 32 Ind. 384.

[3a] Territory v. Abeita, 1 N. M. 545. This case is not very clear, however. It does not appear that any inquiry was made, but it is presumed that the moving party was in possession of a knowledge of the facts when the jury was selected. The court said: "The record does not show that the defendant interposed any objection to the jury until after the verdict. Neither does it appear that the grounds of objection then interposed were not known to the defendant at the time the jury were impaneled. Without stopping to inquire whether there were or were not irregularities either in the selection or summoning of the jury, it is evident that none existed which the defendant could not and did not waive by omitting to interpose his objections at the time of impaneling the jury." In view of the fact that there could hardly be a waiver of the irregularities, whatever they were, in this case nonresidence, without knowledge, either actual or presumptive, the moving party must have either made the necessary inquiries by the usual voir *dire*, or, having neglected to do so, was charged with knowledge of the facts. Concluding, the court said: "The defendant was at liberty to submit his case to an incompetent jury

where one of the jurors had sat on a previous trial of the case, and this fact was not ascertained until after the trial, but the juror was not examined as to his qualifications, a new trial was refused.[4] So where it was shown that previous to the trial a juror had expressed a decided opinion about the case, and that this fact had not been ascertained until after the trial, but it was not shown that the juror had been examined as to his qualifications, a new trial was refused.[5] And it is not sufficient merely to inquire of the juror without having him sworn; he must be placed under oath.[6]

There are some cases, however, which maintain the contrary doctrine.[7] Such cases proceed upon the principle that the parties have a right to presume that none but competent persons have been summoned as jurors. But as was said in People v. Chung Lit, first above cited, these cases are opposed to the weight of authority and to what seems to be the better reason. It would appear, however, that some exceptions to the general rule are founded upon the principle mentioned. Thus where no examination of the jurors was made, and it was ascertained after the trial that one of them did not understand the English language, it was held that it might well be presumed that all the jurors understood the language of the country.[8] This case admits the general rule to be that the parties must examine the jurors, but is put upon the ground of an exception to it.

if he saw fit. If he did so, he was bound by it. It was too late at any subsequent stage of the proceedings, and especially after verdict, for him to interpose his objections, *unless it appeared that the grounds for the objections were previously unknown to him.*" This conclusion is doubtless good law, but its application is not very clear, since nothing less than successful deception on the part of the juror, or some one for him, can excuse want of knowledge, and there was nothing of this sort suggested. See section 45, *post*.

[4] Fitzpatrick v. Harris, 16 B. Mon. 561.

[5] Byars v. Mount Vernon, 77 Ill. 467; and see, also, State v. Shelledy, 8 Iowa, 477; Simpson v. Pitman, 13 Ohio, 365; Alexander v. Dunn, 5 Ind. 122; Meyer v. State, 19 Ark. 156; Collier v. State, 20 Ark. 36; George v. State, 39 Miss. 570; Romaine v. State, 7 Ind. 63.

[6] Taylor v. Greely, 3 Greenl. (Me.) 204.

[7] Such is Burroughs v. State, 33 Ga. 403. In Vennum v. Harwood, 1 Gilm. (6 Ill.) 658, the party did examine the jury, so that what is said is a mere dictum; and the dictum is contrary to the rule in later cases in the same state. See Byars v. Mt. Vernon, 77 Ill. 467. In Maine it is held that where it is ascertained after the trial that any of the jurors are related to the successful party, a new trial must be granted; but in the cases referred to the point does not appear to have been made that the party ought to have examined the jurors. See Hardy v. Sproule, 32 Me. 311; Lane v. Goodwin, 47 Me. 593.

[8] Lafayette Plank Road Co. v. New Albany R. R. Co., 13 Ind. 90, 74 Am. Dec. 246.

And the rule does not apply where the irregularity is such that it would not in all probability have been ascertained by an examination.[9]

§ 45. If a Juror be Examined as to His Qualifications and He Does not Answer Truly, a New Trial will be Granted.—Where the party has examined the jurors concerning their qualifications, and they do not answer truly, it is manifest that he is deprived of his right of challenge for cause, and is deceived into foregoing his right of peremptory challenge. If on ascertaining the truth he were not allowed to present the matter on motion for new trial, the grossest injustice might be done. The employees or partisans of one party could, by perjury, get on the jury and decide the case for him, or prevent an agreement against him, and no relief could be obtained. This would be contrary to the first principles of justice. And accordingly, in most states, the fact that a juror answered falsely as to his qualifications is a recognized ground for a new trial. Thus where a short time previous to the trial a person said that he believed the prisoner "would be hung; that he ought to be hung; that nothing could save him; that salt could not save him, and that there was no law to clear him"; and subsequently went to the jail and told the prisoner that he ought not to be hung, and that if he were on the jury he would not be hung; and upon his examination, when called as a juror, stated that he had not formed or expressed any opinion concerning the case, a verdict against the prisoner was set aside.[1] So where several months before the trial one of the jurors said with reference to the prisoner that if he "was not hung there was no use of laws," and on his examination stated that he had not formed or expressed any opinion concerning the guilt or innocence of the prisoner, a new trial was granted.[2] So where one of the trial jurors who had been on the grand jury which found the indictment, stated on the examination concerning his qualifications, that he had never formed or expressed an opinion concerning the case, a new trial was granted.[3] So where a juror on his examination declared that he was impartial, but it was ascertained after verdict that about a year before the trial he had, on hearing the evidence at a

[9] See Hogshead v. State, 6 Humph. 59; Jeffries v. Randall, 14 Mass. 206; Glover v. Woolsey, Dud. (Ga.) 85.

[1] Sellers v. State, 3 Scam. 412.

[2] Busick v. State, 19 Ohio, 198; see, also, Cody v. State, 3 How. (Miss.) 27.

[3] Rice v. State, 16 Ind. 298.

previous trial of the case, expressed an opinion on the merits in favor of the successful party, and that he entertained feelings of hostility to the losing party, the verdict was set aside.[4] So where previous to the trial one of the jurors said of the plaintiff's case that there "was something about it that looked like roguery," but on being examined as to whether he had formed or expressed any opinion concerning the case, did not state that he had, or mention the above circumstance, a verdict for the defendant was set aside.[5] So where in an action to set aside a sale as fraudulent one of the jurors stated on his examination that he had not formed or expressed any opinion concerning the case, but it was ascertained after the trial that he had repeatedly declared that the sale was fraudulent, the verdict was set aside.[6]

The same principle has been repeatedly recognized in other states. Thus, in Fitzgerald v. People,[6a] a juror stated on his *voir dire* that he had formed and expressed an opinion, which was true; but stated also, after further examination, that he thought he could give the defendant a fair trial, and, upon still further inquiry, that he could give the accused a fair and impartial trial without being influenced by the opinion. He was accepted. On motion for a new trial it was shown that he had made use of the following, among other strong expressions of a like tenor: "I would hang the son of a bitch on the evidence I already have unless stronger testimony than I have already heard could be brought in his favor." A new trial was granted, the supreme court thus giving its reason for the decision: "Such expressions, we think, exhibit malignity and vindictiveness on the part of the juror toward the accused, inconsistent with the purity required in the jury-box, and we think that when the defendant stood before the court with that uncontradicted affidavit in his hand, and from the verge of the grave appealed for a trial of his cause by an impartial jury, it was his right to be heard,

[4] Studley v. Hall, 22 Me. 198.

[5] Wiggin v. Plumer, 31 N. H. 251.

[6] Childress v. Ford, 10 Smedes & M. 25.

[6a] 1 Colo. 56. It is to be noted that this is not in strict accord with the rule of People v. Fair, cited below. There was a motion for a new trial, which was denied, and it is presumed there was an appeal therefrom; but it is also assumed that there was an appeal from the judgment also, in which event the court might very well have reversed the same and directed a new trial without regard to the new trial proceedings in the court below, upon the broad ground of a failure of justice, which is clearly the ground of the decision. The same remark is applicable to other criminal cases cited here.

and the refusal to grant him that right was such error as requires us to reverse the judgment," etc.

In Heasley v. Nichols[6b] a juror stated on his *voir dire* that he was not acquainted with the plaintiff, but was slightly acquainted with the defendant, that he had heard such a case was coming up, but knew nothing about it, and had neither formed nor expressed any opinion, and had no opinion at that time, as to its merits. He was accepted as a juror, and took part in the rendition of the verdict. Subsequent to the conclusion of the trial, and upon a motion for new trial, one of the grounds for which was irregularity of the jury which prevented a fair trial, it was shown that this juror had expressed himself both for and against the plaintiff's claims. One affiant stated that the juror, after expressing an opinion in favor of plaintiff, had said, "I would like to get on the jury, for I would give her all she sued for, and a damn sight more." Two other affiants stated that they had heard him say, "If he were permitted to sit on the jury he would not give the girl a damn cent." Neither of these affidavits were contradicted, and it appeared that neither side knew that the juror had so expressed himself. The court said: "It is plain that this juror was disqualified by reason of his bias and prejudice. He concealed the fact, and by reason of his misrepresentations was taken and permitted to sit upon the jury. Both sides to the controversy were entitled to twelve lawful and unbiased jurors to try the questions of fact in the case. When it was shown to the court that one of the twelve selected was unfit to sit as a juror, either party deeming himself aggrieved was entitled as a matter of right to a new trial."

And it seems that it is not necessary to the operation of the rule that the juror should have been willfully false in his statement. Thus where a juror on his examination stated that he had not formed or expressed an opinion concerning the case, and after verdict it was ascertained that previous to the trial he had expressed an opinion unfavorable to the prisoner, the verdict was set aside, the court saying: "The expression may have escaped the juror's mind; it is not necessary to impute moral turpitude to him; but he was legally disqualified; the appellant had the high and sacred constitutional privilege of being tried by men who had never at any time prejudged his cause."[7] Most of the cases in which the

[6b] 38 Wash. 485, 80 Pac. 769.

[7] State v. Burnside, 37 Mo. 343.

rule has been laid down are cases where the disqualification of the juror was by reason of some expression of opinion concerning the case, or by reason of some feeling of hostility to the losing party. But the reason of the rule extends to all cases where the juror states on his examination that he has some qualification which it turns out that he has not.

In California the rule was applied in the case of People v. Plummer.[8] In that case it was shown that two of the jurors who had answered satisfactorily and been accepted, had previously expressed opinions adverse to the prisoner. One of them had stated that "the people ought to take Plummer out of the jail and hang him," and on other occasions expressed a belief that he was guilty of murder; the supreme court directed a new trial. This case was overruled in People v. Fair,[9] on the ground that the Criminal Practice Act specified certain grounds upon which a new trial could be granted, none of which included the false statement of a juror on his examination, and that the enumeration of the grounds was exclusive of all others not enumerated. The Criminal Practice Act did not specify "irregularity of the jury" as a ground for new trial,[10] as does the Code of Civil Procedure,[11] and consequently it is thought that the decision in People v. Fair has no application to civil cases. It would seem that a false statement by a juror on his examination comes fairly within the meaning of the term "irregularity of the jury"; or possibly it might be considered "misconduct" within the meaning of the second subdivision. But the question does not appear to have been decided.

In at least one jurisdiction "the failure of a juror to disclose material facts" on his *voir dire*, in order to enable the parties to intelligently exercise their right of peremptory challenge, has been held to be ground for a new trial as a surprise which ordinary prudence could not have guarded against. In Tarpey v. Madsen,[12]

[8] 9 Cal. 298. As to errors in the impanelment of the jury see section 100a, *post*.

[9] 43 Cal. 137; approved in People v. Mortimer, 46 Cal. 114, and People v. Samsels, 66 Cal. 99, 4 Pac. 1061. The rule of the Fair case has been followed in Nevada. See State v. Marks, 15 Nev. 33; and see State v. Davis, 6 Idaho, 159, 53 Pac. 678, and State v. Rigley, 7 Idaho, 292, 62 Pac. 679. In the Davis case it was doubted that this was a ground for a new trial in a criminal case, though not decided.

[10] See Laws of 1851, p. 260, sec. 440.

[11] Section 657, California Code of Civil Procedure.

[12] 26 Utah, 294, 73 Pac. 411.

upon a clear showing that the juror had withheld material information touching his qualifications as a juror, the court thus expressed the rule:

" As the foregoing statements are not controverted by the plaintiff, they must be taken as true. The object of the examination of jurors on their *voir dire* is, as stated in the case of State v. Morgan, 23 Utah, 212, 64 Pac. 356, 'to ascertain whether there are grounds for a challenge for either actual or implied bias; also to enable the accused to exercise intelligently his peremptory challenge.' See, also, State v. Thompson, 24 Utah, 314, 67 Pac. 789. When a juror fails to disclose material facts in respect to his relations to either of the parties, in answer to questions adequate to elicit the same, the party asking the questions, if he and his attorney are ignorant of the facts, is thereby deprived of the benefits which he would otherwise derive from such examination, and under the provisions of subdivision 3, sec. 3292, Rev. St. 1898, it constitutes such a surprise as 'ordinary prudence could not have guarded against,' and furnishes grounds, under said section, for a new trial."

But surprise is not ground for new trial in criminal cases.[12a]

In State v. Lauth,[13] the court held that when a venireman, on his *voir dire* in a criminal case, falsely stated that he had not heard the matter discussed, and did not know anything about it, and that he was not acquainted with any of the witnesses, his acts amounted to prejudicial misconduct.

The rule enunciated in the Fair case is no doubt according to the true principles. Nevertheless, it has not been always recognized; or, if recognized, appellate courts, at least, may, and doubtless have, avoided its effect by a reversal of the judgment; and trial courts are seldom without sufficient ground to authorize a new trial where the deception is so gross and the unfairness so palpable as to shock the moral sense.

The rule of conflict has been applied to the determination of the facts involved;[14] and the discretionary control of the trial court

[12a] At least in none of the so-called Pacific Coast states.

[13] 46 Or. 342, 114 Am. St. Rep. 873, 80 Pac. 660.

[14] State v. Lauth, 46 Or. 342, 114 Am. St. Rep. 873, 80 Pac. 660. See, also, State v. Marks, 15 Nev. 33. See, also, State v. Davis, 6 Idaho, 159, 53 Pac. 678, where it was held that one or two *ex parte* affidavits are not sufficient when made after the rendition of the verdict, to overcome

in dealing with questions of this sort, arising upon a conflict of evidence, has been fully recognized.[15]

In Distad v. Shanklin,[16] it was held that insanity of a juror was an irregularity constituting ground for a new trial, where such insanity was shown to exist at the time of the trial.

the positive statement of a juror, made on his *voir dire* examination, that he has no opinion, and has never formed or expressed an opinion as to the guilt or innocence of the accused, where such juror is shown to have a good reputation for truth and veracity among his neighbors and acquaintances. See, also, State v. Rigley, 7 Idaho, 292, 62 Pac. 679.

[15] State v. Lauth, 46 Or. 342, 114 Am. St. Rep. 873, 80 Pac. 660.

[16] 11 S. D. 1, 75 N. W. 205.

CHAPTER VI.

GROUNDS OF THE MOTION—IRREGULARITY OF THE ADVERSE PARTY.

§ 46. Irregularities of the adverse party.
§ 47. Attempts to pack jury.
§ 48. Attempts to improperly influence the jury.
§ 49. Attempts to suppress or manufacture evidence.
§ 50. Irregularities in argument of counsel.

§ 46. The Most Common Irregularities of the Adverse Party are attempts to pack the jury, attempts to improperly influence the jurors, attempts to suppress or manufacture evidence, and irregularities of counsel in argument. When the irregularity consists in an attempt to improperly influence jurors, and the attempt is successful, the application for new trial may be made under the first subdivision for an irregularity of the adverse party or for an irregularity of the jury, or under the second subdivision for misconduct of the jury. For it is as improper in a juror to countenance an attempt to improperly influence him as it is in the party to make the attempt; both the juror and the party are guilty. So, since it is the duty of the court to see that no unfairness occurs in the argument, it may be doubted whether it is not as much an irregularity of the court to permit counsel to make improper arguments to the jury as it is an irregularity of the adverse party for counsel to make them. It will usually be found, however, that each case has some peculiar features, the prominence of which determines the ground on which it is most desirable to proceed. Whenever there is any doubt upon the subject, the careful practitioner will make his motion under all the grounds.

§ 47. Attempts to Pack the Jury.—As has been shown, the general rule is that where an irregularity is shown injury from it is presumed, unless the record shows the contrary.[1] There is no reason why this rule should not be applied to attempts by a party to a cause to have his friends, or persons in his interest, summoned upon the jury. And the rule was so applied in May v.

[1] See section 26, *ante*.

Ham.[2] In that case a new trial was granted for such an occurrence, and Valentine, J., delivering the opinion, said:

"Some time before the trial of the cause all the regular jurors were excused by the court except six. The court then ordered that the sheriff summon twelve additional jurors for the term. Soon after this J. A. Ham, one of the plaintiffs below, who had long resided in the city of Atchison and was acquainted throughout the county of Atchison, approached said sheriff and handed to him a list of persons and solicited the sheriff to summons said persons as such jurors. The sheriff, however, carefully tried to avoid summoning any of them as jurors, but by oversight and inadvertence did summon at least one of them, and this person served on the jury that found the verdict in the case. About the same time another person, who carried on business in the same room with Ham, applied through an attorney of the court to the sheriff to be summoned on the jury, and when this case was called for trial, and the jury was being impaneled, this same person was found present in the courtroom among the bystanders, but the sheriff did not summon him on the jury. Other suspicious circumstances occurred before and during the trial not necessary to be mentioned. But these circumstances, together with those heretofore mentioned, tend very strongly to show an attempt to pack the jury and to obtain a verdict by unfair means. It may be that the conduct of Ham and others was innocent, and the parties connected therewith testify that it was innocent; but it seems almost impossible to believe that all of such conduct could be innocent. The circumstances are certainly very suspicious. It may also be that the seeming misconduct of the plaintiff did not affect the verdict of the jury; but it may be that it did, and we cannot say that we feel clear that it did not, and this is all that is necessary to require a reversal of the judgment. When a party has committed a flagitious act in order to obtain some undue advantage over his adversary, as it would seem one of the plaintiffs in this case did, such party should not ask that the other parties should show that they were in fact prejudiced by his act. On the contrary, he should be compelled to show clearly and beyond all reasonable doubt, if not beyond all doubt, that such parties were not prejudiced by his unwarranted and reprehensible misconduct."

[2] 10 Kan. 598.

But it would seem that there may be cases where a party innocently indicates to the officer a person to be summoned. Thus in Park v. Harrison,[2a] where—a juror being needed to complete the panel—the sheriff was sent to summon one, and the defendant pointed out a person to the sheriff, and such person was summoned and sat upon the jury, the court refused to set aside a verdict for defendant. Each case must, as a matter of course, be governed to a great extent by its peculiar circumstances; but where it appears that there was anything *improper* in the conduct of the adverse party with reference to the panel, such party must show clearly that no injury resulted from it.

§ 48. **Attempts to Influence Jurors.**—Any attempt by the prevailing party to influence the minds of the jurors, or some of them, either by making statements to them out of court, or by exciting their prejudices, or by solicitations, or doing them favors, or otherwise tampering with them, is ground for a new trial, unless it clearly appears that no injury resulted therefrom.

1. *Attempts by a Party or His Counsel.*—Where a defendant endeavored to influence, and apparently succeeded in influencing the verdict, "by imparting evidence and using solicitation to one of the jurors," the verdict was set aside.[1] So where a juror, during the trial, spent the night at the house of one of the parties, and was entertained free of charge, a verdict in favor of such party was set aside.[2] So where, during the trial, two of the jurors spent the night at the house of the counsel for the successful party, the verdict was set aside.[3] So where, during a trial for robbery, one of the counsel for the prosecution, at the request of two of the jurors, kept their horses overnight for them, without charge therefor, a verdict against the prisoner was set aside.[4] So where, during a trial, several of the jurors went to a restaurant kept by a person who was chiefly interested in the verdict, and there partook of refreshments, for which they neither made nor were asked to make compensation, the verdict was set aside.[5] So where, during a trial, a juror and other persons went to a neighboring tavern, and while there the juror ate and drank at the expense of the plaintiff, and some calculations were made by the juror, in the

[2a] 8 Humph. 412.
[1] Cohen v. Roberts, 2 Strob. 410.
[2] Walker v. Walker, 11 Ga. 203.
[3] Walker v. Hunter, 17 Ga. 364.
[4] Springer v. State, 34 Ga. 379.
[5] Redmond v. Royal Ins. Co., 7 Phil. 167.

presence of the plaintiff, respecting the amount of the verdict, a new trial was granted.[6] So where, previous to the trial, the prevailing party sought the society of a juror, and endeavored to impress his mind with the justice of his claim, a verdict in his favor was set aside, the court saying: "It is insisted that the juror was not in fact influenced, and that justice has been done between the parties. It may be so; but it may be useful to the party to learn that a good cause may be injured, but cannot be promoted by conduct of this sort, and to the public generally to know that it will be tolerated in no case whatever."[7] So in a case where a difficulty in plaintiff's accounts was developed, and in relation thereto the foreman told the rest of the jury, while they were deliberating, that "the plaintiff had satisfied him with regard to that difficulty in a conversation which he had with him out of court, and after the jury had been sworn," a verdict in favor of the plaintiff was set aside, the court, per Tighlman, C. J., saying: "It must be known that a party may lose, but cannot gain by a conversation with a juror after he is sworn, unless it be open and by permission of the court. If the verdict should be against him it will stand; if for him, it will be set aside."[8] So where, after the commencement of a trial, in trespass for taking a horse, the plaintiff entered into conversation with a juror, and said to him that "he purchased the horse as fairly as he ever purchased anything in

[6] Keegan v. McCandless, 7 Phil. 248.

[7] Cottle v. Cottle, 6 Greenl. 140, 19 Am. Dec. 200. In Palmer v. Utah & N. Ry. Co., 2 Idaho, 315, 13 Pac. 425, it appeared that one Fisher, father of one of the plaintiffs and grandfather of the other, was a frequent and liberal patron of a saloon kept by one of the jurors in the case, especially during the evenings and night of the trial, and that at this time he treated and entertained in the said saloon large numbers of his friends, and different members of the jury, the juror being present, waiting on his patrons; the court, in reversing an order denying a new trial, on the ground of irregularity of an adverse party, said:

"We are unable to say what effect this liberal and conspicuous patronage during the trial had on the mind of the juror whose bar he was patronizing. It is not necessary for us to find that it had effect upon the verdict in order to sustain this assignment of error as to irregularities of an adverse party. It is enough to find that it was calculated to do so. It is perhaps impossible for the juror himself to appreciate what influence this patronage may have had upon his mind."

See, also, cases cited in note 14f, section 68, *post*, with reference to improper communications, as constituting misconduct of the jury. It is to be remembered, in all cases of this kind, that the same act may, in its various phases, constitute misconduct of the jury, and an irregularity of an adverse party. See below, and see section 68, *post*, for a discussion of this point.

[8] Ritchie v. Holbrooke, 7 Serg. & R. 458.

his life; that the taking of the horse was of great damage to him, for he could have turned him toward land for sixty dollars," a verdict for the plaintiff was set aside.[9] So where, during the term, but before the commencement of the trial, the defendant invited a member of the panel, who was afterward foreman of the jury, to spend the Sabbath with him, which was done; and the defendant then showed him the glass which was the subject of the suit, and a conversation was then held relative to the glass, and during the trial the foreman communicated the information so received to his fellow-jurors, the verdict in favor of the defendant was set aside.[10] So when the defendant, at a juror's request, gave to him a pamphlet, not in evidence, containing the evidence taken at a previous trial of the cause, a verdict for the defendant was set aside.[11] So where the defendant in the hearing of several jurors, declared that the testimony of one of the plaintiff's witnesses was utterly false, the verdict was set aside, although the defendant made affidavit that he did not know that the jurors were present, the court saying that the presumption was that when jurors heard such statements they were more or less affected.[12] So where the defendant, out of court, and in the presence of several of the jurors, abused the plaintiff, and detailed what he said were the facts of the case, a verdict in his favor was set aside, although the jurors left the defendant as soon as the idea of impropriety was suggested to their minds.[13] So where, while the defendant's counsel was making his argument to the jury, the plaintiff, without leave of the court, spoke to one of the jurors in a low tone of voice, and persisted in doing so when forbidden by the justice, a verdict in his favor was set aside.[14] So where the showing was that during the trial the plaintiff told a person that "he was not going home that night, but intended to stay and see some of the jurors," and the foreman of the jury repeatedly, during the trial, made declarations which evinced his partiality for the plaintiff, and it was proved that the plaintiff said that the foreman would give him the case if he could, the verdict was set aside, although a strong showing was made to the effect that no injury in fact resulted.[15] So where, after the verdict was agreed on and

[9] Perkins v. Knight, 2 N. H. 474.
[10] McIntire v. Hussey, 57 Me. 493.
[11] Heffron v. Gallupe, 55 Me. 563.
[12] Cilley v. Bartlett, 19 N. H. 312; but see Hilton v. Southwick, 17 Me. 303, 35 Am. Dec. 253.
[13] Reynolds v. Champlain Transportation Co., 9 How. Pr. 14.
[14] Turner v. Beardsley, 19 Wend. 348.
[15] Tenney v. Evans, 13 N. H. 462, 40 Am. Dec. 166.

sealed up, one of the plaintiff's attorneys had a conversation with several of the jurymen, and when the sealed verdict was opened, some of them dissented, and the jury were sent out, and after some time brought in a verdict for the plaintiff in a larger amount than the one which had been sealed up, a new trial was granted.[16] So where, after arguments were closed, a juror, while in conversation with the plaintiff's counsel, asked him a question concerning the law of the case, which question was answered by the attorney, a new trial was granted.[17]

But in a personal injury case, brought by a woman, it was held not to be prejudicial and a ground for a new trial for plaintiff to suddenly cry out and weep and tremble in the presence of the court and jury, it appearing that she was very nervous as a result of the accident complained of, and had been subjected to considerable criticism in the course of the trial by attorneys and others interested for the defendant, and the conduct in question was wholly involuntary.[17a] So in Johnstone v. Seattle etc. Co., [17b] it was held not ground for a new trial to attempt to prejudice the jury by alleging and trying to prove certain facts without any hope or expectation of succeeding.

2. *Attempts to Influence Jurors, not by the Party or His Counsel, but on His Behalf.*—It cannot be doubted that where attempts to influence jurors are made with the knowledge and acquiescence of a party, they must be considered as made by himself, and necessitate a new trial. The cases, however, go further, and hold that attempts to tamper with a jury, made by the relatives or friends of a party, without his knowledge, are cause for setting aside the verdict.[18] Perhaps it may be doubted whether such proceedings, although irregular, would come under the head of "irregularity of the adverse party." Probably they would be so considered if relief could not be had in any other way. The case might be such that relief could be had as for "irregularity of the jury."

[16] Martin v. Morelock, 32 Ill. 485.

[17] Oleson v. Meader, 40 Iowa, 663.

[17a] Connell v. Seattle etc. Co., 47 Wash. 510, 92 Pac. 377. See, also, Poe v. Arch (S. D.), 128 N. W. 166.

[17b] 45 Wash. 154, 87 Pac. 1125. The court held that such an abuse of privilege would have to be very flagrant before a new trial would be allowed on that ground alone, and its prejudicial effect would have to be plainly evident or exceedingly probable. Misconduct of this kind must be brought home to the jury and shown to be either strongly likely to influence them or to have actually done so. Paul v. Salt Lake City etc. Co., 34 Utah, 1, 95 Pac. 363.

[18] McDaniels v. McDaniels, 40 Vt. 363; Broadbury v. Cony, 62 Me. 223, 16 Am. Rep. 449; Knight v. Freeport, 13 Mass. 219.

Thus in People v. Murray,[18a] where the jurors, or some of them, were permitted to read, and did read, certain articles published in a local newspaper, containing references to the character of verdict that would be acceptable to public opinion, and associating therewith veiled threats as to what those members of the jury who should have the temerity to vote for a contrary verdict, might expect at the hands of the public, it was held error on the part of the trial judge to refuse to admit evidence in support of a motion for a new trial on the ground of irregularity. So in People v. Stokes,[18b] where it was shown that members of the jury had been permitted to read, during the trial, articles published in a local newspaper, containing indirect threats to the effect that certain jurors who were expected to "hang" the jury would be dealt with, a new trial was ordered by the supreme court.

Mere publication is not enough.[18c] There must be an affirmative showing that the newspaper containing the article was in the hands of and was read by one or more of the jurors, before the alleged irregularity can be said to have any foundation.[18d] Possibly the rule goes to the extent of requiring an affirmative showing that one or more jurors had actually read the article in question, not merely that an opportunity to do so is brought home to them.[18e]

[18a] 85 Cal. 350, 24 Pac. 666. See, also, People v. Mitchell, 100 Cal. 328, 34 Pac. 698. But compare People v. Goldenson, 76 Cal. 328, 16 Pac. 161. In the case cited in the text Mr. Justice Works, for the court, said: "An attempt on the part of any person, whether through the medium of a newspaper or otherwise, to influence a jury by any improper means to bring a verdict against a defendant is a palpable violation of his right to a fair and impartial trial, and if it appears to the court to have such effect, a new trial should be granted."

[18b] 103 Cal. 193, 42 Am. St. Rep. 102, 37 Pac. 207. And see People v. McCoy, 71 Cal. 395, 12 Pac. 272.

[18c] See People v. Feld, 149 Cal. 464, 86 Pac. 1100. Here the court said: "It, however, devolves upon the party moving for a new trial on this ground to show that such articles have come to the knowledge of the jurors," etc. And, after ruling that mere publication raises no presumption, the court said: "It is their duty to abstain from reading any articles," etc., "and the presumption is that they have fully performed their duty."

In Sheehan v. Hammond, 2 Cal. App. 371, 84 Pac. 340, the court said: "We do not think it a safe rule to grant a new trial on account of statements in public journals during the trial, *which statements do not appear to have been read by the jurors*," etc.

See People v. Hower, 151 Cal. 638, 91 Pac. 507, where it was held that the mere presence in the jury-room where the jury were deliberating of clothing worn by the prosecuting witness when assaulted, unaccompanied with a showing that the jurors had examined the same, was insufficient to establish an irregularity.

[18d] See cases cited in previous note. And see People v. McCoy, 71 Cal. 395, 12 Pac. 272, where it seemed to be the opinion of the court that the article must be actually read, and the showing must be to that effect.

[18e] See cases cited in last two notes.

Although mere publication—even if accompanied with a showing of intent to influence the verdict—is not enough, yet such publication, if accompanied with a showing that it was actually read by one or more jurors, is an irregularity, even though the publisher was innocent of any intent to interfere with the sanctity of the verdict. The elements of the irregularity are, first, the character of the publication; and second, the reading thereof by a member of the jury. If either element is wanting, the irregularity itself fails of establishment; but if both are present, even though actual influence be not shown, it will be presumed that the right of the losing party has been invaded, and he will be accorded a new trial.

This irregularity must be clearly differentiated from the act of publication, on the one hand, and the act of reading in violation of the caution of the court by a member of the jury, on the other. The former is an offense, if at all, in the nature of a contempt, the act of an outsider which neither can nor does affect the proceedings of the court, so far as the parties to the action are concerned; and it cannot be accepted as the basis for a new trial order, or any other action or order of court. The latter is misconduct of the jury, and must be treated as such.[18f] It is true, the same publication may be the occasion for a contempt proceeding and a basis for a motion for a new trial.

The act of reading being brought home to a member of the jury by an affirmative showing to that effect, the irregularity is established if it clearly appears that the verdict was affected, or that the character of the publication was such that the court is unable to say positively that it was not affected. If it is shown, or if it appears to the court, that the verdict was really unaffected by the publication, it should stand. Differently stated, the presumption is always against the verdict, and the burden is on the winning party to show that the improper publication did not affect it.[18h]

An attempt was made in Paul v. Salt Lake City etc. Co.[18i] to obtain a new trial on this ground by reason of the alleged influence of the church government of the Mormon church upon the minds of the jury, exerted against the interests of the moving party; but the attempt was unsuccessful, the court holding that mis-

[18f] See section 67, *post*.

[18h] See sections 73 and 74, *post*, for discussion of questions of proof of misconduct and irregularity by jurors themselves. See section 26, *ante*, as to presumption.

[18i] 34 Utah, 1, 95 Pac. 363.

conduct of this kind, to be prejudicial, must be brought home to the jury in some more definite way than the subtle influence of religious societies, where there was no indication that there had been any overt act pointing to the voluntary exercise of such influence upon the part of the elders of the church.

Affidavits based upon information and belief are wholly valueless for the purpose of establishing the facts upon which an irregularity of this description is based.[18k]

3. *Harmless Conversation Between the Parties and Jurors.*—It is not every passing remark by a party to a juror that will invalidate the verdict. If it *appear affirmatively* that no injury could have resulted from the conversation, a new trial will be refused. Thus where during the trial the defendant, not recognizing a juror, asked him "what he thought of the case, if it was not a singular case," but stopped talking as soon as the juror stated that he was on the jury, the court declined to disturb the verdict for the defendant.[19] So where one of the parties remarked to a juror that he would have to go home to get two deeds to be used on the trial, and this fact was called to the attention of the judge and the losing party at the time, and no action was then taken in regard to the matter, a new trial was refused.[20] So where before the trial the defendant remarked to a third person, in the hearing of some of the persons on the panel, whom, however, he did not know, that his case would not be hard to try as the plaintiff had sued him for five hundred dollars and had offered to take five dollars, but ceased talking as soon as he was informed that jurors were present, the court declined to disturb a verdict in his favor, saying: "This was no attempt to approach any of them in an improper manner or for an improper purpose, or to obtain any advantage to himself, or work any harm to his adversary, or to create any prejudice against him; and therefore without some proof having at least a tendency to show that his casual statement did produce some effect upon the mind of one or more of the jurors, there appears to be no reason for supposing that their impartiality was diminished or affected by it."[21] So where a juror who lived in the same vicinity as the plaintiff accepted a seat in plaintiff's wagon, his own horse not having arrived as expected,

[18k] See People v. Findley, 132 Cal. 301, 64 Pac. 472; Gay v. Torrance, 145 Cal. 144, 78 Pac. 540.

[19] Wise v. Bosley, 32 Iowa, 34.

[20] White v. Wood, 8 Cush. 413.

[21] Shea v. Lawrence, 1 Allen, 167.

but did not talk about the case, the court refused to grant a new trial, saying: "The plaintiff does not appear to have sought for the juror or to have conversed with him respecting it (the trial); and he did not go out of his own way to accommodate the juror. And yet the exercise of these acts of kindness under such circumstances are suited to produce a suspicion that the juror had been influenced by improper motives, and the court must feel a want of perfect confidence, as much to be deplored by it as by the losing party. It has, however, come to the conclusion, not without doubt and hesitation, that the verdict may be regarded as found by a jury free from improper influences." [22]

As to whether the actual bribery of a juror would be deemed such an irregularity of the adverse party as would irretrievably vitiate the verdict, no decision directly bearing upon the point has been noted. It is believed, however, that no distinction exists between this and any other improper influence, and that the rule permitting an affirmative showing that the irregularity did not really affect the verdict would apply here as in the case of other attempts to influence the jury improperly.[23]

§ 49. Attempts to Suppress or Manufacture Evidence.—Any attempt by the prevailing party to induce his adversary's witnesses to keep out of the way, or to testify against the truth, or to suppress or manufacture evidence is ground for setting aside a verdict in his favor. Thus where the agent of the plaintiff hired a material witness, for whom the other side was inquiring, to absent himself, so that he could not be summoned as a witness, and the witness did so absent himself, a new trial was granted.[1] So where a party induced a witness for the other side to keep out of the way to avoid service of a subpoena, and also promised her a reward if she would sustain her testimony taken by deposition, and she confirmed such testimony when the other side finally succeeded in getting her on the stand, a new trial was granted, and Bellows, J., delivering the opinion, said:

[22] Hilton v. Southwick, 17 Me. 303, 35 Am. Dec. 253; look at Cilley v. Bartlett, 19 N. H. 312.

[23] See, also, note 14f, section 68, *post*, as to the misconduct of a juror in accepting a bribe. Also, see section 95, *post*, as to excessive verdicts resulting from corruption of the jury.

[1] Crafts v. Union Mut. Ins. Co., 36 N. H. 44; look at Patterson v. Donner, 48 Cal. 369.

"There is nothing, however, in the evidence that clearly proves that she was induced to testify falsely, or that the plaintiff intended she should do so; although it cannot be disguised that there are strong grounds of suspicion as to the truth of her testimony. However that may be, any interference of one party to defeat the service of a subpoena by the other is wholly inconsistent with the due administration of justice, and cannot for a moment be tolerated. The promise of a reward to induce a reluctant witness to testify in a particular way is a much graver offense, and affords just ground for such suspicion as would ordinarily incline the court to set aside a verdict if in favor of the party who is guilty of such misconduct. In these cases the court has no means of ascertaining the extent of the wrong done by such misconduct, nor is there occasion for any critical examination upon that point. The offense is of a character so odious and so utterly at war with the due course of justice, that when once established its injurious effect would ordinarily be taken for granted unless disproved."

So where the defendant induced a material witness for the plaintiff to absent himself from his usual place of business to prevent his being subpoenaed as a witness, a new trial was granted.[2]

So where it was agreed between counsel that certain papers on each side should be handed to the jury when they retired, and as counsel for the plaintiff was about to hand his papers to the jury the counsel for the defendant took them on some pretext and before giving them to the jury suppressed some of them, a new trial was granted, and Woodruff, J., delivering the opinion, said: "That counsel should surreptitiously remove and conceal some of his adversary's documentary evidence, clandestinely suppress other written testimony when the whole papers were asked for by the jury, or are agreed to be delivered to them on their retiring, and deceive the adverse counsel into the belief that the papers have all been delivered to the jury for their examination and consideration, can never be tolerated."[3] But where in a criminal case a paper, not of much consequence, was accidentally retained by the counsel for the prosecution, and the jurors testified that they remembered its contents, a new trial was refused.[4]

[2] Carey v. King, 5 Ga. 75.
[3] Hastings v. McKinley, 2 E. D. Smith, 47.
[4] State v. Pike, 20 N. H. 344.

As to the effect of documents not in evidence getting to the jury without the intervention of the prevailing party or his attorney, see section 68.

§ 50. **Irregularities in the Argument to the Jury.**—Irregularities in the argument to the jury are mainly of two kinds, viz., attempts to get before the jury facts not in evidence, and attempts to induce the jury to take the law from other sources than the charge of the court.

1. *Attempts to Get Before the Jury Facts not in Evidence.*—That such attempts are improper is clear upon principle and from authority. In People v. Wheeler, the judgment was reversed because the district attorney was allowed to read to the jury extracts from a medical work which was not in evidence.[1] So where counsel was allowed to read from a pamphlet issued by the defendant which was not in evidence, the verdict was set aside.[2] So where the court permitted counsel to read to the jury as part of his argument a report of evidence taken at a former trial, a new trial was granted.[3] So where the plaintiff's attorney read to the jury as part of his closing argument the instructions of the judge given at a previous trial, containing statements as to the facts of the case, the verdict was set aside, the court saying: "It is somewhat to be wondered at that counsel should have insisted on the admission of testimony that could do them no good, and which if admitted would be sure to be followed, even if they were successful, by disappointment and expense in the end. Counsel owe a duty not only to the court but to the client, and that is never to insist on aids to success clearly wrong either in law or fact."[4] So where in an action for damages for personal injuries the counsel made remarks concerning the wealth of the defendant, respecting which there was no evidence, the verdict was set aside, and Ryan, C. J., delivering the opinion, said:

"The profession of the law is instituted for the administration of justice. The duties of the bench and bar differ in kind but not in purpose. The duties of both alike is to establish the truth

[1] 9 Pac. C. L. J., p. 581. But in addition to the fact that the book had not been offered in evidence, several of the court thought it would have been inadmissible if offered. See, also, Mowry v. Starbuck, 4 Cal. 274.

[2] Koelges v. Guardian Life Ins. Co., 57 N. Y. 638.

[3] Martin v. Orndorff, 22 Iowa, 504.

[4] Butler v. Slam, 50 Pa. 456.

and apply the law to it. It is essential to the proper administration of justice, frail and uncertain at the best, that all that can be said for each party in the determination of fact and law should be heard. Forensic strife is but a method, and a mighty one, to ascertain the truth and the law governing the truth. It is the duty of counsel to make the most of the case which his client is able to give him; but counsel is out of his duty and his right, and outside of the principle and object of his profession, when he travels out of his client's case and assumes to supply its deficiencies. Therefore it is that the nice sense of the profession regards with such distrust and aversion the testimony of a lawyer in favor of his client. It is the duty and right of counsel to indulge in all fair argument in favor of the right of his client; but he is outside of his duty and his right when he appeals to prejudices irrelevant to the case. Properly, prejudice has no more sanction at the bar than on the bench. But an advocate may make himself the *alter ego* of his client, and indulge in prejudice in his favor. He may even share his client's prejudices against his adversary, as far as they rest on the facts in his case; but he has neither duty nor right to appeal to prejudices, just or unjust, against his adversary *dehors* the very case he has to try. The very fullest freedom of speech within the duty of his profession should be accorded to counsel; but it is license, not freedom of speech, to travel out of the record, basing his argument on facts not appearing, and appealing to prejudices irrelevant to the case and outside of the proof. It may sometimes be a very difficult and delicate duty to confine counsel to a legitimate course of argument; but like other difficult and delicate duties, it must be performed by those upon whom the law imposes it. It is the duty of the circuit court to interfere in all cases of their own motion. This is due to truth and justice. And if counsel persevere in arguing upon pertinent facts not before the jury, or appealing to prejudices foreign to the case in evidence, exception may be taken by the other side which may be good ground for a new trial, or for a reversal in this court."[5]

The views of the supreme court of Wisconsin in the preceding case were approved and applied by the supreme court of Cali-

[5] Brown v. Swineford, 44 Wis. 282, 28 Am. Rep. 582. And see cases cited in notes 23, 24, 25, 26, 27 and 28, below.

fornia in the case of People v. Mitchell,[6] in which case the court said: "There are cases in other states, it is said, in conflict with the rule above laid down. But the rule is supported by principle; in this state by precedent; and as we believe by the great weight of authority everywhere."[7]

In Marshall v. Taylor,[7a] although the conduct was not deemed sufficient to warrant a new trial for that reason, the court said: "This misconduct consisted in attempting to get before the jury matters not within the issues by means of asking improper questions and 'offers to prove,' etc. It was held in People v. Ah Len (92 Cal. 282, 27 Am. St. Rep. 103, 28 Pac. 286) that this character of misconduct could be carried to such lengths as to justify a new trial, and for that reason a new trial was there ordered. The rule is a most wholesome one, and in a criminal case especially its rigid enforcement will be maintained by the court. A trial court should always be on the alert to prevent an attorney from obtaining advantages in jury trials by the practice of methods not countenanced by the ethics of the profession."

So in other cases,[7b] similar doctrine was upheld. Misconduct of this character seldom occurs in civil cases, where it is recognized

[6] 62 Cal. 411; Mitchum v. State, 11 Ga. 615; Tucker v. Henniker, 41 N. H. 317.

[7] See, also, Berry v. State, 10 Ga. 511; McNabb v. Lockhart, 18 Ga. 495; Gould v. Moore, 40 N. Y. Sup. Ct. 395.

[7a] 98 Cal. 55, 35 Am. St. Rep. 144, 32 Pac. 867.

[7b] The doctrine was sustained in the following cases: People v. Lemperle, 94 Cal. 45, 29 Pac. 709; People v. Hall, 94 Cal. 595, 30 Pac. 7; People v. Devine, 95 Cal. 227, 30 Pac. 378; People v. UnDong, 106 Cal. 83, 39 Pac. 12; People v. Ryan, 108 Cal. 581, 41 Pac. 451; People v. Louie Foo, 112 Cal. 17, 44 Pac. 453; People v. Mayes, 113 Cal. 618, 45 Pac. 860; People v. Ward, 105 Cal. 335, 38 Pac. 945; People v. Wong Chuey, 117 Cal. 624, 49 Pac. 833; People v. Crandall, 125 Cal. 129, 57 Pac. 785; People v. Molina, 126 Cal. 505, 59 Pac. 34; People v. Cole, 127 Cal. 545, 59 Pac. 984; People v. Derbert, 138 Cal. 467, 71 Pac. 564; People v. Ward, 134 Cal. 301, 66 Pac. 372; People v. Sing Lee, 145 Cal. 190, 78 Pac. 636; People v. Cook, 148 Cal. 334, 83 Pac. 43; People v. Kramer, 117 Cal. 647, 49 Pac. 842; People v. Helm, 152 Cal. 532, 93 Pac. 99; People v. Derwae, 155 Cal. 592, 102 Pac. 266. Also, People v. Valliere, 127 Cal. 65, 59 Pac. 295. Also, People v. Hamberg, 84 Cal. 468, 24 Pac. 298.

The following are instances where the misconduct was held not prejudicial: People v. Ross, 85 Cal. 383, 24 Pac. 789; People v. Gordon, 103 Cal. 568, 37 Pac. 534; People v. Barthleman, 120 Cal. 7, 52 Pac. 112; People v. Cokahnour, 120 Cal. 253, 52 Pac. 505; People v. Searcey, 121 Cal. 1, 53 Pac. 359, 41 L. R. A. 157; People v. Burns, 121 Cal. 529, 53 Pac. 1096; People v. Little Pete, 123 Cal. 373, 55 Pac. 993; People v. Phelan, 123 Cal. 551, 56 Pac. 424; People v. Patterson, 124 Cal. 102, 56 Pac. 882; People v. McMahon, 124 Cal. 435, 57 Pac. 224; People v. Lewis, 124 Cal. 551, 57 Pac. 470, 45 L. R. A. 783; People v. Gleason, 127 Cal. 323, 59 Pac. 592; People v. Vann, 129 Cal. 118, 61 Pac. 776; People v. Benc. 130 Cal. 159, 62 Pac. 404; People v.

as an irregularity of the adverse party, and ground for a new trial; whereas, although not a ground for new trial in criminal

Smith, 134 Cal. 453, 66 Pac. 669; People v. Amaya, 134 Cal. 531, 66 Pac. 794; People v. Glaze, 139 Cal. 154, 72 Pac. 965; People v. Mathews, 139 Cal. 527, 73 Pac. 416; People v. Metzgar, 143 Cal. 447, 77 Pac. 155; People v. Romero, 143 Cal. 458, 77 Pac. 163; People v. Smith, 143 Cal. 597, 77 Pac. 449; People v. Perry, 144 Cal. 748, 78 Pac. 284; People v. Mead, 145 Cal. 503, 78 Pac. 1047; People v. Kelly, 146 Cal. 119, 79 Pac. 846; People v. Woods, 147 Cal. 265, 109 Am. St. Rep. 151, 81 Pac. 652; People v. Warner, 147 Cal. 546, 82 Pac. 196; People v. Feld, 149 Cal. 464, 86 Pac. 1100; People v. Soeder, 150 Cal. 12, 87 Pac. 1016; People v. Bradbury, 151 Cal. 675, 91 Pac. 497; People v. Siemsen, 153 Cal. 387, 95 Pac. 863; People v. Whalen, 154 Cal. 472, 98 Pac. 194; People v. Davis, 1 Cal. App. 8, 81 Pac. 716, 88 Pac. 1101.

The subject of misconduct of counsel in argument, as an irregularity of the adverse party, is considered from various points of view in the several states, and the cases themselves must be studied to ascertain what particular course of argument is and what is not to be regarded as reprehensible, and ground for a new trial. In Denver etc. Co. v. Moynahan, 8 Colo. 56, 5 Pac. 811, with reference to language calculated to prejudice the jury against one of the parties, a corporation, the court said:

"This style of argument is too common in closely contested cases, and especially so when a corporation is a party. It is a covert way of introducing before the jury facts which are not in evidence, upon which to base a denunciation of the conduct of the opposite party, for the purpose of exciting sympathy for one side and prejudice against the other. Such a course is both illegitimate and unprofessional. It is a violation of the rule which confines counsel to the facts proven, and is an abuse of the privileges of counsel, which merits severe censure. It is the privilege and duty of counsel to deal with the facts in evidence according to his view of the case. He may draw illustrations therefrom, or from facts hypothetically assumed, but he must not make himself a witness by stating facts within his own knowledge affecting the case. It is his privilege and duty to show up in their true light such acts and conduct of the opposite party as are deserving of criticism or condemnation, but he must not depart from the evidence for such purpose, and surreptitiously introduce before the jury irrelevant matters."

But the court, while describing the conduct of counsel in the particular case as "clearly reprehensible," did not think it was sufficient to justify a reversal of the order denying the motion for a new trial.

Similar expressions are to be found in Hurd v. Atkins, 1 Colo. App. 449, 29 Pac. 528. In Cook v. Doud, 14 Colo. 483, 23 Pac. 906, the verdict was set aside and a new trial granted for improper argument. In Grant v. Varney, 21 Colo. 329, 40 Pac. 771, a like order was made, because, in his argument, attorney for plaintiff arraigned the defendants as "living in their mansions and handling their millions," even though, after being applauded by the audience, and mildly reproved by the court, he retracted his expressions, and the jury added a postscript to their verdict to the effect that they were not influenced thereby. See, also, Waldron v. Waldron, 156 U. S. 361, 15 Sup. Ct. Rep. 383, 39 L. ed. 453 (a Colorado case).

In Kinna v. Horn, 1 Mont. 597, it appeared that counsel for Horn misstated certain evidence, and stated other evidence that the court had excluded, in the course of his argument; but the trial court denied the motion for a new trial, and the supreme court affirmed the ruling upon the ground of the exercise of discretion. The report of the case is rather interesting as an example of frontier justice.

In Easterly v. Gater, 17 Okl. 93, 87 Pac. 853, 10 Ann. Cas. 888, the supreme court held that misconduct of this kind would not justify a new trial unless the circumstances raise the rea-

cases,[7c] it is often set up as ground for reversing the judgment. Thus in People v. Lee Chuck,[7d] where the trial judge had permitted the assistant district attorney, over the objection of counsel for the defense, to comment at length upon incompetent testimony under pretense of argument for its admission, the supreme court severely rebuked the delinquent and reversed the judgment. So in People v. Bowers,[7e] it was held prejudicial error for the district attorney to refer to matters outside the evidence in his closing argument, of a character calculated to influence the jury against the defendant. And this is true although the jury were cautioned by the court to pay no attention to such argument.[7f] So in People v. Ah Len,[7g] regarded as a leading case upon the point, the court said:

"A person accused of crime is entitled, under the constitution, to a trial by jury, according to the established principles of law, not the least important of which is, that the verdict shall be founded only on relevant and competent facts produced before the jury under the rules prescribed for the admission of evidence, and it was held by the supreme court of New Hampshire, in the leading and well considered case of Tucker v. Henniker, 41 N. H. 317, that this right is violated 'if counsel are permitted to state facts, and comment upon them in argument against the adverse party, which are not before the jury by proofs regularly submitted.' It is true that the attorney for the prosecution in this case was not permitted by the court to comment at any length upon the facts which he himself imported into the case; but while

sonable suspicion that the jury were improperly influenced thereby.

In Lindsey v. Pettigrew, 3 S. D. 199, 52 N. W. 873, counsel for plaintiff commented on defendant's efforts to delay the trial, and referred to the fact, not in evidence, that plaintiff had prevailed in other litigation connected with the present, and, after being warned by the court, persisted in this mode of argument. The supreme court held that the trial court abused its discretion in refusing to grant the motion for a new trial. See, also, Morris v. Hubbard, 14 S. D. 525, 86 N. W. 25.

See the following Oregon cases: State v. Abrams, 11 Or. 169, 8 Pac. 327; State v. Olds, 19 Or. 397, 24 Pac. 394; State v. Hatcher, 29 Or. 309, 44 Pac. 584; State v. Ross (Or.), 104 Pac. 596.

In Brennan v. Seattle, 46 Wash. 427, 90 Pac. 434, and Kielhover v. Washington etc. Co., 49 Wash. 646, 96 Pac. 220, such misconduct of counsel was held prejudicial; but in Sears v. Seattle etc. Co., 6 Wash. 227, 33 Pac. 389, 1081; and Spencer v. Arlington, 49 Wash. 121, 94 Pac. 904, it was held otherwise.

[7c] See People v. Amer, 151 Cal. 303, 90 Pac. 698, and cases there cited.

[7d] 78 Cal. 317, 20 Pac. 719.

[7e] 79 Cal. 415, 21 Pac. 75.

[7f] See paragraph 3, latter part of this section.

[7g] 92 Cal. 282, 27 Am. St. Rep. 103, 28 Pac. 286.

this was to the credit of the court, it does not change the fact that a matter not in evidence and of a nature clearly prejudicial to the appellant, was laid before the jury for the purpose of affecting their verdict, and it is not answer to this to say that the jury may have disregarded it. As was said in the case just cited: 'When counsel are permitted to state facts in argument, and to comment upon them, the usage of courts regulating trials is departed from, the laws of evidence are violated, and the full benefit of trial by jury denied.' It follows that the only safe and just rule to apply in such cases is to make it impossible for a party to derive any advantage from such misconduct of counsel by promptly granting a new trial to the adverse party, unless it is clear that the verdict was not affected thereby."

So in People v. Sansome,[7h] where the district attorney sought to call attention to the fact of defendant's failure to appear on the stand in his own behalf, and to draw therefrom an inference of guilt, the supreme court said:

"It is clear in view of this plain provision of the statute (Sec. 1323, Penal Code) that the district attorney had no right to make the remarks complained of, and it is to be regretted that prosecuting officers, in their zeal to procure convictions, so often forget that they are under as much obligation to give one accused of crime a fair and impartial trial as is the judge upon the bench."

So in People v. Wells,[7k] where the district attorney sought, by means of questions asked for the sake of the questions and not the answers, to get before the jury certain improper facts and incompetent evidence, for the purpose of prejudicing the defendant's cause, the supreme court, in reversing the judgment and ordering a retrial, said:

"The wrong and the harm was in asking the questions. Of course, in trials of criminal cases questions as to the admissibility of evidence will frequently arise about which lawyers and judges may fairly differ in opinion; and in such cases defendants must be satisfied when the courts sustain their objections. But where the prosecuting attorney asks a defendant questions which he knows, and every judge and lawyer knows, to be wholly inadmissible and wrong, and where the questions are asked without the expectation of answers and where the clear purpose is to prejudice

[7h] 98 Cal. 235, 33 Pac. 202.
[7k] 100 Cal. 459, 34 Pac. 1078. See, also, People v. Mullings, 83 Cal. 138, 17 Am. St. Rep. 223, 23 Pac. 229.

the jury against the defendant in a vital matter by the mere asking of questions, then a judgment against the defendant will be reversed, although objections to the questions were sustained, unless it appears that such questions could not have influenced the verdict."

So in People v. McRoberts [n] it was held prejudicial misconduct "against objection to state facts pertinent to the issue not in evidence, or to assume arguendo such facts to be in the case when they are not."

And it makes no difference that counsel on the other side have been guilty of the same offense. In the case last cited McKinstry, J., delivering the opinion of the court in bank, said:

"The impropriety of the statements, and apparently their materiality, were conceded by the district attorney and by the court; but the court held that the district attorney was justified in departing from the testimony because counsel for the defendant had done the same thing. If the record showed (which it does not) that such statements had been made by counsel for defendant, the fact would not cure the error of the court. The district attorney might have objected to such statements on the part of the defendant's counsel when they were made, or have asked the court specifically to charge the jury that they were to be disregarded. But to say that because an impropriety on the one side has passed unrebuked it ceases to be an impropriety when committed on the other would lead to confusion worse confounded. The jury would have the allegations of fact of the respective counsel pitted against each other, and the fate of a defendant would perhaps be determined not by the evidence in the case, but by the degree of confidence which the jury might repose in the honesty or intelligence, or both combined, of one or the other of the counsel. For counsel to state a fact not proven, or sought to be proven, is in effect to place unsworn evidence before the jury; and when improper evidence is admitted without objection upon the one side, this will not authorize improper evidence on the other. (Donnelly v. Curran, 54 Cal. 282.) Only sworn testimony can go to the jury. (People v. Wheeler, 9 Pac. C. L. J. 581, and cases there cited; [Tucker v. Henniker] 41 N. H. 317; [Rolfe v. Rumford] 66 Me. 564; [Martin v. Orndorff] 22 Iowa,

[n] 1 Cal. App. 25, 81 Pac. 734.

504; [Ferguson v. State] 49 Ind. 33; [St. Louis etc. Ry Co. v. Myrtle] 51 Ind. 567; [Bullock v. Smith] 15 Ga. 395; [Dickerson v. Burke] 25 Ga. 225; [Hoxie v. Home Ins. Co.] 33 Conn. 471; [State v. Smith] 75 N. C. 306.)"

This principle has been sustained in later decisions of the California courts.[7m]

But where the evidence is conflicting the court should not interfere with counsel's statement of its effect.[8] And whenever counsel may infer any particular result from the evidence, however improbable such result may be, the court should not restrain him from arguing upon such result.[9] And a mere mistake in stating the testimony is no ground for a new trial, especially if the opposite party does not avail himself of the judge's offer to have the reporter's notes read.[9a]

2. *Attempts to Induce the Jury to Take the Law from Other Sources Than the Charge of the Judge.*—It is the duty of the judge to prevent counsel from arguing against instructions,[10] and from misstating the law to the jury.[11] So the court should not permit counsel to read to the jury the opinion of the appellate court upon a former appeal in the case,[12] or the reports of other cases.[13] It has sometimes been said that counsel have the right to read law reports to the jury as part of their address.[14] But this means to read them in illustration of their argument; and whether or not they may read them at all is in the discretion of the court. The true rule was stated by Crockett, J., delivering the opinion in People v. Anderson,[15] as follows:

"As a general rule, the practice of allowing counsel in either a civil or criminal action to read law to the jury is objectionable and ought not to be tolerated. Its usual effect is to confuse

[7m] See People v. Dye, 75 Cal. 108, 16 Pac. 537; San Diego etc. Co. v. Neale, 78 Cal. 63, 76, 20 Pac. 372, 3 L. R. A. 83.

[8] Hatcher v. State, 18 Ga. 460; look at People v. Barnhart, 59 Cal. 402.

[9] Logan v. Monroe, 20 Me. 257.

[9a] People v. Barnhart, 59 Cal. 402.

[10] Smith v. Morrison, 3 A. K. Marsh. 81; Harrison v. Park, 1 J. J. Marsh. 170; United States v. Columbus, 5 Cranch C. C. 305, Fed. Cas. No. 14,841.

[11] Ormsby v. Johnson, 1 B. Mon. 80.

[12] Good v. Mylin, 13 Pa. 538.

[13] Phoenix Ins. Co. v. Allen, 11 Mich. 501, 83 Am. Dec. 756.

[14] Regina v. Courvoisier, 9 Car. & P. 362; Commonwealth v. Porter, 10 Met. 263.

[15] 44 Cal. 65. In addition to cases cited in People v. Anderson, see Jones v. Doe, 1 Ind. 109; Legg v. Drake, 1 Ohio St. 286; Cory v. Silcox, 6 Ind. 39; and look at sections 251, 253, of Proffatt on Jury Trial; People v. Treadwell, 69 Cal. 226, 10 Pac. 502; Sullivan v. Royer, 72 Cal. 248, 1 Am. St. Rep. 51, 13 Pac. 655;

rather than enlighten the jury. There are cases, however, in which it is permissible for counsel, by way of illustration, to read to the jury reported cases or extracts from text-books, subject to the sound discretion of the court, whose duty it is to check promptly any effort on the part of counsel to induce the jury to disregard the instructions, or to take the law of the case from the books rather than from the court."

In People v. Forsythe,[15a] where the district attorney was permitted, against the objections of the defendant's attorneys, to read, while summing up to the jury, some portions of an opinion filed by this court in a late case, the supreme court said:

"No case is cited, and we know of none, in which it has ever been held that doing so was error. Still, we are not disposed to commend the practice."

In a later case,[15b] however, Mr. Commissioner Hayne, for the court, commended the refusal of the trial judge to permit counsel to argue the law to the jury in the opening address.

It is not an abuse of discretion on the part of the trial judge to permit the counsel for defendants to read and comment on instructions of the court already given.[15c] So likewise as to the reading of the codes.[15d]

It sometimes happens that when counsel are forbidden to read law to the jury, they will face about, and say that they will read it to the court. But such a manifest attempt to evade obedience to the order of the court ought not to be tolerated. Counsel has no right to read authorities to the court unless the court desires to hear them. They may request instructions on any point they may desire to have the jury informed, and error in refusing instructions requested by counsel, or in giving instructions requested by opposing counsel, is ground for reversal. But if the action of the court in giving or refusing instructions be correct, it will not be invalidated by the refusal to hear authorities read in relation to them; and if such action be erroneous, the error will not be cured by the reading of any number of authorities.

People v. Goldenson, 76 Cal. 328, 19 Pac. 161; People v. Godwin, 123 Cal. 374, 55 Pac. 1059; Meyer v. Foster, 147 Cal. 166, 81 Pac. 402.

[15a] 65 Cal. 101, 3 Pac. 402.

[15b] People v. Carty, 77 Cal. 213, 19 Pac. 490.

[15c] Boreham v. Byrne, 83 Cal. 23, 23 Pac. 212.

[15d] Meyer v. Foster, 147 Cal. 166, 81 Pac. 402.

The irregularities above mentioned are the principal ones that occur in the argument to the jury.[16]

3. *Objection to Irregularities in the Argument Should be Made When They Occur, and the Court Should Interpose at the Time.*— As has been stated, the general rule is that a party must call the attention of the court to the irregularity in time to permit of its correction.[17] And this rule has been held to apply to the irregularities under consideration,[18] although some cases maintain the contrary doctrine.[19]

Where the judge is appealed to, to stop an improper line of argument he should do so at once, and not wait until he comes to instruct the jury. It has been said that the judge may interpose "at the moment, or wait until he charges the jury."[20] But other cases do not agree to this. In Brown v. Swineford, above cited, the verdict was set aside, notwithstanding the fact that the judge told the jury that they were to disregard the statement of the counsel, and Ryan, C. J., delivering the opinion, said: "Doubtless the circuit court can do as it did in this case, charge the jury to disregard all statements of facts not in evidence. But it is not so certain that a jury will do so. Verdicts are too often found against evidence, and without evidence to warrant so great a reliance on the discrimination of juries, and without notes of the evidence it may be difficult for juries to discriminate between the statements of facts by counsel, following the evidence and outside of it. It is sufficient that the extra professional statements of counsel may gravely prejudice the jury and affect the result." There is great force in these remarks of Chief Justice Ryan. Comparatively few men are capable of analyzing their mental processes sufficiently to distinguish the effect pro-

[16] The court should not permit counsel in a criminal case to comment upon the failure of the prisoner to testify. People v. Tyler, 36 Cal. 522; State v. Cameron, 40 Vt. 555; People v. Sansome, 98 Cal. 235, 33 Pac. 202. But the failure of a party in a civil case to testify may be commented on, unless perhaps where he is incompetent to testify. Gray v. Burk, 19 Tex. 228.

[17] See section 27, *ante*.

[18] Crosby v. Blanchard, 7 Allen, 385; Ames v. Potter, 7 R. I. 265; Wilkins v. Anderson, 11 Pa. 399; People v. Ah Fook, 64 Cal. 380, 1 Pac. 347; People v. Beaver, 83 Cal. 419, 23 Pac. 321; People v. Abbott, 101 Cal. 645, 36 Pac. 129; People v. Frigerio, 107 Cal. 151, 40 Pac. 107; People v. Kramer, 117 Cal. 647, 49 Pac. 842; People v. Brittan, 118 Cal. 409, 50 Pac. 664; People v. Beuc. 130 Cal. 159, 62 Pac. 404; People v. Shears, 133 Cal. 154, 65 Pac. 295.

[19] Melvin v. Early, 1 Jones, 386, 62 Am. Dec. 171.

[20] State v. O'Neal, 7 Ired. 251.

duced on their minds by any particular portion of a complex case. Many are swayed by prejudices which they hardly acknowledge to themselves; and it is proverbially difficult to devest one's mind of a prejudice. It cannot be exorcised at the mere bidding of another. If the truth could be known, it would probably be found that very many verdicts are the result of prejudice and feeling. And it seems a farce to allow counsel to excite the prejudice and passions of the jury, and to mislead them by statements of facts not in evidence, and then simply to tell them that they are not to be influenced by the course pursued. It is a case where prevention is better than cure.

As was said by Temple, J., in the case of People v. Valliere,[20a] where the district attorney had made use of a remark in his argument, which was nothing short of evidence and evidence that had been ruled out during the trial, and had been rebuked by the court: "The court promptly rebuked the attorney, but that did not cure the injury. Rebukes do not seem to have any effect upon prosecuting officers, and probably as little upon juries. The only way to secure fair trials is to set verdicts so procured aside."

The view here suggested was also well expressed by the supreme court of New Hampshire in the case of Tucker v. Henniker,[20b] and quoted by De Haven, J., in the leading case of People v. Ah Len.[20c] The language is as follows:

"It may be said that the statements of counsel are not evidence, that the court is bound to so instruct the jury, and

[20a] 127 Cal. 65, 59 Pac. 295.

[20b] 41 N. H. 317.

[20c] 92 Cal. 282, 27 Am. St. Rep. 103, 28 Pac. 286. But see People v. Bradbury, 151 Cal. 675, 91 Pac. 497, where Shaw, J., for the court made use of expressions not entirely in accord with that of the New Hampshire case. He said: "I concur," etc. "I wish to add, however, that, even in cases where a district attorney does persistently attempt to influence a jury by improper questions calculated to produce suspicions and hurtful suggestions, it is the duty of the counsel for the defendant to make timely objection to the court, and the duty of the court thereupon to instruct the jury that such suggestions must be disregarded and that suspicions must be rejected, and that when such instructions are given it will not be presumed that the jury were influenced by the improper conduct objected to, unless the record shows extraordinary circumstances tending to show that such influence existed notwithstanding the caution of the court. I think the language of the opinions in some of the previous decisions of this court goes too far in support of the theory that there is some sort of a presumption that the misconduct of a district attorney will prevail with the jury and influence them in the face of the positive instructions of the court that they must not consider the suggestions improperly made. The presumption should always be that a jury has obeyed the instructions of the court, and unless the contrary is shown by the record,

that they are sworn to render their verdict according to evidence. All this is true; yet the necessary effect is to bring the statements of counsel to bear upon the verdict with more or less force, according to circumstances, and if they, in the slightest degree, influence the finding, the law is violated, the purity and impartiality of the trial tarnished and weakened. If not evidence, then manifestly the jury have nothing to do with them, and the advocate has no right to make them. It is unreasonable to believe the jury will entirely disregard them. They may struggle to disregard them; they may think they have done so, and still be led involuntarily to shape their verdict under their influence."

If counsel desist when the judge interferes, the verdict will not ordinarily be set aside.[21]

As in the case of other irregularities there must be some reason to suppose that a fair trial may have been prevented.[22] The tests are various. In People v. Putnam [23] it was suggested that if the remarks were irrelevant and unwarranted, or if they extended to the point of militating against justice and the fair and orderly conduct of the cause, or if the right of the defendant to a fair and impartial trial was materially curtailed, it would be regarded as an irregularity warranting a retrial of the cause. In People v. Ward [24] it was said: "Counsel have no right to indulge in extravagant ex-

that presumption should prevail in the appellate courts."

Upon the general question, which cannot be said to be very far away at any crisis of a trial by jury, of the prejudicial effect of the presentation and discussion of legal points by counsel in the presence of the jury, there is an interesting dictum of Cooper, J., in the case of Risdon v. Yates, 145 Cal. 210, 78 Pac. 641. An amended answer was stricken from the files at the commencement of the trial, on motion made in the presence of the jury, upon the ground that it had been filed without permission of the court. Thereupon the defendant claimed the right to refile the amended answer under section 472 of the Code of Civil Procedure, and it was granted. Contending that he had a right to amend once without permission, and that it was error to strike from the files his amended answer, the defendant charged that his case had been prejudiced before the jury by the proceeding in its presence. The court said: "The jurors are not supposed to know or interest themselves with questions of law raised before the court during the trial. If every ruling made by the court in the presence and hearing of the jury could be investigated as to whether or not it might possibly have injured the rights of one of the parties, and thus be made the ground for reversing the case, there would be few verdicts that would stand. We must presume that the jury did its duty and decided the question of fact under the instructions of the court upon the pleadings as they are."

21 Fry v. Bennett, 3 Bosw. 200, 243; People v. Hamberg, 84 Cal. 468, 24 Pac. 298.

22 See Morgan v. Hugg, 5 Cal. 409; Bank of Charlestown v. Emeric, 2 Saund. 719; and see section 26, *ante*.

23 129 Cal. 258, 61 Pac. 961.

24 134 Cal. 301, 66 Pac. 372.

pression of their belief, or in the use of degrading epithets, but the judgment should not be reversed because counsel lose their temper and indulge in epithets, unless it clearly appeared that it prejudiced the defendant. The remedy for such excesses should be administered in the trial court." So in People v. Mayes [25] the court were of the opinion that it was not expected that a district attorney should maintain his urbanity and courtesy throughout the performance of his duty, but, on the contrary, it was not surprising that his conduct should, under the pressure of events, become more or less brusque at times; yet, unless it could be said that manners or conduct were of such a character as to have interfered with the judgment of the jury upon the evidence before them, they could not be held prejudicial. The court there said:

"Counsel's conduct must reach a course of proceeding militating against justice, and the fair and orderly conduct which should characterize judicial proceedings in criminal cases before error can be predicated of it. There must be willful error persisted in for an illegitimate purpose, followed by injustice to the prisoner."

Again, in People v. Ward [26] the court said: "The animus of the prosecution there was apparent, and its effect so pronounced, that the court deemed it but just to stamp with the seal of its disapprobation, not only for that case but as a warning against like conduct in other cases, a course of proceeding militating against justice and the fair and orderly conduct which should characterize judicial proceedings in criminal cases."

The principle announced in these cases is not to be distinguished from that which lies at the base of the irregularity occasioned by the attempt of the people's attorney to get improper evidence before the jury, or to mislead the jury by misstatements of the evidence actually introduced. The irregularity in each case is based upon specific misconduct on the part of the district attorney, whereby the right of the defendant to a fair and impartial trial has been sensibly diminished. The test is therefore to be regarded as the same.[27]

[25] 113 Cal. 618, 45 Pac. 850.

[26] 105 Cal. 335, 38 Pac. 945.

[27] The recently decided case of People v. Derwae, 155 Cal. 592, 102 Pac. 266, offers not only a well-defined and decidedly characteristic case of prejudicial misconduct, but also illustrates the prevailing differences of opinion among the judges of the higher courts as to the effect of this particular kind of misconduct. It also aptly outlines the duty of the trial judge, and suggests the legal effect of the prompt and efficient performance of that duty.

The appellate courts are not favorably disposed toward granting retrials on the ground of misconduct of the district attorney. Particularly is this true as to alleged misconduct in the course of the argument to the jury. The trial judge has a wide discretion in regulating such argument, as he has in the case of other counsel, and, as usual, his action with regard thereto will not be reversed except for manifest abuse.[28] In the case of People v. Mayes, above cited, Harrison, J., touching such exercise of discretion, said:

"Much must be left to the discretion of the trial judge in determining whether an attorney oversteps the bounds of legal propriety in his conduct of the trial, and, unless it clearly appears to the contrary, the judgment of the trial court that his conduct has wrought no prejudice to the defendant will not be set aside."

If the record on appeal fails to show whether or not the court corrected or rebuked the attorney, the facts as to the irregularity appearing, it will be presumed by the appellate court that the attorney was rebuked, or his statements corrected, and that the jury were instructed or cautioned to disregard the same.[29]

It is to be borne in mind that the irregularity here defined is not ground for a new trial in criminal cases, but in civil cases only.[30] It has long been held a ground, as misconduct of the district attorney, for reversal of the judgment in criminal cases, and sometimes, through inadvertence, in the same class of cases, has been treated as ground for a new trial. The result is practically the same, for a reversal carries with it, with rare exceptions, the right and the necessity for a new trial, or a retrial, if the technical distinction is to be retained. But the procedure is different. On appeal from the judgment the point must be saved by objection and exception, as an error of law affecting the right of the defendant to a fair and impartial trial. Such objection and exception, together with the concurrent facts, must be incorporated in a bill of exceptions, and so be made a part of the record on appeal. If, on

[28] People v. Owens, 132 Cal. 469, 64 Pac. 770.

[29] Fredericks v. Judah, 73 Cal. 604, 15 Pac. 305; People v. Molina, 126 Cal. 505, 59 Pac. 34.

[30] See People v. Amer, 151 Cal. 303, 90 Pac. 698; and note 7c, section 50, *ante*. And see People v. Pang Sui Lin (Cal. App.), 114 Pac. 583, Third Appellate District of California, decided February 1, 1911.

the other hand, this kind of misconduct constituted a ground for new trial, as in civil cases, it must be reviewed upon a record made up as prescribed by section 658 of the Code of Civil Procedure.

Failure to take a deposition after having given notice thereof [21] is not ground for a new trial, as an irregularity of an adverse party.

[21] Rydalch v. Anderson (Utah), 107 Pac. 25.

CHAPTER VII.

GROUNDS OF THE MOTION—ANY ORDER OF THE COURT OR ABUSE OF DISCRETION, ETC.

§ 51. Scope of the Subject.—As stated with reference to irregularities,[1] the first subdivision is not restricted, as is the seventh, to matters "occurring at the trial." The words "any order of the court or abuse of discretion by which either party was prevented from having a fair trial,"[2] therefore, have a very extended signification. For a multitude of things, occurring before and at the trial, are wisely left to the discretion of the court, unregulated by precise rules. Whenever, in such a case, there has been an abuse of discretion which prevented a fair trial of the issues of fact,[3] the matter should be presented under the head under consideration. It will not be attempted here to enumerate the matters which are in the discretion of the court.[4] But there are two subjects, which, from their importance, seem to deserve special consideration, viz., amendments and continuances. A chapter will be devoted to each.

[1] See section 25, *ante*.

[2] Subdivision 1 of section 657, California Code of Civil Procedure; section 193, old Practice Act.

[3] Of the issues of *fact*, see section 1, *ante*.

[4] See section 289, *post*.

CHAPTER VIII.

GROUNDS OF THE MOTION—ANY ORDER OF THE COURT OR ABUSE OF DISCRETION, ETC.—AMENDMENTS.

§ 52. Scope of subject—Amendments before joinder.
§ 53. Amendments after joinder—Provisions of statute.
§ 54. Amendments are in court's discretion—Liberality in granting should be practiced.
§ 55. Privilege of amendment not unlimited.
§ 56. Amendments are confined to *nisi prius* court—Time to apply for leave to amend.
§ 57. How amendments are made.
§ 58. Effect of filing an amended pleading.
§ 59. Miscellaneous matters relating to amendments—Terms.

§ 52. General Scope of the Subject—Amendments Before Joinder of Issue.—An abuse of discretion in allowing or disallowing an amendment to any pleading or proceeding is, if made subsequent to joinder of issue of fact, ground for a new trial under subdivision 1 of section 657, Code of Civil Procedure.[1] Amendments before the joinder of issues of fact have not a direct relation to the trial of such issues,[1a] and are not within the scope of the first subdivision. They are considered in this connection out of regard for the completeness of the subject.

1. *Amendments as of Course.*—Section 472 of the Code of Civil Procedure provides that[2] "any pleading may be amended

[1] See section 23, *ante*. Where, on appeal from the judgment, the bill of exceptions shows an abuse of discretion in allowing or disallowing an amendment, appellant is entitled to a reversal. Upon the same showing (by affidavits as prescribed by section 658, Code of Civil Procedure) in the trial court itself, he would be entitled to a new trial, and if denied him, to a reversal of the order on appeal. The difference is solely in the method of review and in the form of the record, and not at all in the substance of the action of the court. The principle being the same, however the ruling may be reviewed, or by what record soever the question may be presented, no distinction is attempted to be noted in the authorities hereinafter cited, whether reviewed by motion for new trial or by appeal from the judgment.

As to method of presentation for review, see note 7b, below.

As to rules and practice of the appellate courts with respect to abuse of discretion in general, see section 289, *post*.

[1a] A motion for new trial is proper only where there has been a trial of the issues of *fact*. See section 1.

[2] These words were in the code as first enacted. The amendments of the section in 1874 changed it in other respects. The old Practice Act gave

once by the party of course, and without costs, at any time before answer or demurrer filed, or after demurrer and before the trial of the issue of law thereon, by filing the same as amended and serving a copy on the adverse party." Such amendments are matters of right, a denial of which is error for which the judgment will be reversed.[3] But the right is absolute only when exercised before the demurrer is argued and submitted for decision.[3a]

The language of this section suggests the necessity for judicial construction upon the point as to the time within which the de-

the privilege of amendment as of course only *after* demurrer, and before the trial of the issue raised thereby. Section 67; Laws of 1865–66, p. 703; Laws of 1862, p. 563; Laws of 1860, p. 300; Laws of 1854, p. 60. The act of 1851 contained no such provision. Laws of 1851, p. 60. The same or a similar provision is to be found in the procedure of most of the other states. Section 1288, Revised Statutes of Arizona (section 79, Civil Practice), is as follows: "All pleadings or proceedings may upon leave of the court be amended at any stage of the action within such time as the court may prescribe, or they may be amended before trial *without such leave* upon serving the adverse party with a copy of such amended pleading or proceedings." Section 3162, Cutting's Compiled Laws of Nevada (section 67, Civil Practice), provides that, "after demurrer and before the trial of issue on demurrer, either party may, within ten days, amend any pleading demurred to of course, and without costs, filing the same as amended, and serving a copy thereof upon the adverse party or his attorney, ... but a party shall not so amend more than once." Section 100, Lord's Oregon Laws, provides that "any pleading may be once amended by the party of course without costs, and without prejudice to the proceedings already had, at any time before the period for answering it shall expire; in such case a copy of the amended pleading shall be served on the adverse party before the expiration of said period." Section 4434, Compiled Statutes of Wyoming, is as follows: "The plaintiff may amend his petition without leave, at any time before the answer is filed, without prejudice to the proceeding, but notice of such amendment shall be served upon the defendant, or his attorney;" Sections 4228, Revised Codes of Idaho, and 6588, Revised Codes of Montana (section 773, Code of Civil Procedure), are identical with the California section quoted; and section 2685, subsection 81, Compiled Laws of New Mexico, and section 6882, Revised Codes of North Dakota, are the same, in effect.

Section 3004, Compiled Laws of Utah, provides that "any pleading may be amended once by the party as of course," etc. Section 149, Code of Civil Procedure of South Dakota, contains a similar provision.

Section 5676, Compiled Laws of Oklahoma, provides that the plaintiff may amend at any time before answer without leave; and section 5677 allows an amendment after demurrer allowed on payment of costs.

[3] Look at Lord v. Hopkins, 30 Cal. 76. Whether the party may mutilate the original complaint by interlining his amendment is a question between himself and the court, and does not concern his opponent. Allen v. Marshall, 34 Cal. 165. See, also, Young v. Fink, 119 Cal. 107, 50 Pac. 1060, and cases cited below in notes 3a, 3b, 3c and 3d.

And see State v. Clancy, 30 Mont. 529, 77 Pac. 312, where it was said that "A party to an action may amend his pleading once as a matter of right —a right which the court cannot deny him, and respecting which it cannot exercise any discretion whatever."

[3a] Stewart v. Douglas, 148 Cal. 511, 83 Pac. 699. A second amendment

fendant may amend his answer as of course. Apparently this right extends to actual joinder of issue of fact, in the absence of a demurrer to his pleading, and this was the contention of the defendant in Tingley v. Times-Mirror Co.[ab] Manifestly under this theory the right of defendant to amend is curtailed or extended, as the plaintiff elects to demur, or not. The answer might be unassailable; but, unless the plaintiff would leave his adversary free to amend at any time prior to the trial of the issue of fact raised by the pleadings, and to uncover his defense only when it is too late for adequate preparation on the part of the plaintiff to meet it, he must interpose a frivolous demurrer. The legislature assuredly never contemplated such an idle act. It clearly intended to give equal rights of amendment to both sides, and certainly did not intend to confer a special right upon either one. The right to amend was given to the pleader in order that he might himself cure defects in his pleading without waiting to have them pointed out by his adversary on demurrer. The right should not extend beyond the time when a demurrer can be filed, or beyond the trial of the issue raised by a demurrer, if filed. The court, in the Tingley case above cited, said:

"In providing that a pleading might be amended 'before demurrer filed,' it was intended to give the right to amend, within the legal time the adverse party had within which to demur, without waiting to have the defect in the pleading pointed out on demurrer, or without taking the hazard that his adversary would not demur, and so preclude him from amending as of course under the section. It was not intended to confer a special right on a defendant to amend because plaintiff had not gone through the idle ceremony of demurring to an apparently good and sufficient answer. The construction which, in our judgment, is to be given to the section and which commends itself as a reasonable and consistent one, is that the right of plaintiff to amend his complaint as of course is extended only up to the time when the answer of defendant is filed, or if a demurrer is interposed by defendant only while the issue of law raised thereby is undetermined. If the defendant answers without demurring, or if his demurrer to the complaint is overruled, the right of plaintiff under the section to amend as

without leave is not permissible. See Tripp v. Yankton, 10 S. D. 516, 74 N. W. 447; S. C., 11 S. D. 353, 77 N. W. 580.

[ab] 151 Cal. 1, 89 Pac. 1097. See, also, to same effect, Manha v. Union Fertilizer Co., 151 Cal. 581, 91 Pac. 393.

of course is gone. The right of defendant to amend can be exercised only during the time that a demurrer to the answer if interposed by plaintiff is undetermined, or should the plaintiff not demur, then the defendant is concluded from amending as of course under the section, by the expiration of the time within which such demurrer might have been interposed. When the demurrer of the plaintiff to the answer is overruled, or the time has expired within which the plaintiff might have demurred to the answer, the issues of fact are then fully joined and the right of defendant to amend under the section as of course is gone. This we think is the reasonable construction to be placed on the section. Under this construction equal rights to amend are given both parties; each has a right to amend while the issue of law raised by demurrer to his pleading is undetermined. Where a demurrer is not interposed, the right of plaintiff to amend is concluded by the answer of defendant, and the right of defendant is concluded by the expiration of time within which plaintiff might have demurred to the answer."[3c]

The phrase "any pleading," in section as above quoted, has been held to include a second or amended demurrer, if "served and filed before trial of the issues of law raised by the original demurrer."[3d]

[3c] It will be observed that the court throughout its opinion in the Tingley case, as quoted in the text, refers to the "determination" of the issue of law raised by demurrer, as marking the point of time after which an amendment as of course could not be claimed; while the code section itself (section 472, Code of Civil Procedure) fixes the time "after demurrer and before *trial* of the issue of law thereon." So in Stewart v. Douglas, 148 Cal. 511, 83 Pac. 699, the court fixes the point as being "before the demurrer is argued and submitted." In Durrell v. Dooner, 119 Cal. 411, 51 Pac. 628, by inference the time fixed was the "trial" of the issues of law raised by a demurrer. It seems clear that the learned justice who wrote the opinion in the Tingley case made use of the word "determination" rather as referring to the conclusion of the trial of the issue than to the actual conclusion of the proceeding in the order itself. Otherwise the discrepancy becomes most important, and the principle enunciated must be regarded as a departure from well established rules, and a departure without adequate reason.

[3d] Hedges v. Dam, 72 Cal. 520, 14 Pac. 133; Kelly v. Leachman, 3 Idaho, 629, 33 Pac. 44. See, also, Dunbar v. Board of Commissioners, 5 Idaho, 407, 49 Pac. 409, where it was said that while a demurrer might be amended as any other pleading, yet it should show on its face that it is an amended demurrer. It seemed also to be the opinion of the court that while the rule of the statute that a pleading might be amended once as of course unquestionably applies to demurrers, yet "we think that leave to file an amended demurrer should be first obtained." The court further said, "But, as to a first amendment prior to a hearing on demurrer, the leave should be granted as a matter of course." Also, "The prac-

The right to amend an answer in response to, or in accordance with, an amended complaint is not addressed to the discretion of the court. Its refusal is error.[3e]

2. *Amendments After Trial of the Issues of Law Raised by a Demurrer, and Before Answer Filed.*[3f]—Such amendments are not within the provision of section 472, above quoted, and consequently cannot be made without the permission of the court. Where a demurrer is sustained the allowance of an amendment is within the discretion of the court. In Gallagher v. Delaney,[4] where the court, on sustaining the demurrer to the complaint, gave judgment dismissing the action, such judgment was reversed, the court saying that leave to amend should have been granted. But it was said in subsequent cases that the decision in Gallagher v. Delaney was not intended to lay down a general rule. Thus in Smith v. Yreka Water Co.,[5] where the court below dismissed the bill on sustaining the demurrer, the supreme court affirmed the judgment, saying: "The case of Gallagher v. Delaney, 10 Cal. 410, is relied on by the appellant. But that case depended on its own particular circumstances, which do not appear in the report, and the general language there used is to be taken in connection with the facts. This we had occasion to explain in the case of Thornton v. Borland, 12 Cal. 438." But the decision in Smith v. Yreka Water Co. proceeds upon the ground that no leave to amend the complaint was asked; and the rule laid down by it is that it is not an abuse of discretion to give final judgment against the plaintiff on the demurrer, if no leave to amend be asked. This rule, however, does not seem satisfactory.[5a] For in the majority of cases the order sustaining the demurrer is made in the absence of the party who, in such case, would have no opportunity to ask for leave to amend;

tice of filing a number of demurrers to the same pleading by the same party is not permissible, nor is the court called upon to look through the files to see how many demurrers have been filed." In Perrin v. Mallory etc. Co., 8 Ariz. 404, 76 Pac. 476, a general demurrer was treated as an answer, and it was held that it might be amended.

3e See Morton v. Bartning, 68 Cal. 306, 9 Pac. 146. But such amendment must be limited to the part of the complaint amended. Harney v. Corcoran, 60 Cal. 314; Hawthorne v. Siegel, 88 Cal. 159, 22 Am. St. Rep. 291, 25 Pac. 1114. And, of course, it is error to render judgment upon an amended complaint without giving defendant an opportunity to answer same. See Mears v. James, 2 Nev. 342.

3f The Oregon law (see section 53, note 3a) provides that the amendment shall be before trial.

4 10 Cal. 410.

5 14 Cal. 201.

5a But look at Smith v. Taylor, 82 Cal. 533, 23 Pac. 217.

and the fact that he did ask would have to be made to appear by bill of exceptions, for otherwise it would have to be presumed in support of the judgment that no leave was asked.[6] The universal practice is to grant leave to amend in all cases, even on sustaining a demurrer to an *amended* complaint, and not to give final judgment, unless the plaintiff declines to amend.

But "the privilege of amending, after trial of the issue of law raised by demurrer, is not one of right, but one resting in the discretion of the trial court."[6a] If, after a demurrer to a complaint is sustained, plaintiff desires to amend, application should be made to the trial court. If the case be one whose defects may be cured by amendment, it is thought, notwithstanding Smith v. Yreka Water Co., that it would be an abuse of discretion not to afford an opportunity to amend.[7] The case is nevertheless one within the court's discretion, and is governed by the rules which control the exercise of discretion in other cases.[7a]

If the application to amend is refused, the ruling should be excepted to and the exception saved, or steps taken to reserve it for subsequent review. The point cannot be considered on appeal where there is nothing in the record to show the abuse of discretion complained of.[7b]

[6] See section 285, *post*, as to presumptions in support of the judgment.

[6a] Buckley v. Howe, 86 Cal. 596, 25 Pac. 132; Durrell v. Dooner, 119 Cal. 411, 51 Pac. 628; and see Schaake v. Eagle etc. Co., 135 Cal. 472, 63 Pac. 1025, 67 Pac. 759.

[7] Undoubtedly it would be abuse of discretion to refuse an amendment, if leave be asked (Maumus v. Hamblon, 38 Cal. 539), unless the court can see that the case cannot be cured by an amendment. If the court should be in error upon the point as to the efficacy of the complaint with the amendment proposed to state a cause of action, a refusal to allow an amendment would be an abuse of discretion. See Campbell v. Campbell, 152 Cal. 201, 92 Pac. 184.

[7a] See section 289, *post;* and also section 54, *post*.

[7b] By the phrase "the ruling should be excepted to and the exception saved," in the text, is meant merely that the ruling, along with the request and the facts upon which it was based, must appear in a bill of exceptions, unless it appears on the face of the judgment-roll. Section 647, Code of Civil Procedure, does not dispense with the necessity of a bill of exceptions for the purpose of incorporating therein the exceptions deemed, as matter of law, to have been made. Nash v. Harris, 57 Cal. 243. If the erroneous ruling appears on the face of the judgment-roll, the effect of section 647 is merely to dispense with a showing that the ruling was excepted to, as would otherwise be the case. If the judgment-roll does not show such erroneous ruling, a bill of exceptions is necessary, though it need not show a formal exception.

Buckley v. Howe, and Durrell v. Dooner, above cited, held that "if plaintiff desired to amend, she should have applied to the court below, and if refused, exception should have been taken." The court cannot have meant that a formal exception was necessary, since the amendment in question

Where the court can see that the complaint could not be cured by amendment, final judgment may be ordered on sustaining the demurrer.[7a]

The foregoing is with reference to amendments where a demurrer is sustained. Where the demurrer is overruled it is within the discretion of the court to allow an answer to be filed.[8] Ordinarily, leave to answer should be granted.[9]

The exercise of discretion here referred to is not affected by the fact that the amendment may cover matters arising or discovered after the original pleading.[10] And it is the same with respect to the filing of supplementary pleadings.[11]

§ 53. Amendments After the Joinder of Issues of Fact—Provisions of the Statute.—The amendments which come within the operation of the clause—"any order of the court or abuse of discretion by which either party was prevented from having a fair trial"—are those sought to be made after the joinder of the issues of fact. It is manifest that a fair trial may be prevented by refusal of leave to amend; and if such orders do not come within

was covered by the provisions of section 647, Code of Civil Procedure. It could have meant no more than that the privilege of amending should have been tested in the trial court, and an appropriate record of the ruling thereon, and the facts and grounds upon which it was based, prepared, or saved, for purposes of review. The opinion of the court in Schaake v. Eagle etc. Co., above cited, sustains this view, the court there holding that it was not necessary to have a bill of exceptions, the erroneous ruling appearing on the face of the judgment-roll, and section 647, Code of Civil Procedure, dispensing with a formal exception.

If, however, it is desired to use the alleged erroneous ruling as a ground for a motion for a new trial, "steps should be taken to reserve it" for that purpose. A formal objection is believed to be necessary. See section 27, *ante*. However this may be, there is no question as to the necessity of presentation by affidavit to the lower court. See section 658, Code of Civil Procedure. Although it is probable that a statement or bill of exceptions is necessary on appeal (see section 140, *post*, as to affidavits used on the motion; section 168, *post*, as to record on appeal from order on new trial motion, and section 264, as to identification of papers. Also, Rule 29, Supreme Court, 144 Cal. lii; and see Campbell v. Freeman, 99 Cal. 546, 34 Pac. 113).

[7a] See Stewart v. Douglas, 148 Cal. 511, 83 Pac. 699; and look at Campbell v. Campbell, 152 Cal. 201, 92 Pac. 184.

[8] Thornton v. Borland, 12 Cal. 438; Seale v. McLaughlin, 28 Cal. 668; Barron v. Deleval, 58 Cal. 95; section 472, Code of Civil Procedure.

[9] Barron v. Deleval, 58 Cal. 95.

[10] Mono Co. v. Flannigan, 130 Cal. 105, 62 Pac. 293; Randolph v. Hudson, 12 Okl. 516, 74 Pac. 946; Long v. Eisenbeis, 23 Wash. 556, 63 Pac. 249. But there should be a showing, in any event, that the facts were unknown when original pleading filed. See Halleck v. Bresnahan, 3 Wyo. 73, 2 Pac. 537.

[11] See Belles v. Miller, 10 Wash. 259, 38 Pac. 1050; Knapp v. Order of Pendo, 36 Wash. 601, 79 Pac. 209.

the operation of the clause under consideration, it can only be because it is without meaning, which is manifestly not the case.

The provision of the act of 1851 in relation to amendments was as follows:[1]

"Sec. 68. The court may, in furtherance of justice and on such terms as may be proper, amend any pleading or proceeding by adding or striking out the name of any party, or by correcting a mistake in the name of a party, or a mistake in any other respect. The court may likewise, upon affidavit showing good cause therefor, after notice to the adverse party, allow, upon such terms as may be just, an amendment to any pleading or proceeding in any other particulars."

This section was several times amended,[2] but not so as to change the above portion in relation to amendments. The provision of the Code of Civil Procedure, as it stands at present,[3] is as follows:

"Sec. 473. The court may, in furtherance of justice and on such terms as may be proper, allow a party to amend any pleading or proceeding by adding or striking out the name of any party, or by correcting a mistake in the name of a party, or a mistake in any other respect, and may upon like terms enlarge the time for answer or demurrer. The court may likewise in its discretion, after notice to the adverse party, allow, upon such terms as may be just, an amendment to any pleading or proceeding in other particulars."[3a]

The words "any pleading or proceeding" in the above section are of extended signification. Under them the court has power, in proper cases, to amend not only a pleading but also other docu-

[1] Laws of 1851, p. 60.

[2] See Laws of 1853, p. 276; Laws of 1865–66, p. 843.

[3] The provisions of section 473 of the California Code of Civil Procedure as first enacted followed the language of the amendment of 1866, so far as amendments are concerned. As amended in 1874, the phrase "allow a party to amend," is substituted for "may amend," and the words "in its discretion" are inserted.

[3a] The references in the last three notes are to California laws. The following are corresponding provisions in the statutes of other states: Section 1288, Revised Statutes of Arizona; section 75, Mills' Annotated Code of Colorado; section 4229, Revised Codes of Idaho; section 6589, Revised Codes of Montana (section 774, Code of Civil Procedure); section 3163, Cutting's Compiled Laws of Nevada (section 68, Civil Practice); section 2685, subsection 82, Compiled Laws of New Mexico; section 6883, Revised Codes of North Dakota; section 5679, Compiled Laws of Oklahoma; section 102, Lord's Oregon Laws; section 150, Code of Civil Procedure of South Dakota; section 3005, Compiled Laws of Utah; section 303, Rem. & Bal. Code of Washington (section 4953, Bal. Code); section 4437, Compiled Statutes of Wyoming.

ments, such as a summons,[4] or a judgment,[5] or an execution,[6] or the return thereto,[7] or a bill of costs,[8] or a statement on motion for new trial, or the like.[9] The remainder of this chapter will be devoted to a consideration of amendments to pleadings after the joinder of the issues of fact.

§ 54. Granting or Refusing Amendments is in the Discretion of the Court; but the Court Should be Liberal in Allowing Amendments in Furtherance of Justice.—It is in the discretion of the court below, upon terms or otherwise, to allow,[1] or to refuse to

[4] Polack v. Hunt, 2 Cal. 193. Including service thereof. People v. Goldenson, 76 Cal. 328, 19 Pac. 161.

[5] When judgment may be amended: See Morrison v. Dapman, 3 Cal. 255; Gronfier v. Minturn, 5 Cal. 492; Leviston v. Swan, 33 Cal. 480; Estate of Schroeder, 46 Cal. 304; Rousset v. Boyle, 45 Cal. 64. When may not: McNally v. Mott, 3 Cal. 235.

Generally: Bostwick v. McEvoy, 62 Cal. 496; Savings & Loan Society v. Horton, 63 Cal. 310; Dreyfuss v. Tompkins, 67 Cal. 339, 7 Pac. 732; In re Skerritt, 80 Cal. 62, 22 Pac. 85; Barry v. Superior Court, 91 Cal. 486, 27 Pac. 763; In re Barry, 94 Cal. 562, 29 Pac. 1109; San Joaquin etc. Co. v. West, 99 Cal. 345, 33 Pac. 928; Brackett v. Banegas, 99 Cal. 623, 34 Pac. 344; Kaufman v. Shain, 111 Cal. 16, 52 Am. St. Rep. 139, 43 Pac. 393 (where the subject is exhaustively treated); Dickey v. Gibson, 113 Cal. 26, 54 Am. St. Rep. 321, 45 Pac. 15; Scammon v. Bonslett, 118 Cal. 93, 62 Am. St. Rep. 226, 50 Pac. 272; Chicago Clock Co. v. Tobin, 123 Cal. 377, 55 Pac. 1007; Leonis v. Leffingwell, 126 Cal. 369, 58 Pac. 904; White v. White, 130 Cal. 597, 80 Am. St. Rep. 150, 62 Pac. 1062; Herd v. Tuohy, 133 Cal. 55, 65 Pac. 139; Spencer v. Troutt, 133 Cal. 605, 65 Pac. 1083; Cowdery v. London etc. Bank, 139 Cal. 298, 96 Am. St. Rep. 115, 73 Pac. 196; Estate of Potter, 141 Cal. 424, 75 Pac. 850; People v. Ward, 141 Cal. 628, 75 Pac. 306 (application of rule to criminal cases).

[6] Hunt v. Loucks, 38 Cal. 372, 99 Am. Dec. 404.

[7] Gavitt v. Doub, 23 Cal. 78.

[8] Burnham v. Hays, 3 Cal. 115, 58 Am. Dec. 389.

[9] The following illustrate the subject in various ways: People v. Murback, 64 Cal. 369, 30 Pac. 608, as to amendment of minute entry of appearance of defendant for sentence; Kirby v. Superior Court, 68 Cal. 604, 10 Pac. 119, as to amendment of pleading after appeal; Fallon v. Britton, 84 Cal. 511, 24 Pac. 381, amendment after *remittitur;* People v. McNulty, 93 Cal. 427, 26 Pac. 597, 29 Pac. 61, amendment of minutes *nunc pro tunc;* Estate of Willard, 139 Cal. 501, 73 Pac. 240, 64 L. R. A. 554, amendment of probate accounts; Fay v. Steubenrauch, 141 Cal. 573, 75 Pac. 174, amendment of pleadings, minutes and judgment in case of misnomer; Gans v. Beasley, 4 N. D. 140, 59 N. W. 714, amendment of affidavit for attachment.

[1] *Arizona:* Consolidated Canal Co. v. Peters, 5 Ariz. 80, 46 Pac. 74.

California: Pierson v. McCahill, 22 Cal. 127; Lestrade v. Barth, 17 Cal. 285; Robinson v. Smith, 14 Cal. 254; Burnham v. Hays, 3 Cal. 115, 58 Am. Dec. 388; Cheney v. O'Brien, 69 Cal. 199, 10 Pac. 479; Walsh v. McKeen, 75 Cal. 519, 17 Pac. 673; Hart v. British etc. Co., 80 Cal. 440, 22 Pac. 302; McPherson v. Weston, 85 Cal. 90, 24 Pac. 733; Henderson v. Hart, 122 Cal. 332, 54 Pac. 1110; Barnes v. Berendes, 139 Cal. 32, 69 Pac. 491, 72 Pac. 406; Carter v. Lothian, 133 Cal. 451, 65 Pac. 962; and cases cited in notes 8g and 10, below.

Colorado: Cooper v. McKeen, 11 Colo. 41, 17 Pac. 97; Cascade Ice

allow,[2] amendments to pleadings. This has been many times decided, and so far as mere precedent may be said to control, no principle of the law is more firmly established. This discretion,

Co. v. Austin etc. Co., 23 Colo. 292, 47 Pac. 268; Gelwicks v. Todd, 24 Colo. 494, 52 Pac. 788; Kilham v. Western Bank etc. Co., 30 Colo. 365, 70 Pac. 409; Tanner v. Harper, 32 Colo. 156, 75 Pac. 404; Knight v. Boring, 38 Colo. 153, 87 Pac. 1078; Ft. Collins etc. Co. v. France, 41 Colo. 512, 92 Pac. 953; Rude v. Levy, 43 Colo. 482, 127 Am. St. Rep. 123, 96 Pac. 560, 24 L. R. A., N. S., 91; Richner v. Plateau etc. Co., 44 Colo. 302, 98 Pac. 178; United States etc. Co. v. People, 44 Colo. 557, 98 Pac. 828; Burnell v. Olmstead, 46 Colo. 67, 102 Pac. 515; Hyman v. Jockey etc. Co., 9 Colo. App. 299, 48 Pac. 671; Mullins v. Gilligan, 12 Colo. App. 13, 54 Pac. 1106; Browns v. Lutin, 16 Colo. App. 263, 64 Pac. 674.

Idaho: Small v. Harrington, 10 Idaho, 499, 79 Pac. 461; Havlick v. Davidson, 15 Idaho, 787, 100 Pac. 91.

Montana: Williston v. Camp, 9 Mont. 88, 22 Pac. 501; Bennett v. Tillmon, 18 Mont. 28, 44 Pac. 80; Merrill v. Miller, 28 Mont. 134, 72 Pac. 423; Christiansen v. Aldrich, 30 Mont. 446, 76 Pac. 1007; Gehlert v. Quinn, 35 Mont. 451, 119 Am. St. Rep. 864, 90 Pac. 168.

Nevada: McCausland v. Ralston, 12 Nev. 195, 28 Am. Rep. 782; Beck v. Thompson, 22 Nev. 109, 36 Pac. 562; Shields v. Orr Ditch Co., 23 Nev. 349, 47 Pac. 194.

New Mexico: Berry v. Hull, 6 N. M. 643, 30 Pac. 936; United States v. Rio Grande etc. Co., 13 N. M. 386, 85 Pac. 393.

Oklahoma: Lookabaugh v. La Vance, 6 Okl. 358, 49 Pac. 65; Kuchler v. Weaver, 23 Okl. 420, 100 Pac. 915; Alcorn v. Dennis, 25 Okl. 135, 105 Pac. 1012, and cases there cited; Jantzer v. Baptist Church (Okl.), 112 Pac. 1124.

Oregon: Swift v. Mulkey, 14 Or. 59, 12 Pac. 76; Baldock v. Atwood, 21 Or. 73, 26 Pac. 1058; Foste v. Standard etc. Co., 26 Or. 449, 38 Pac. 617; Clemens v. Hanley, 27 Or. 326, 41 Pac. 658; Foster v. Henderson, 29 Or. 210, 45 Pac. 899; Osmun v. Winters, 30 Or. 177, 46 Pac. 780; South Portland etc. Co. v. Munger, 36 Or. 457, 54 Pac. 815, 60 Pac. 5; Nunn v. Bird, 36 Or. 515, 59 Pac. 808; Christenson v. Nelson, 38 Or. 473, 63 Pac. 648; Baines v. Coos Bay etc. Co., 45 Or. 307, 77 Pac. 400; Strauhal v. Asiatic S. S. Co., 48 Or. 100, 85 Pac. 230; Longfellow v. Huffman, 49 Or. 486, 90 Pac. 907; Pacific etc. Co. v. Inman-Poulson Co., 50 Or. 22, 90 Pac. 1099; Ridings v. Marion Co., 50 Or. 30, 91 Pac. 22; Sears v. Dunbar, 50 Or. 36, 91 Pac. 145.

Utah: McCord etc. Co. v. Glenn, 6 Utah, 139, 21 Pac. 500; Walton v. Jones, 7 Utah, 462, 27 Pac. 580; American Publishing Co. v. Fisher, 10 Utah, 147, 37 Pac. 259; Thompson v. Whitney, 20 Utah, 1, 57 Pac. 429; Murphy v. Ganey, 23 Utah, 633, 66 Pac. 190.

Washington: Hulbert v. Brackett, 8 Wash. 438, 36 Pac. 264; Morgan v. Morgan, 10 Wash. 99, 38 Pac. 1054; Gould v. Gleason, 10 Wash. 476, 39 Pac. 123; Maney v. Hart, 11 Wash. 67, 39 Pac. 268; McDonough v. Great Northern Ry. Co., 15 Wash. 244, 46 Pac. 334; Ogle v. Jones, 16 Wash. 319, 47 Pac. 747; Van Lehn v. Morse, 16 Wash. 672, 48 Pac. 404; McClaine v. Fairchild, 23 Wash. 758, 63 Pac. 517; McDaniels v. Gowey, 30 Wash. 412, 71 Pac. 12; Cummings v. Weir, 37 Wash. 42, 79 Pac. 487; Ryder-Gouger Co. v. Garretson, 53 Wash. 71, 132 Am. St. Rep. 1053, 101 Pac. 478; Neilson v. Hovander, 56 Wash. 93, 105 Pac. 172; Puget Sound National Bank v. Biswanger, 59 Wash. 134, 109 Pac. 327; International Development Co. v. Clemans, 59 Wash. 398, 109 Pac. 1034.

Wyoming: Redman v. Union Pacific R. R. Co., 3 Wyo. 678, 29 Pac. 88; Lellman v. Mills, 15 Wyo. 149, 87 Pac. 985.

[2] *Arizona:* Brady v. Pinal Co., 8 Ariz. 114, 71 Pac. 910; Sandoval v. Randolph, 11 Ariz. 371, 95 Pac. 119.

California: Cooke v. Spears, 2 Cal. 409, 56 Am. Dec. 348; Stearns v. Martin, 4 Cal. 227; Smith v. Brown, 5 Cal. 118; Canfield v. Bates, 13 Cal.

which every trial court is called upon to exercise, in almost every case brought before it, means a legal and not an arbitrary

606; Gillan v. Hutchinson, 16 Cal. 153; Gilman v. Cosgrove, 22 Cal. 357; Schilling v. Holmes, 23 Cal. 227; Gluckauf v. Bliven, 23 Cal. 312; McMinn v. O'Conner, 27 Cal. 238; Nevada C. & S. C. Co. v. Kidd, 37 Cal. 282; Page v. Williams, 54 Cal. 563; Harney v. Corcoran, 60 Cal. 314; Hancock v. Hubbell, 71 Cal. 537, 12 Pac. 618; Emeric v. Alvarado, 90 Cal. 444, 27 Pac. 356; Wixon v. Devine, 91 Cal. 477, 27 Pac. 777; Dorn v. Baker, 96 Cal. 206, 31 Pac. 37; Siskiyou Co. v. Gamlich, 110 Cal. 94, 42 Pac. 268; Pacific Rolling Mill Co. v. Bear Valley Irrigation Co., 120 Cal. 94, 65 Am. St. Rep. 158, 52 Pac. 136; Bank of Woodland v. Heron, 122 Cal. 107, 54 Pac. 537; San Joaquin Valley Bank v. Dodge, 125 Cal. 77, 57 Pac. 687; Santa Rosa National Bank v. Barnett, 125 Cal. 407, 58 Pac. 85; Dukes v. Kellogg, 127 Cal. 563, 60 Pac. 44; Buffalo Cycle Co. v. Todd, 133 Cal. 292, 65 Pac. 573; Todhunter v. Klemmer, 134 Cal. 60, 66 Pac. 75; Barnes v. Berendes, 139 Cal. 32, 69 Pac. 491, 72 Pac. 406; Salmon v. Rathjens, 152 Cal. 290, 92 Pac. 733; Trower v. San Francisco, 157 Cal. 762, 109 Pac. 617; Skinner v. Knickrehm, 10 Cal. App. 596, 102 Pac. 947, and cases cited in notes 8g and 10, below.

Colorado: Sears v. Collins, 5 Colo. 492, 12 Morr. Min. Rep. 400; Dyer v. McPhee, 6 Colo. 174; Lebanon etc. Co. v. Consolidated etc. Co., 6 Colo. 371; Buddee v. Spangler, 12 Colo. 216, 20 Pac. 760; Patrick v. Crowe, 15 Colo. 543, 25 Pac. 985; Bransford v. Norwich etc. Co., 21 Colo. 34, 39 Pac. 419; Sigel-Campion etc. Co. v. Holly, 44 Colo. 580, 101 Pac. 68; Harrison v. Carlson, 45 Colo. 55, 101 Pac. 76; Cooper v. Wood, 1 Colo. App. 101, 27 Pac. 884; Buno v. Gomer, 3 Colo. App. 456, 34 Pac. 256; People v. Barton, 4 Colo. App. 455, 36 Pac. 299; Davis v. Johnson, 4 Colo. App. 545, 36 Pac. 887; Klippel v. Oppenstein, 8 Colo. App. 187, 45 Pac. 224.

Idaho: Palmer v. Utah etc. Co., 2 Idaho, 382, 16 Pac. 553; Kindall v. Lincoln etc. Co., 10 Idaho, 13, 76 Pac. 992; Dunbar v. Griffiths, 14 Idaho, 120, 93 Pac. 654; Idaho etc. Co. v. Green, 14 Idaho, 294, 94 Pac. 161.

Montana: Billings v. Sanderson, 8 Mont. 201, 19 Pac. 307; Neimick v. American Ins. Co., 16 Mont. 318, 40 Pac. 597; Barngrover v. North, 35 Mont. 448, 90 Pac. 162; Nichols v. Williams, 38 Mont. 552, 100 Pac. 969.

New Mexico: Puritan Mfg. Co. v. Toti & Gradi, 14 N. M. 425, 94 Pac. 1022; Home Savings Bank v. Woodruff, 14 N. M. 502, 94 Pac. 957; First National Bank v. Speed (N. M.), 99 Pac. 696.

Oklahoma: Jantzen v. Baptist Church (Okl.), 112 Pac. 1127.

Oregon: Hexter v. Schneider, 14 Or. 184, 12 Pac. 668; Wild v. Oregon etc. Co., 21 Or. 159, 27 Pac. 954; Garrison v. Goodale, 23 Or. 307, 31 Pac. 709; Cook v. Croissan, 25 Or. 475, 36 Pac. 532; Mendenhall v. Harrisonburgh etc. Co., 27 Or. 38, 39 Pac. 399; Hume v. Kelly, 28 Or. 398, 43 Pac. 380; Nosler v. Coos Bay etc. Co., 39 Or. 331, 64 Pac. 644.

Utah: Peck v. Rees, 7 Utah, 467, 27 Pac. 581, 13 L. R. A. 714; Haddock v. Salt Lake City, 23 Utah, 521, 65 Pac. 491.

Washington: Skagit etc. Co. v. Cole, 1 Wash. 330, 26 Pac. 535; Davis v. Erickson, 3 Wash. 654, 29 Pac. 86; Balch v. Smith, 4 Wash. 497, 30 Pac. 648; Maney v. Hart, 11 Wash. 67, 39 Pac. 268; Price v. Scott, 13 Wash. 574, 43 Pac. 634; Bishop v. Averill, 19 Wash. 490, 53 Pac. 726; Irwin v. Buffalo etc. Co., 39 Wash. 346, 81 Pac. 849; Leaman v. Thompson, 43 Wash. 579, 86 Pac. 926; Gerber v. Gerber, 52 Wash. 253, 100 Pac. 735; Hudson v. Ellsworth, 56 Wash. 243, 105 Pac. 463; Roberts v. Tacoma etc. Co., 59 Wash. 226, 109 Pac. 605; Harson v. Oman, 59 Wash. 693, 110 Pac. 621; Worthington v. La Violette (Wash.), 111 Pac. 784.

See, also, the following Dakota cases, as to which no distinction is made between an exercise of discretion for and against the amendment: Kelsey v. Chicago etc. Ry. Co., 1 S. D. 80, 45 N. W. 204; Nashua etc. Co. v. Lovejoy, 1 N. D. 211, 46 N. W. 411; Anderson v Bank, 5 N. D. 80, 64 N. W. 114; Bigelow v. Draper, 6

discretion,[3] and the supreme court has often admonished judges to be liberal in allowing amendments in furtherance of justice. Thus in Smith v. Yreka Water Co.,[4] Baldwin, J., delivering the opinion, said: "Amendments should be liberally allowed by the inferior courts in advancement of justice and to secure a fair and speedy trial of suits upon their merits; and an arbitrary refusal to allow them under the proper circumstances would be good ground for the interference of this court." So in Lestrade v. Barth,[5] the same learned justice, delivering the opinion, said: "We have repeatedly held that it is within the power of the court below to grant amendments whenever at any stage of the trial they are necessary for the purposes of justice. This power should be liberally exercised to secure a fair and speedy trial on the merits." So in Kirstein v. Madden,[6] Sawyer, C. J., delivering the opinion, said: "From oversights of counsel committed under pressure of business, pleadings are often defective. In such cases when an offer to amend is made, at such a stage in the proceedings that the other party will not lose an opportunity to fairly present his whole case, amendments should be allowed with great liberality." So in Valencia v. Couch,[7] Sanderson, J., delivering the opinion, said: "Undoubtedly the statute is most liberal on the question of amendment, and the court should not be less, and doubtless if there is any reasonable controversy about what the testimony establishes, the better and safer practice would be to allow counsel to amend so as to be able to present his case in accordance with his own judgment or theory. By such a course no error will intervene, and the manifest spirit of the statute will be fully subserved." So in Hayden v. Hayden,[8] Belcher, J., delivering the opinion, said: "Undoubtedly courts should be liberal in allowing amendments to the end that cases may be fully and fairly presented upon their merits, and that equal and exact justice may be done between the parties."

N. D. 152, 69 N. W. 570; Haggerty v. Strong, 10 S. D. 585, 74 N. W. 1037; Chaffee v. Runkle etc. Co., 11 S. D. 333, 77 N. W. 583; J. I. Case etc. Co. v. Eichinger, 15 S. D. 530, 91 N. W. 82; Heegaard v. Trust Co., 3 S. D. 569, 54 N. W. 656; Martin v. Bank, 7 S. D. 263, 64 N. W. 127; Loverin-Browne Co. v. Bank, 7 N. D. 569, 75 N. W. 923.

[3] Stringer v. Davis, 30 Cal. 318; and look at Lybecker v. Murray, 58 Cal. 186. Also, Martin v. Luger Furniture Co., 8 N. D. 220, 77 N. W. 1003; Tom Boy etc. Co. v. Green, 11 Colo. App. 447, 53 Pac. 845. See section 289, *post*.

[4] 14 Cal. 201. Also, Graham v. Stewart, 68 Cal. 374, 9 Pac. 555.

[5] 17 Cal. 285.

[6] 38 Cal. 158.

[7] 32 Cal. 339, 91 Am. Dec. 589.

[8] 46 Cal. 332; see, also, Connalley v. Peck, 3 Cal. 75; Pierson v. McCahill, 22 Cal. 127.

So in Farmers' National Gold Bank v. Stover,[8a] where there was an issue of payment generally upon an action on a promissory note, and evidence of payment by novation, which was excluded, it was held that the court committed error in refusing to permit defendant to amend the answer to conform to the proof, the supreme court saying: "It may be conceded that the issue was not properly framed so as to admit of the evidence, yet, as it had been offered and was admitted, the court should have allowed the pleadings to be amended so as to conform to the facts proved by it." So in Riverside etc. Co. v. Jensen,[8b] where an amended complaint was permitted to be filed, the court said:

"The gist of the action as stated in the original complaint was the same as that contained in the complaint upon which the trial was had. The amended complaint was only permitted to be filed upon terms imposed by the court, with which the plaintiff complied, and we see nothing in the action taken in the premises, under the circumstances, which worked any hardship or surprise upon the defendant."

So in Guidery v. Green,[8c] where the trial court refused to permit an amendment to the answer so as to enable the defendant to present his case on the merits, the court said:

"If the defendant could establish the facts presented by these amendments to his answer, they would constitute a defense to the plaintiff's demand ; and for that reason, if for no other, the court should have allowed the amendments. (Stringer v. Davis, 30 Cal. 318.) If, by reason of such amendments, the court was satisfied that the plaintiff was taken by surprise, and required further time in which to make suitable preparations for meeting such defense, it could have continued the case, or postponed the further hearing until the plaintiff should have reasonable time to make such preparations, and at the same time would impose on the defendant such terms as would compensate the plaintiff for the expense and delay caused thereby. It can very rarely happen that a court will be justified in refusing a party leave to amend his pleading so that he may properly present his case, and obviate any objection that the facts which constitute his cause of action or his defense are not embraced within the issues or properly presented by his pleading. This rule is especially cogent when the objection to testimony is not

[8a] 60 Cal. 387; Anderson v. Bank, 5 N. D. 80, 64 Pac. 114.

[8b] 73 Cal. 550, 15 Pac. 131.

[8c] 95 Cal. 630, 30 Pac. 786.

that it is then for the first time brought to the notice of his adversary, but that by reason of the language of the pleading it is not within the terms of the issue."

So in Burns v. Scooffy,[84] where an amendment was refused, the court said:

"Our code looks to liberality in this matter, and the action of our courts tends in the same direction. To strike out a pleading which is susceptible of being amended by a statement of facts known to exist, and which constitute a cause of action, is a harsh proceeding, and should only be resorted to in extreme cases."

Courts are particularly liberal in allowing amendments to answers, and it is said that such amendments should always be allowed as do not seriously impair the rights of the opposite party.[85] The reason for this is said to rest, in a measure, in the elementary difference between a complaint and an answer. A defendant may always set up any defense he may have, and as many as may be available, whatever their nature; and he is not subject to the restriction which prohibits the plaintiff from changing the form of

[84] 98 Cal. 271, 33 Pac. 86.

[85] See Gould v. Stafford, 101 Cal. 32, 35 Pac. 429. In De Baker v. So. Cal. Ry. Co., 106 Cal. 257, 46 Am. St. Rep. 237, 39 Pac. 610, the supreme court suggested that trial courts should be liberal in granting amendments to answers, particularly where there is a good defense which is merely defectively pleaded. It is not an abuse of discretion to allow an amendment, even though the adverse party is thereby prevented from pleading the statute of limitations. See Tucker v. Mayor, 4 Nev. 20.

In Bowers v. Good, 52 Wash. 384, 100 Pac. 848, it was said that statutes allowing amendments should be liberally construed and applied in furtherance of justice. See, also, Dunbar v. Griffiths, 14 Idaho, 120, 93 Pac. 654. In Kroetch v. Empire etc. Co., 9 Idaho, 277, 74 Pac. 868, it was said that great liberality in the allowance of amendments in the furtherance of justice should be practiced; and in Kindall v. Lincoln etc. Co., 10 Idaho, 13, 76 Pac. 992, similar language was made use of.

In Norton v. Bassett, 158 Cal. 425, 111 Pac. 253, Melvin, J., made use of the following language descriptive of the test of abuse of discretion in allowing or disallowing amendments on the part of the trial court:

"In the matter of amending pleadings this court has always counseled and sanctioned great liberality. No discussion upon so plain a proposition is necessary. Thus in People v. Mt. Shasta Co., 107 Cal. 256, 40 Pac. 391, it is said: 'The court refused to allow the plaintiff to amend the complaint. This is generally a matter of absolute right, and when it is refused the court must be able to say that the complaint cannot be so amended as to state a good cause of action.' See, also, Crosby v. Clark, 132 Cal. 1, 63 Pac. 1022. But, while such is the undoubted rule, there is always in the granting or refusing to grant leave to amend the exercise of the discretion of the trial court. Brittan v. Oakland Bank of Savings, 124 Cal. 282, 71 Am. St. Rep. 58, 57 Pac. 84; Bank of Woodland v. Heron, 122 Cal. 107, 54 Pac. 537. Speaking generally, it may be said that the test is as to whether the amendment is a permissible amendment which will perfect a cause of action otherwise imperfectly pleaded."

his action from one *ex contractu* to one *ex delicto*, and *vice versa*. Neverthless plaintiff's right of recovery, upon the showing of his complaint, is not affected, whatever be the form of the answer, or the nature of the defense.

It is not to be understood that the privilege of the plaintiff with respect to amendments suffers any perceptible diminution by comparison with his adversary. The liberal policy of the courts in allowing amendments in all proper cases, whether asked for by plaintiff or defendant, is well settled. "The rule has been often stated here, that during the trial, the court, in the furtherance of justice, should allow amendments liberally, in order to mold and direct its proceedings so as to dispose of cases upon their substantial merits and without unreasonable delay, regarding mere technicalities as obstacles to be avoided, rather than as principles to which effect is to be given in derogation of substantial right."[sf] This principle finds support in a large number of cases,[sg] in which no distinction is made between amendments of complaints and amendments of answers.

Pleas in abatement are regarded with disfavor by the courts. They do not concern the merits, and amendments whereby parties seek to avail themselves of such pleas are within the discretion of the court, and it would be a flagrant case indeed that would justify reversal for an abuse of discretion in refusing an amendment of such a description, particularly in view of the provisions of the code requiring such pleas to be interposed at the first opportunity, otherwise they are deemed to be waived.[sh] An example of the application of the rule is to be found in the opinion of the court in Tingley v. Times-Mirror Co.[sk]

[sf] See McDougald v. Hulet, 132 Cal. 154, 64 Pac. 278.

[sg] See Harney v. Corcoran, 60 Cal. 314; Edgar v. Stevenson, 70 Cal. 286, 11 Pac. 704; Shadburne v. Daly, 76 Cal. 355, 18 Pac. 403; So. Pac. Co. v. Purcell, 77 Cal. 69, 18 Pac. 886; Ward v. Clay, 82 Cal. 502, 23 Pac. 50, 227; McPherson v. Weston, 85 Cal. 90, 24 Pac. 733; Chatfield v. Williams, 85 Cal. 518, 24 Pac. 839; Emeric v. Alvarado, 90 Cal. 444, 27 Pac. 356; Dorn v. Baker, 96 Cal. 206, 31 Pac. 37; Bean v. Stoneman, 104 Cal. 49, 37 Pac. 777, 38 Pac. 39; People v. Mount Shasta etc. Co., 107 Cal. 256, 40 Pac. 391; Siskiyou Co. v. Gamlich, 110 Cal. 94, 42 Pac. 468; Robertson v. Burrell, 110 Cal. 569, 42 Pac. 1086; Lee v. Murphy, 119 Cal. 364, 51 Pac. 549, 955; Pacific Rolling Mill Co. v. Bear Valley Irr. Co., 120 Cal. 94, 65 Am. St. Rep. 158, 52 Pac. 136; Bank of Woodland v. Heron, 122 Cal. 107, 54 Pac. 537; Marr v. Rhodes, 131 Cal. 267, 63 Pac. 364; Crosby v. Clark, 132 Cal. 1, 63 Pac. 1022; Balfour-Guthrie Co. v. Sawday, 133 Cal. 228, 65 Pac. 400. See chapter on Relief from Defaults (chapter 52).

[sh] Sections 430, 433 and 434, California Code of Civil Procedure.

[sk] 151 Cal. 1, 89 Pac. 1097.

A demurrer for ambiguity and uncertainty is said to be in aid of the pleading, rather than an attack upon the same, and contemplates an amendment in the particulars specified.[8l] So a defectively pleaded defense is not ground for a motion to strike out. Demurrer is the proper method of reaching such defects, and if a good defense is defectively pleaded an opportunity should be given the pleader to amend his answer.[8m]

In justices' courts the greatest liberality in allowing amendments should be exercised.[9]

The exercise of the discretion of the court in allowing or disallowing amendments will be disturbed only for its abuse;[10] but in case of abuse of discretion the appellate court will reverse.[11]

The trial court will always be presumed to exercise its discretion as to amendments in furtherance of justice and with the end in view of disposing of the causes on their merits.[12] The presumption is always in favor of the regularity of the amendment.[12a]

It is not abuse of discretion to allow an amended complaint to support a preliminary injunction already issued.[13]

The discretion of the trial court to allow additional amendments is not affected by the direction of the appellate court to allow others.[14]

§ 55. The Privilege of Amendment is not Unlimited.—The court should not allow an amendment which changes an action *ex*

[8l] See Schaacke v. Eagle etc. Co., 135 Cal. 472, 63 Pac. 1025, 67 Pac. 759.

[8m] De Baker v. Southern Cal. Ry. Co., 106 Cal. 257, 46 Am. St. Rep. 237, 39 Pac. 610.

[9] Butler v. King, 10 Cal. 342; Linhart v. Buiff, 11 Cal. 280.

[10] Peters v. Foss, 16 Cal. 357; and Sharon v. Sharon, 77 Cal. 102, 19 Pac. 230; Wixon v. Devine, 91 Cal. 477, 27 Pac. 777; Schultz v. McLean, 109 Cal. 437, 42 Pac. 557; Siskiyou Co. v. Gamlich, 110 Cal. 94, 42 Pac. 468; Pacific Roll. Mill Co. v. Bear Valley etc. Co., 120 Cal. 94, 65 Am. St. Rep. 158, 52 Pac. 136; Bank of Woodland v. Heron, 122 Cal. 107, 54 Pac. 537; Brittan v. Oakland Bank of Savings, 124 Cal. 283, 71 Am. St. Rep. 58, 57 Pac. 84; San Joaquin Valley Bank v. Dodge, 125 Cal. 77, 57 Pac. 687; Santa Rosa National Bank v. Barnett, 125 Cal. 407, 58 Pac. 85; Salmon v. Rathjens, 152 Cal. 290, 92 Pac. 733.

See, also, section 289, *post*, as to abuse of discretion in general.

[11] Kirstein v. Madden, 38 Cal. 158; Ritchie v. Davis, 5 Cal. 453; and see section 289, *post*. For instances of abuse of discretion with reference to supplemental pleadings see Grady v. Bramlett, 59 Cal. 105; Seehorn v. Big Meadows etc. Mining Co., 60 Cal. 240, 9 Pac. C. L. J. 230.

[12] San Joaquin Valley Bank v. Dodge, 125 Cal. 77, 57 Pac. 687.

[12a] Jessup v. King, 4 Cal. 331; Livermore v. Webb, 56 Cal. 489; Reynolds v. Hosmer, 45 Cal. 616.

[13] Tehama Co. v. Sisson, 152 Cal. 167, 92 Pac. 64.

[14] Ellis v. Witmer, 148 Cal. 528, 83 Pac. 800.

delicto to an action *ex contractu*,[1] nor one which changes an action *ex contractu* to one *ex delicto*.[2]

So the court may properly refuse to allow an amended answer to be filed, which does not present any new issue, or any defense not

[1] Hackett v. Bank of California, 57 Cal. 335; Wheeler v. West, 78 Cal. 95, 20 Pac. 45.

A distinction is to be noted between a change of the character referred to in the text, that is, a change in the nature and scope of the action, and a change by substitution of a wholly different *cause* of action. See Frost v. Witter, 132 Cal. 421, 84 Am. St. Rep. 53, 64 Pac. 705. And see Heilbron v. Heinlein, 72 Cal. 376, 14 Pac. 24, where the complaint was amended so as to describe a different tract of land from that described in the original complaint; Walsh v. McKeen, 75 Cal. 519, 17 Pac. 673, where the case was changed from an action at law to a suit in equity; Cox v. McLaughlin, 76 Cal. 60, 9 Am. St. Rep. 164, 18 Pac. 100, where the change was from an action on a special contract to an action on a *quantum meruit;* Bogart v. Crosby, 80 Cal. 195, 22 Pac. 84, where the principal debtors were brought in by amendment; Riciotto v. Clement, 94 Cal. 105, 29 Pac. 414, and Henderson v. Hart, 122 Cal. 332, 54 Pac. 1110, where replevin was changed to wrongful conversion; Sterritt v. Barker, 119 Cal. 492, 51 Pac. 695, where the complaint was amended so as to show a cause of action against defendant individually instead of as an administrator; Porter v. Fillebrown, 119 Cal. 235, 51 Pac. 322, where change was made from claim of ward against guardian to an action for an accounting. But see Peiser v. Griffin, 125 Cal. 9, 57 Pac. 690, where an action to declare a trust was held not to be capable of being changed into an action to declare the property in controversy community property. And compare Louvall v. Gridley, 70 Cal. 507, 11 Pac. 777. See, also, Suksdorff v. Bigham, 13 Or. 369, 12 Pac. 818.

[2] Ramirez v. Murray, 5 Cal. 222. See note 1, above, as to distinction.

See, also, Mares v. Wormington, 8 N. D. 329, 79 N. W. 441.

The following decisions illustrate the rule as to amendments which change the action: Ware v. Walker, 70 Cal. 591, 12 Pac. 475; Malone v. Johnson (Cal.), 47 Pac. 579; Peiser v. Griffin, 125 Cal. 9, 57 Pac. 690; St. Clair v. San Francisco etc. Co., 142 Cal. 647, 76 Pac. 485; Adams v. Hopkins, 144 Cal. 19, 77 Pac. 712; Frey v. Vignier, 145 Cal. 251, 78 Pac. 733; Maionchi v. Nicholini, 1 Cal. App. 690, 82 Pac. 1052; People v. Davidson, 2 Cal. App. 100, 83 Pac. 161; Barling v. Weeks, 4 Cal. App. 455, 88 Pac. 502; People's etc. Co. v. Gillard, 5 Cal. App. 435, 90 Pac. 556; Simpson v. Miller, 7 Cal. App. 248, 94 Pac. 252; Givens v. Wheeler, 5 Colo. 598; Mullen v. McKim, 22 Colo. 468, 45 Pac. 416; Anthony v. Slayden, 27 Colo. 144, 60 Pac. 826; Kilham v. Western etc. Co., 30 Colo. 365, 70 Pac. 409; Tanner v. Harper, 32 Colo. 156, 75 Pac. 404; Connell v. El Paso etc. Co., 33 Colo. 30, 78 Pac. 677; Jordan v. Greig, 33 Colo. 360, 80 Pac. 1045; Davidson v. Frazer, 36 Colo. 1, 84 Pac. 695, 4 L. R. A., N. S., 1126; Haviland v. Mayfield, 38 Colo. 185, 88 Pac. 148; Kent etc. Co. v. Zimmerman, 48 Colo. 388, 110 Pac. 187; White v. Nickolls (Colo.), 112 Pac. 329; Rockwell v. Holcomb, 3 Colo. App. 1, 31 Pac. 944; Waterbury v. Fisher, 5 Colo. App. 362, 38 Pac. 846; Lemp v. Ryus, 7 Colo. App. 37, 42 Pac. 169; Johnson v. Cummings, 12 Colo. App. 17, 55 Pac. 269; Adamson v. Bergen, 15 Colo. App. 396, 62 Pac. 629; Baldwin etc. Co. v. Davis, 15 Colo. App. 371, 62 Pac. 1041; Board v. Crump, 18 Colo. App. 59, 70 Pac. 159; Eklund v. Lewis Lumber Co., 13 Idaho, 581, 92 Pac. 532; Montana etc. Co. v. B. & M. etc. Co., 27 Mont. 288, 70 Pac. 1114, 22 Morr. Min. Rep. 471; S. C., 27 Mont. 536, 71 Pac. 1005; Smith v. Wells etc. Co., 29 Nev. 411, 91 Pac. 315; Finnegan v. Ulmer, 31 Nev. 523, 104 Pac. 17; Bremen etc. Co. v. Bremen, 13 N. M. 111, 79 Pac. 806; Liggett v. Ladd, 23 Or. 26, 31 Pac. 81; Foste v. Standard etc. Co., 26 Or. 449, 38 Pac. 617; Talbot v. Garretson, 31 Or. 256, 49 Pac. 978;

embraced in the original answer.[2a] Nor is it error to refuse leave to amend a complaint in a case where a cause of action could not possibly be stated,[2b] or where it is incapable of amendment in a radical particular.[2c] So, although it may add,[3] or strike out,[4] or correct errors in,[4a] the name of a party, it should not substitute for the plaintiff a third party claiming independent of the plaintiff.[5] And although, as stated in the preceding section, the court should be liberal in allowing amendments, a showing should be required[6] for anything beyond the correction of a mere clerical mistake. The theory of the statute seems to be that such mistakes may be corrected without any particular showing or notice; but that amendments "in other particulars" should be made only "after notice to the adverse

Hammer v. Downing, 39 Or. 504, 64 Pac. 651, 65 Pac. 17, 990, 67 Pac. 30; Strauhal v. Asiatic etc. Co., 48 Or. 100, 85 Pac. 230; Haywood v. Doernbecher etc. Co., 48 Or. 359, 86 Pac. 357, 87 Pac. 530; Ridings v. Marion Co., 50 Or. 30, 91 Pac. 22; Doyle v. Southern Pacific Co. (Or.), 108 Pac. 201; Casady v. Casady, 31 Utah, 394, 88 Pac. 32; Fell v. Union Pacific Co., 32 Utah, 101, 88 Pac. 1003, 13 Ann. Cas. 1137; Jones v. Ogden, 32 Utah, 221, 89 Pac. 1006; Andrews v. Andrews, 3 Wash. Ter. 286, 14 Pac. 68; Richardson v. Carbon Hill Coal Co., 18 Wash. 368, 51 Pac. 402, 1046; Ross v. Howard, 25 Wash. 1, 64 Pac. 794; Roberts v. Tacoma etc. Co., 59 Wash. 226, 109 Pac. 605.

[2a] Duff v. Duff, 101 Cal. 1, 35 Pac. 437. And see Edgar v. Stevenson, 70 Cal. 286, 11 Pac. 704, where it was held not to be erroneous to refuse to allow an amendment to an answer setting up matters which could be proven under the original averments.

[2b] Ryan v. North Alaska Salmon Co., 153 Cal. 438, 95 Pac. 862.

[2c] San Joaquin etc. Co. v. Stanislaus Co., 155 Cal. 21, 99 Pac. 365.

[3] Section 473, California Code of Civil Procedure; Acquital v. Crowell, 1 Cal. 191; Polk v. Coffin, 9 Cal. 56. See, also, Armour Packing Co. v. Orrick, 4 Okl. 661, 46 Pac. 573; Liggett v. Ladd, 23 Or. 26, 31 Pac. 81. A defendant sued under a wrong name cannot object to an amendment inserting his right name. See Ramsey v. Cortlandt etc. Co., 6 Mont. 498, 13 Pac. 247.

[4] Section 473, California Code of Civil Procedure; Torney v. Pierce, 49 Cal. 306. See, also, Doane v. Houghton, 75 Cal. 360, 17 Pac. 426; Hamill v. Ashley, 11 Colo. 180, 17 Pac. 502; Liggett v. Ladd, 23 Or. 26, 31 Pac. 81; Brown v. Pickard, 4 Utah, 292, 9 Pac. 573, 11 Pac. 512.

[4a] Lucich v. Medin, 3 Nev. 93, 93 Am. Dec. 376. See, also, Wilcox v. American Savings Bank, 21 Colo. 348, 40 Pac. 881; Rawles v. People, 2 Colo. App. 501, 31 Pac. 941.

[5] Dubbers v. Goux, 51 Cal. 153. Also, Little v. V. & G. H. W. Co., 9 Nev. 317. See, also, Wilson v. Kiesel, 9 Utah, 397, 35 Pac. 488; Liebman v. McGraw, 3 Wash. 520, 28 Pac. 1107.

[6] Hayden v. Hayden, 46 Cal. 332. In People v. Barton, 4 Colo. App. 455, 36 Pac. 299, it was held reversible error to allow an amendment without a showing by affidavit; but in Muth v. Erwin, 14 Mont. 227, 36 Pac. 43, the contrary seems to have been held, unless substantial injury resulted to the adverse party; and in Colorado, even, the effect of section 75 of the code has been held to be such that it is not error to allow an amendment during the trial, without an affidavit showing the cause therefor. See Buddee v. Spangler, 12 Colo. 216, 20 Pac. 760; Cascade etc. Co. v. Water Co., 23 Colo. 292, 47 Pac. 268; Board etc. v. Hider, 47 Colo. 443, 107 Pac. 1068. And see Jordan v. Grieg, 33 Colo. 360, 80 Pac. 1045. And see Cooke v. Cain, 35 Wash. 353, 77 Pac. 682.

party," and proper showing; and the amendment, it has been held, must be put in writing, and the facts alleged in its support verified.[6a]

The controlling principle should always be whether the amendment is in furtherance of justice. If it be not the amendment should not be allowed. Thus, the court should disallow an amendment which is evasive;[7] so it may refuse to allow an amendment averring a mere conclusion of law,[8] or one which is immaterial and unnecessary,[9] or one which changes a sworn admission into a denial,[10] or one which sets up the statute of limitations after answering to the merits,[11] or a mere legal defense, wholly without equity, or contrary thereto.[11a] So where the demand is unconscionable, leave to amend should be refused.[11b] So where an unfair advantage is sought by the amendment,[11c] the court may refuse to allow an amendment where the whole defense is invalid,[12] and may refuse an amendment not justified or sustained by the evidence;[12a] and, in a proper case, may refuse to allow an amendment, after the evidence is in, changing the prayer of the complaint.[13]

The lateness of the application for leave to amend may be ground for its refusal;[14] but, as explained in the next section, is not always so.

The mere fact that the party was aware of the circumstances sought to be set up by amendment at the time he filed his original pleading is not of itself a ground for refusal.[15]

[6a] Todhunter v. Klemmer, 134 Cal. 60, 66 Pac. 75. Unless it is of course. Nance v. People, 25 Colo. 252, 54 Pac. 631.

[7] Shepard v. McNeil, 38 Cal. 72.

[8] Levinson v. Schwartz, 22 Cal. 229.

[9] Valencia v. Couch, 32 Cal. 339, 91 Am. Dec. 589; Ferrer v. Home Mut. L. Ins. Co., 47 Cal. 416; Carey v. Brown, 58 Cal. 180.

[10] Spanagel v. Reay, 47 Cal. 608; Hayden v. Hayden, 46 Cal. 332; Bank of Woodland v. Heron, 122 Cal. 107, 54 Pac. 537; In re Redfield, 116 Cal. 637, 48 Pac. 794 (as to contradictory amendments).

[11] Cooke v. Spears, 2 Cal. 409, 56 Am. Dec. 348; Stuart v. Lander, 16 Cal. 372, 76 Am. Dec. 578. But as to the correction of a defective plea of the statute, see Robinson v. Smith, 14 Cal. 254.

[11a] Bank of Woodland v. Heron, 122 Cal. 107, 54 Pac. 537.

[11b] Daley v. Russ, 86 Cal. 114, 24 Pac. 867.

[11c] See Howell v. Foster, 65 Cal. 169, 3 Pac. 647.

[12] Gillan v. Hutchinson, 16 Cal. 153, 2 Morr. Min. Rep. 317.

[12a] McGue v. Rommel, 148 Cal. 539, 83 Pac. 1000.

[13] Nevada etc. Co. v. Kidd, 37 Cal. 282.

[14] Gluckauf v. Bliven, 23 Cal. 312; Page v. Williams, 54 Cal. 562. See, also, Emeric v. Alvarado, 90 Cal. 444, 483, 27 Pac. 356.

[15] Pierson v. McCahill, 22 Cal. 127; McPherson v. Weston, 85 Cal. 90, 24 Pac. 733. See note 10, section 52, *ante*.

§ 56. Amendments must be Made in Court Below—Time to Apply for Leave to Amend.—As stated in another place, the supreme court has no power to alter or amend the records of the court below.[1] Nor will the court reverse a judgment merely to allow an application to amend to be made to the court below,[2] but where a judgment is reversed for another cause the supreme court will sometimes direct the court below to allow an amendment.[3] And there are several cases in which the court has directed merely formal defects to be corrected, although the judgment was affirmed.[4]

There does not appear to be any limitation upon the time in which leave to amend must be applied for. The matter rests in the discretion of the judge. In some cases it is said that an amendment may be made "at any stage of the trial";[5] and the decisions are in accordance with this statement. Thus it is not too late to move to amend after a motion for nonsuit is made.[6] Whether a motion made after decision upon the motion for nonsuit would be too late does not appear to have been decided. But it has been decided that where a motion to amend is made after decision upon a motion for judgment on the pleadings, and is denied, the supreme court will not interpose.[7] After the testimony is closed the court may direct an amendment to make the pleadings conform to the evidence.[8] So, it has been held that an amendment might be allowed after impanelment of the jury, where there is no showing of surprise or injury.[8a] Again, an amendment may be made after argument of counsel has

[1] See section 283, *post;* Hooper v. Wells, Fargo & Co., 27 Cal. 11, 85 Am. Dec. 211. See, also, Reynolds v. Pascoe, 24 Utah, 219, 66 Pac. 1064.

[2] Gibbons v. Scott, 15 Cal. 284; People v. Jackson, 24 Cal. 630; Sutter v. San Francisco, 36 Cal. 112.

[3] Fish v. Redington, 31 Cal. 185.

[4] Baldwin v. Bornheimer, 48 Cal. 433; Mahon v. San Rafael T. R. Co., 49 Cal. 269. In the cases of Powell v. Dayton etc. R. R. Co., 14 Or. 22, 12 Pac. 83; Fowle v. House, 30 Or. 305, 47 Pac. 787, and State v. Metschan, 32 Or. 372, 46 Pac. 791, 53 Pac. 1071, 41 L. R. A. 692, the supreme court declined to give express directions, either allowing or disallowing permission to answer over, after affirming an order sustaining a demurrer, merely remanding the case for further proceedings. The question is still one addressed to the trial court's discretion. See Gould v. Stafford, 101 Cal. 32, 35 Pac. 429.

[5] Lestrade v. Barth, 17 Cal. 285. In Link v. Jarvis (Cal.), 33 Pac. 206, it was held that amendments might be made at any stage of the trial, in the discretion of the court, when necessary for the purposes of justice.

[6] Valencia v. Couch, 32 Cal. 339, 91 Am. Dec. 589; and see section 118, *post.*

[7] Felch v. Beaudry, 40 Cal. 439. See concurring opinion of Crockett, J.

[8] Connalley v. Peck, 3 Cal. 75. Also, Carter v. Lothian, 133 Cal. 451, 65 Pac. 962. See note 12, below.

[8a] Beronio v. Southern Pacific Co., 86 Cal. 415, 21 Am. St. Rep. 57, 24 Pac. 1093; but see Shadburne v. Daly, 76 Cal. 355, 18 Pac. 403. To same effect see Williams v. Meyer, 150 Cal. 714, 89 Pac. 972.

commenced,[8b] or even after verdict.[9] But the court may, in its discretion refuse to allow an amendment so late in the proceedings.[10] The principal test seems to be as to whether the proposed amendment is in the interests of justice; but other considerations, such as diligence, convenience, etc., have their weight in determining the exercise of discretion. The true rule is to be sought in a study of the cases.[11] As above stated, the mere lateness of the time when the

[8b] Anglo-Californian Bank v. Field, 154 Cal. 513, 98 Pac. 267.

[9] Look at Hooper v. Wells, 27 Cal. 11, 85 Am. Dec. 211. In Clark v. San Francisco etc. Ry. Co., 142 Cal. 614, 76 Pac. 507, the supreme court said: "We are not prepared to say that an amendment can never be made after decision or verdict, and it is not necessary here to discuss that question. But ordinarily it is certain that a defendant has a right to rely on the plaintiff's allegations as to the amount of actual damage, knowing that a verdict for any amount in excess thereof will, as to such excess, be without the issues, and, in the face of reasonable and proper objection, invalid. If the plaintiff wishes to make any amendment in this regard, by increasing his demand, he should ask to do so before the case is submitted for decision, or at least before decision, in order that the defendant may have proper notice of the higher demand, and an opportunity to take such action in regard thereto, as he may deem proper." See, also, Good v. Martin, 1 Colo. 406. See note 12, as to amendments after trial.

[10] Nevada Co. S. Co. v. Kidd, 37 Cal. 282, 301. See note 12.

[11] Hall v. Rice, 64 Cal. 443, 1 Pac. 891, 2 Pac. 889; Graham v. Stewart, 68 Cal. 374, 9 Pac. 555; Hancock v. Hubbell, 71 Cal. 537, 12 Pac. 618; Riverside Land etc. Co. v. Jensen, 73 Cal. 550, 15 Pac. 131; Walsh v. McKeen, 75 Cal. 519, 17 Pac. 673; Shadburne v. Daly, 76 Cal. 355, 18 Pac. 403; Hart v. British etc. Co., 80 Cal. 440, 22 Pac. 302; Chatfield v. Williams, 85 Cal. 518, 24 Pac. 839; Emeric v. Alvarado, 90 Cal. 444, 27 Pac. 356; Guidery v. Green, 95 Cal. 630, 30 Pac. 786; McDougald v. Argonaut etc. Co., 117 Cal. 87, 48 Pac. 1021; also Farmers' etc. Bank v. Stover, 60 Cal. 387; Sharon v. Sharon, 77 Cal. 102, 19 Pac. 230; Beronio v. Southern Pacific Co., 86 Cal. 415, 21 Am. St. Rep. 57, 24 Pac. 1093. The following decisions illustrate the rule in the various jurisdictions as to the time when amendments may, and when they may not, be allowed: Good v. Martin, 1 Colo. 406; Buno v. Gomer, 3 Colo. 456, 34 Pac. 256; Gwynn v. Butler, 17 Colo. 114, 28 Pac. 466; Belmont etc. Co. v. Costigan, 21 Colo. 471, 42 Pac. 647; Johnson v. Johnson, 30 Colo. 402, 70 Pac. 692; Jordan v. Grieg, 33 Colo. 360, 80 Pac. 1045; Ft. Collins Development Co. v. France, 41 Colo. 512, 92 Pac. 953; United States etc. Co. v. People, 44 Colo. 557, 98 Pac. 828; Higgins v. People, 2 Colo. App. 567, 31 Pac. 951; Snowy etc. Co. v. Tamarack etc. Co. (Idaho), 107 Pac. 60; Pennsylvania etc. Co. v. Gallagher (Idaho), 112 Pac. 1044; Haggin v. Lorenz, 15 Mont. 309, 39 Pac. 285; Neimick v. American Ins. Co., 16 Mont. 318, 40 Pac. 597; York v. Stewart, 21 Mont. 515, 55 Pac. 29; Bryant v. Davis, 22 Mont. 534, 57 Pac. 143; Berry v. Hull, 6 N. M. 643, 30 Pac. 936; Garrison v. Goodale, 23 Or. 307, 31 Pac. 709; Longfellow v. Huffman, 49 Or. 486, 90 Pac. 907; Ridings v. Marion Co., 50 Or. 30, 91 Pac. 22; American Publishing Co. v. Fisher, 10 Utah, 147, 37 Pac. 259; Skagit etc. Co. v. Cole, 1 Wash. 330, 25 Pac. 1077; Lee v. Lee, 3 Wash. 236, 28 Pac. 355; Gould v. Gleason, 10 Wash. 476, 39 Pac. 123; Maney v. Hart, 11 Wash. 67, 39 Pac. 268; Price v. Scott, 13 Wash. 574, 43 Pac. 634; McDonough v. Great Northern Ry. Co., 15 Wash, 244, 46 Pac. 334; Ogle v. Jones, 16 Wash. 319, 47 Pac. 747; Morrissey v. Faucett, 28 Wash. 52, 68 Pac. 352; Daly v. Everett etc. Co., 31 Wash. 252, 71 Pac. 1014;

amendment is proposed is but a circumstance, which should not, of itself, control. But an amendment should not be allowed at a time when it will operate as a surprise or hardship.

As to amendments after judgment, see cases.[12]

Miner v. Paulson (Wash.), 110 Pac. 1044; Harsin v. Oman (Wash.), 110 Pac. 621; Gilland v. Union Pacific Co., 6 Wyo. 185, 43 Pac. 508. See note 12, below, as to statutory provisions; also, as to amendment after judgment, and amendment to cure variance.

[12] See Felch v. Beaudry, 40 Cal. 439; Chatfield v. Williams, 85 Cal. 518, 24 Pac. 839; Gilliam v. Brown, 126 Cal. 160, 58 Pac. 466.

The New Mexico law (section 2685, subsection 82, Compiled Laws) provides that the amendment may be made at any time before final judgment. Section 102, Lord's Oregon Laws, provides that it may be made "at any time before trial," if it is the addition of the name of a party, "or other allegation material to the cause"; and at any time before submission, if it is "by striking out the name of any party, or by correcting a mistake in the name of a party, or a mistake in any other respect, or when the amendment does not substantially change the cause of action or defense, by conforming the pleading or proceeding to the facts proved." Section 6883, Revised Codes of North Dakota, and section 4437, Compiled Statutes of Wyoming, contains, as to the time of making the amendment, the phrase, "before or after judgment." In all other statutes cited in note 3a, section 53, *ante*, the phraseology is the same as that quoted from section 473, California Code of Civil Procedure, in the same section.

Sections 97 and 98 of Lord's Oregon Laws cover the subject of amendments to cure variances, material and immaterial. The purpose of the last clause above quoted, from section 102, as to amendments to make the pleading conform to the proof, is not entirely clear. It cannot be important, however, so far as the present subject is concerned. The subject of variance is also covered by statutory provisions, similar in scope, in most of the other states, and is treated later on in connection with the subject of nonsuit. See section 115, *post*. It is sufficient to say in the present connection that there is no time limit for the correction of a variance between the *allegata* and *probata*. The power to amend certainly continues until after the evidence is all in, if the purpose is to make evidence and pleading correspond. See Harris v. Harris, 9 Colo. App. 211, 47 Pac. 841. So, in another Colorado case, it was held that the pleadings might be amended after verdict, if the latter was sufficiently supported by the evidence. See Haley v. Kilpatrick, 104 Fed. 647, 44 C. C. A. 102. In United States etc. Co. v. People, 44 Colo. 557, 98 Pac. 828, an amendment was offered for the purpose of meeting an objection offered by the adverse party, after the evidence was all in. It was not allowed, and the term was adjourned. At the opening of the following term, the case having been under advisement, the amendment was allowed *nunc pro tunc*, and the supreme court held that while this was a very broad exercise of discretion, amendments might be allowed at any time before judgment, and as defendant had suffered no material injury, the action would not be disturbed. Inasmuch as the judgment must be in accordance with the allegations of the complaint rather than the proof, if there is a variance (Owl etc. Co. v. Ferguson, 2 Colo. App. 119, 30 Pac. 255; Tucker v. Parks, 7 Colo. 62, 1 Pac. 427; Miller v. Hallock, 9 Colo. 551, 13 Pac. 541; First Nat. Bank v. Devenish, 15 Colo. 229, 22 Am. St. Rep. 394, 25 Pac. 177), and a judgment upon a verdict or decision arrived at by a manifest departure from the issues (Jackson v. Ackroyd, 15 Colo. 583, 26 Pac. 132), or based upon evidence improperly admitted because incompetent (McLaughlin v. Thompson, 2 Colo. App. 135, 29 Pac. 816), cannot stand, it follows that

§ 57. How Amendments are Made.—Unless the case is such that the amendment is of course,[1] there must first be an order for leave to amend. Mere intention of the judge to allow an amendment does not amount to an order.[2] The order is of no effect unless complied with.[3] The amendment itself is made either as an addition to the original pleading, in which case it is filed as a separate document, or it is incorporated into the original, by reingrossing the whole. The provision of the code is, that "if the complaint is amended a copy of the amendments must be filed, or the court may, in its discretion, require the complaint, as amended, to be filed, and a copy of the amendments, or amended complaint, must be served upon the defendants affected thereby."[4] This provision relates only to complaints. But the practice is the same with other plead-

where there is a variance, and not merely a failure of proof, the pleading must be amended, even after judgment, if the latter is to be allowed to stand.

The Oregon cases hold that the question is addressed to the discretion of the trial court. See Brown v. Moore, 3 Or. 438; Henderson v. Morris, 5 Or. 24; Stokes v. Brown, 20 Or. 530, 26 Pac. 561. And that nothing short of a clear abuse of discretion will warrant a reversal on appeal. Brown v. Moore, *supra*. The practice in that state is clearly outlined in the following cases: Hill v. Mellon, 3 Or. 435; Dodd v. Denny, 6 Or. 158, 25 Am. Rep. 510; Moore v. Frazer, 15 Or. 635, 16 Pac. 869; Mendenhall v. Harrisburg Water Co., 27 Or. 38, 39 Pac. 399; Bishop v. Baisley, 28 Or. 119, 41 Pac. 937; Denn v. Peters, 36 Or. 486, 59 Pac. 1109; West v. Eley, 39 Or. 461, 65 Pac. 798.

The various statutes on the subject, in the different states, cannot be said to vary so materially as to call for a different rule of construction in any case; and a fair statement of the general rule would doubtless be, that if the purpose of the amendment is to cure a variance between the *allegata* and *probata*, it may be made at any time within the discretion of the court. But if the purpose is "in furtherance of justice," the time limit fixed by the statute, whatever that may be, is determinative of the question.

In Pennsylvania etc. Co. v. Gallagher (Idaho), 112 Pac. 1044, and Miner v. Paulson (Wash.), 110 Pac. 994, it was said that to make the pleadings and the proof correspond it was proper to allow an amendment at any stage of the proceedings "almost as of course."

While there is the broadest liberality in allowing amendments so as to make the *allegata* and *probata* conform, both as to time and conditions, and while it is usually deemed prejudicial abuse of discretion to disallow an offered amendment for this purpose (Harrison v. Russell, 17 Idaho, 196, 105 Pac. 48), yet there would seem to be certain well-recognized restrictions. If the evidence was introduced without objection, the rule will be held to control. See Coughlin v. Holmes, 53 Wash. 692, 102 Pac. 772. But if it is admitted over objection the rule is otherwise. See Heath v. Potlatch etc. Co., 18 Idaho, 42, 108 Pac. 343; Leggat v. Palmer, 39 Mont. 302, 102 Pac. 327.

[1] As to such cases, see section 52.

[2] See Carpentier v. Brenham, 50 Cal. 549.

[3] Kimball v. Gearheart, 12 Cal. 27. See, also, Satterlund v. Beal, 12 N. D. 122, 95 N. W. 518, where it was held that unless acted upon when leave granted, the amendment would be deemed abandoned, and that the pleading must be rewritten.

[4] Section 432, California Code of Civil Procedure. Section 472 of the same code relates to amendments as of course.

ings. Sometimes the matter is regulated by rule of court. Where the amendment consists in adding or striking out the name of a party, the order is sufficient without filing an amendment, unless the court directs one to be filed;[5] the order in such case is part of the judgment-roll, and the character of the amendment is such that no confusion can arise. If an amended complaint be filed omitting the names of some defendants, the amendment operates as a discontinuance of the suit as to them.[6] Amendments and amended pleadings must be served,[7] as well as filed;[7a] and the service should follow, or be contemporaneous with the filing.[7b] It is error to allow an amendment without serving it.[7c] So amendments must be upon notice.[7d]

Although it has been held that an order allowing an amendment is ineffectual unless complied with, it has also been held that failure to make and file an amendment in accordance with the order allowing same until after verdict and entry of judgment was error without injury, the case having been tried as though the amendment had been in fact made.[8] The failure in such case would not necessitate the reversal of the judgment, but the record could be corrected to conform to the order.[9]

§ 58. Effect of Filing an Amended Pleading.—An amended pleading supersedes the original;[1] but it is not the commencement

[5] Tormey v. Pierce, 49 Cal. 306.

[6] Browner v. Davis, 15 Cal. 9.

[7] Section 432, Code of Civil Procedure, as amended in 1880; Thompson v. Johnson, 60 Cal. 292, 9 Pac. C. L. J. 264; Elder v. Spinks, 53 Cal. 293. But where a defendant is sued by a fictitious name, and his default is entered, the amended complaint with his true name inserted need not be served. Brock v. Martinovich, 55 Cal. 516; and look at Harney v. Corcoran, 60 Cal. 314, 9 Pac. C. L. J. 262; McGarry v. De Pedrorena, 58 Cal. 91. See, also, Vermont Loan & Trust Co. v. McGregor, 5 Idaho, 510, 51 Pac. 104; Barber v. Briscoe, 8 Mont. 214, 19 Pac. 589. This rule does not seem to apply to an amendment other than of right and under the authority of the statute, and it was said in Holter etc. Co. v. Ontario Min. Co., 24 Mont. 184, 61 Pac. 6, that the court might require either the pleading, as amended, or the amendment itself, to be served, in its discretion. But see section 432, California Code of Civil Procedure, and corresponding provisions in other states.

[7a] See sections 432 and 472, California Code of Civil Procedure.

[7b] See Galliano v. Kilfoy, 94 Cal. 86, 29 Pac. 416; Billings v. Palmer, 2 Cal. App. 432, 83 Pac. 1077.

[7c] Nodine v. Richmond, 48 Or. 527, 87 Pac. 775.

[7d] Keller v. Blasdel, 2 Nev. 162.

[8] Stark v. Wellman, 96 Cal. 400, 31 Pac. 259.

[9] French v. McCarthy, 125 Cal. 508, 58 Pac. 154.

[1] Gilman v. Cosgrove, 22 Cal. 356; Jones v. Frost, 28 Cal. 245; Barber v. Reynolds, 33 Cal. 497; Kelley v. McKibbin, 54 Cal. 192; Kentfield v. Hayes, 57 Cal. 409; Thompson v. Johnson, 60 Cal. 292, 9 Pac. C. L. J. 264; Kuhland v. Sedgwick, 17 Cal. 123. See, also, People v.

of a new action. In this regard in Barber v. Reynolds[2] (in which it was held that the filing of an amended complaint did not operate to dissolve an injunction previously granted), Sawyer, J., delivering the opinion, said:

"The amended complaint supersedes the original, but there is no dismissal of the action. It simply takes the place of the other. No new or different action is commenced, and no new cause of action is introduced. There is no change in the identity of the cause of action. That is the same as before, and the commencement of the action dates from the filing of the original complaint and the issuing of summons thereon. The change consists merely in more fully setting forth the cause of action defectively alleged in the original complaint. It is the former complaint amended. The old complaint in the form first filed ceases to be the complaint in the case, or to perform any further function as a pleading, but the amended complaint falls into its place and performs the same and not different functions. The identity of the action is in no respect affected."

Since the filing of the amended complaint is not the commencement of a new action, it follows that the running of the statute of limitations is to the filing of the original and not of the amended complaint.[3] But if by the amendment a new cause of action is introduced, the limitation runs as to such cause of action to the filing of the amended complaint.[4]

§ 59. Miscellaneous Matters in Relation to Amendments—Terms.—Terms may be imposed as a condition of amendment if the court sees fit to do so.[1] The authority to do so is derived

Hunt, 1 Idaho, 433; Wooddy v. Jamieson, 4 Idaho, 448, 40 Pac. 61; McFadden v. Mining Co., 8 Nev. 57; Wells v. Applegate, 12 Or. 208, 6 Pac. 770. But if nothing materially new is presented by the amendment, it cannot be said to take the place of the amended pleading so as to require to be answered. See Brossard v. Morgan, 7 Idaho, 215, 61 Pac. 1031.

It is otherwise with reference to an amendment to a pleading.

[2] 33 Cal. 497. To same effect, Jones v. Frost, 28 Cal. 245.

[3] Allen v. Marshall, 34 Cal. 165; Lorenzana v. Camarillo, 45 Cal. 125.

[4] Anderson v. Mayers, 50 Cal. 525; Jeffers v. Cook, 58 Cal. 147; Frost v. Witter, 132 Cal. 421, 84 Am. St. Rep. 53, 64 Pac. 705.

[1] Clune v. Sullivan, 56 Cal. 249; Fish v. Redington, 31 Cal. 185; Tormey v. Pierce, 49 Cal. 306; Culverhouse v. Crosan, 94 Cal. 544, 29 Pac. 1100; Wise v. Wakefield, 118 Cal. 107, 50 Pac. 310; Williams v. Myer, 150 Cal. 714, 89 Pac. 972. Also, Miller v. Thorpe, 4 Colo. App. 559, 36 Pac. 891; Lowe v. Long, 5 Idaho, 122, 47 Pac. 93; Jones v. Stoddart, 8 Idaho, 210, 67 Pac. 650; Pappe v. Post, 23 Okl. 581, 101 Pac. 1055; Chicago etc. Co. v. Pollock, 16 Wyo. 321, 93 Pac. 847; and see Dixon v. Risley, 114

from section 473 of the California Code of Civil Procedure (and corresponding sections of other codes) along with the authority to allow or disallow amendments in general. The terms must be "just." "By this is meant that the terms imposed shall be such as will be just, considering the circumstances under which the amendment is asked, and particularly as between the parties to the action—such as will compensate the party for the loss or inconvenience which he will suffer by granting the application to amend."[2] And this is not limited to compensation for such expenses as are recoverable as costs which may be properly taxed in the case.[3] It includes whatever charges or expenses are incurred with reference to the trial, which would not have been incurred but for the amendment, and the amount is to be fixed solely with the view of compensation. Thus in Williams v. Myer[4] it was held that it was not improper to require plaintiff to pay to defendant one hundred dollars for expenses in the employment of attorneys, and as compensation for his own expenses, in addition to jury fees, and fees of witnesses whose attendance had been secured for the defendant, which were taxable as costs.

The imposition of unjust terms is to be regarded as equivalent to the denial of an application to amend while conceding that a proper case for permitting an amendment to be filed is presented, and that no valid objection to the character of the proposed amendment exists. The question in such a case, therefore, is not whether the discretion of the court has been properly exercised, but whether the terms imposed are just.[5] The answer to the latter question is likewise an answer to the former. If the terms imposed are just, no abuse of discretion can be shown, and the action of the court in the imposition of terms will not be interfered with.[6]

When the terms imposed are just, it is not abuse of discretion to disallow the amendment if the terms are rejected.[7] The right

Cal. 204, 46 Pac. 5; Gabriel v. Tonner, 138 Cal. 63, 70 Pac. 1021; Supreme Lodge K. of H. v. Davis, 26 Colo. 252, 58 Pac. 595.

[2] Williams v. Myer, 150 Cal. 714, 89 Pac. 972.

[3] Williams v. Myer, 150 Cal. 714, 89 Pac. 972; and compare Pomeroy v. Bell, 118 Cal. 636, 50 Pac. 683, where the rule was applied in the case of a continuance upon terms.

[4] 150 Cal. 714, 89 Pac. 972.

[5] Williams v. Myer, 150 Cal. 714, 89 Pac. 972.

[6] Wise v. Wakefield, 118 Cal. 107, 50 Pac. 310; Williams v. Myer, 150 Cal. 714, 89 Pac. 972.

[7] Wise v. Wakefield, 118 Cal. 107, 50 Pac. 310.

to impose terms includes right to limit time within which amendment must be filed.[8]

Waiver.—Failure to object to an improper amendment, or one which gives an unfair advantage to one of the parties to an action, and to take the necessary steps to save the ruling for review, may be said to be in effect a waiver thereof.[8a] A similar result may be said to follow a demurrer directed to a different portion of the amended pleading, or an answer without raising the objection.[9] So an erroneous refusal to allow an amendment may be cured by the admission of evidence of the facts covered by the amendment,[10] and the case is tried as though the amendment had been allowed.[10a]

Referees—Justices' Courts, etc.—A referee cannot change by amendment the issues presented to him for determination.[11] The jurisdiction of the superior court to allow amendments to pleadings in actions appealed from the justices' courts for trial *de novo*, is well settled,[11a] except as to proceedings which are said to be special, and such actions must be tried upon the pleadings as made in the lower courts.[12] Under the provisions of section 389 of the California code, a court may, when deemed necessary to the complete determination of the controversy, direct the amendment of the pleadings of its own motion.[13] A supplemental pleading is not an amended pleading, and is not so classified in the code;[13a] but the filing of the former, like the latter, has been said to be addressed to the "sound legal discretion" of the trial court, and to be governed by the same rules as to the exercise

[8] Schultz v. McLean, 109 Cal. 437, 42 Pac. 557. And see Dixon v. Risley, 114 Cal. 204, 46 Pac. 5.

[8a] See Jackson v. Jackson, 94 Cal. 446, 29 Pac. 957.

[9] See Witkowski v. Hern, 82 Cal. 604, 23 Pac. 132; and compare Cox v. Western etc. Co., 47 Cal. 87.

[10] See Jones v. Block, 30 Cal. 227, and other cases cited in next note.

[10a] Jones v. Block, 30 Cal. 227; Shadburn v. Daly, 76 Cal. 355, 18 Pac. 403; Pacific Rolling Mill Co. v. Bear Valley Irr. Co., 120 Cal. 94, 65 Am. St. Rep. 158, 52 Pac. 136; National Bank of Santa Rosa v. Barnett, 125 Cal. 407, 58 Pac. 85.

[11] De La Riva v. Berreyesa, 2 Cal. 195.

[11a] Kitts v. Superior Court, 62 Cal. 203; Ketchum v. Superior Court, 65 Cal. 494, 4 Pac. 492; but compare People v. El Dorado County Court, 10 Cal. 19; Funkenstein v. Elgutter, 11 Cal. 328; S. P. R. R. Co. v. Superior Court, 59 Cal. 471; Rickey v. Superior Court, 59 Cal. 661.

[12] Santa Cruz v. Santa Cruz R. R. Co., 56 Cal. 143.

[13] See Robinson v. Gleason, 53 Cal. 38; see, also, section 464, as to supplemental complaint and answer.

[13a] Giddings v. The 76 etc. Co., 109 Cal. 116, 41 Pac. 788.

of such discretion;[14] i. e., that the action of the trial court will be reversed only for the abuse thereof, and that terms may be imposed as a condition precedent to the allowance of the proposed pleading.[15] In the filing of an amended complaint a cause of action set forth in the original may be omitted. The defendant is not prejudiced by the abandonment of a cause of action against him.[16] Section 443 of the California code, as to the time to demur, applies to the original pleadings and not to amended pleadings.[17] Erroneous findings cannot be amended after judgment. The proper method of procedure to correct the error is by motion for new trial under the sixth subdivision of section 657 of the same code.[18] The trial court is without jurisdiction to allow an amendment to the pleadings pending appeal.[19]

[14] Greenwood v. Adams, 80 Cal. 74, 21 Pac. 1134; and compare Jacob v. Lorenz, 98 Cal. 332, 33 Pac. 119, and Giddings v. The 76 etc. Co., 109 Cal. 116, 41 Pac. 788.

[15] Greenwood v. Adams, 80 Cal. 74, 21 Pac. 1134; Jacob v. Lorenz, 98 Cal. 332, 33 Pac. 119.

[16] Concannon v. Smith, 134 Cal. 14, 66 Pac. 40.

[17] Schultz v. McLean, 109 Cal. 437, 42 Pac. 557.

[18] Pico v. Sepulveda, 66 Cal. 336, 5 Pac. 515.

[19] Kirby v. Superior Court, 68 Cal. 604, 10 Pac. 119.

CHAPTER IX.

GROUNDS OF THE MOTION—ANY ORDER OF COURT OR ABUSE OF DISCRETION, ETC.—CONTINUANCES.

§ 60. Continuances are in court's discretion—Power.
§ 61. Continuances for absence of witnesses.
§ 62. Continuances for absence of counsel.
§ 63. Miscellaneous matters relating to continuances—Terms—New pleadings—Filing *remittitur* in another case.

§ 60. The Granting or Refusing of a Continuance is in the Discretion of the Judge—Power.—Jurisdiction to hear and determine includes the power, good cause appearing, to postpone the time for such hearing and determination, unless prohibited by statute.[1] A motion for a postponement or continuance is a dilatory motion, and one not favored by the law;[2] but the necessity therefor, and, by consequence, the right thereto, may arise, and when it does, the refusal of the court to grant it operates as a denial of a fair and impartial trial upon the merits, and constitutes error necessitating a reversal of the judgment, and a retrial.

This refusal also constitutes an abuse of discretion on the part of the trial court, and such abuse of discretion is a well-recognized ground for a new trial under the provisions of subdivision 1 of section 657 of the California code.[2a] The principle is the same, whether the attack is upon the judgment, by appeal, or upon the verdict or other decision, by motion for a new trial. For this reason no attempt will be made in this place to distinguish between the two classes of decisions which illustrate the principle.[3]

[1] Curtis v. Underwood, 101 Cal. 661, 36 Pac. 110.

[2] In re Kasson's Estate, 141 Cal. 33, 74 Pac. 436.

[2a] See note a, section 23, *ante*, for corresponding provisions of other states.

[3] Upon the point as to whether the discretion of the trial court is coextensive with the entire proceedings, and is addressed to every phase of the subject of continuances and postponements, doubt is sometimes expressed. It has been suggested that when the moving party places himself distinctly within the terms of the statute, the refusal of a continuance is not abuse of discretion, but is error solely. There is some ground for this view in the cases. See People v. Dodge, 28 Cal. 445; People v. McCrory, 41 Cal. 458; People v. Brown, 46 Cal. 102; People v. Brown, 54 Cal. 243; People v. Plyler, 121 Cal. 160, 53 Pac. 553; and compare Lord v. Dunster, 79 Cal. 477, 21 Pac. 865; People v. Lampson, 70 Cal. 204, 11 Pac. 593; Stewart v. Sutherland, 93

The appellate court will not disturb the exercise of discretion of the trial court in the matter of continuances, except for clear abuse of discretion. In this regard Field, J., delivering the opinion in Musgrove v. Perkins,[4] said: "The granting or refusing of a continuance rests in the sound discretion of the court below; and its ruling will not be revised except for the most cogent reasons. The court below is apprised of all the circumstances of the case, and the previous proceedings, and is therefore better able to decide upon the propriety of granting the application than an appellate court; and when it exercises a reasonable and not an arbitrary discretion, its action will not be disturbed."

This language has been often quoted,[5] and the doctrine there laid down many times restated.[6]

Cal. 270, 28 Pac. 947; Jaffe v. Lilienthal, 101 Cal. 175, 35 Pac. 636; also, People v. Beam, 66 Cal. 394, 5 Pac. 677; and People v. Dinsmore, 102 Cal. 381, 36 Pac. 661. So the converse of this would seem to be equally true. So, it might be error, and not abuse of discretion, to proceed with the trial of a case before the issues are made up. See Friedlander v. Sumner etc. Co., 61 Cal. 116. So, the refusal of a continuance, based upon the fact of the party's attorney being a member of the legislature, conceding employment before the commencement of the legislative term, might be error, instead of abuse of discretion. See People v Goldenson, 76 Cal. 328, 19 Pac. 161. So the granting of a continuance previous to the calling of the action for trial, or before the commencement of the trial, would seem to be error, and not abuse of discretion. See sections 1052 and 1433, Penal Code of California. The point has logic and good reason to sustain it, but no decisions are to be found bearing directly upon it.

[4] 9 Cal. 211.

[5] See Barnes v. Barnes, 95 Cal. 177; Estate of Kasson, 141 Cal. 33, 74 Pac. 436.

[6] *Arizona:* Copper Belle Co. v. Costello, 12 Ariz. 318, 100 Pac. 807; Hurley v. Territory (Ariz.), 108 Pac. 222.

California: Pilot R. C. Co. v. Chapman, 11 Cal. 161; Griffin v. Polhemus, 20 Cal. 180; People v. Gaunt, 23 Cal. 156; Schilling v. Holmes, 23 Cal. 227; Gluckauf v. Bliven, 23 Cal. 312; McMinn v. O'Conner, 27 Cal. 238; People v. De Lacey, 28 Cal. 589; People v. Jocelyn, 29 Cal. 562; Hastings v. Hastings, 31 Cal. 96; Wilkinson v. Parrott, 32 Cal. 102; Harper v. Lamping, 33 Cal. 641; Kern Valley Bank v. Chester, 55 Cal. 49; Fleming v. Hawley, 65 Cal. 492, 4 Pac. 494; Stone v. McCann, 79 Cal. 460, 21 Pac. 863; Kneebone v. Kneebone, 83 Cal. 645, 23 Pac. 1031; Hawes v. Clark, 84 Cal. 272, 24 Pac. 116; Barnes v. Barnes, 95 Cal. 171, 30 Pac. 298, 16 L. R. A. 600; Baumberger v. Arff, 96 Cal. 261, 31 Pac. 53; People v. Dinsmore, 102 Cal. 381, 36 Pac. 661; People v. Ward, 105 Cal. 335, 38 Pac. 945; People v. Leyshon, 108 Cal. 440, 41 Pac. 480; People v. Shaw, 111 Cal. 171, 43 Pac. 593; People v. Winthrop, 118 Cal. 85, 50 Pac. 390; People v. Wade, 118 Cal. 672, 50 Pac. 841; People v. Logan, 123 Cal. 414, 56 Pac. 56; People v. Breen, 130 Cal. 72, 62 Pac. 408; People v. Totman, 135 Cal. 133, 67 Pac. 51; In re Guardianship of Lovern, 137 Cal. 680, 70 Pac. 783; Estate of Kasson, 141 Cal. 33; Lindy v. McChesney, 141 Cal. 33; People v. Chutnacut, 141 Cal. 682, 75 Pac. 340; Abrook v. Ellis, 6 Cal. App. 451, 92 Pac. 396.

Colorado: Byers v. McPhee, 4 Colo. 204; Michael v. Mills, 22 Colo. 439, 45 Pac. 429; McFadden v. Pyne, 46

§ 61. Continuance for Absence of Witnesses.—Section 595 of the Code of Civil Procedure, as amended in 1880, is as follows:[1]

"Sec. 595. A motion to postpone a trial on the ground of the absence of evidence can only be made upon affidavit showing the

Colo. 319, 104 Pac. 491; Koch v. Story, 47 Colo. 335, 107 Pac. 1093; Outcault v. Johnson, 9 Colo. App. 519, 49 Pac. 1058.

Idaho: Herron v. Jury, 1 Idaho, 164; Cox v. Northwest etc. Co., 1 Idaho, 376; Lilienthal v. Anderson, 1 Idaho, 673; Holt v. Gridley, 7 Idaho, 416, 63 Pac. 188; Reynolds v. Corbus, 7 Idaho, 481, 63 Pac. 884; Robertson v. Moore, 10 Idaho, 115, 77 Pac. 218; Richardson v. Ruddy, 11 Idaho, 561, 83 Pac. 606; Rankin v. Caldwell, 15 Idaho, 625, 99 Pac. 108; Storer v. Heidfeld (Idaho), 105 Pac. 55; Miller v. Brown, 18 Idaho, 200, 109 Pac. 139.

Nevada: Croate v. Bullion Co., 1 Nev. 73.

New Mexico: Texas etc. Co. v. Saxton, 7 N. M. 302, 34 Pac. 532; Territory v. Padilla, 12 N. M. 1, 71 Pac. 1084; Perea v. State Life Ins. Co. (N. M.), 110 Pac. 559.

Oklahoma: McMahan v. Norick, 12 Okl. 125, 69 Pac. 1047; McCann v. McCann, 24 Okl. 264, 103 Pac. 694; St. Louis & San Francisco Ry. Co. v. Cox, 26 Okl. 331, 109 Pac. 511; Terrapin v. Barker, 26 Okl. 93, 109 Pac. 931.

Oregon: Linn Co. v. Morris, 40 Or. 415, 67 Pac. 295; Pacific etc. Co. v. Inman etc. Co., 50 Or. 22, 90 Pac. 1099; State v. Mack (Or.), 112 Pac. 1079.

Washington: Thompson v. Territory, 1 Wash. Ter. 547; State v. Murphy, 9 Wash. 204, 37 Pac. 420; Juch v. Hanna, 11 Wash. 676, 40 Pac. 341; State v. Burns, 19 Wash. 52, 52 Pac. 316; State v. Boyce, 24 Wash. 514, 64 Pac. 719; State v. Champoux, 33 Wash. 339, 74 Pac. 557; Knapp v. Order of Pendo, 36 Wash. 601, 79 Pac. 209; Leghorn v. Nydell, 39 Wash. 17, 80 Pac. 833; Spokane v. Costello, 42 Wash. 182, 84 Pac. 652; Bank of Montreal v. Howard, 44 Wash. 10, 86 Pac. 1115; Warehime v. Schweitzer, 51 Wash. 299, 98 Pac. 747; Fruitland etc. Co. v. Smith, 54 Wash. 185, 102 Pac. 1031; Sholin v. Skamania etc. Co., 56 Wash. 303, 105 Pac. 632.

[1] This is the California provision. With the exception of the clause in reference to attendance upon the legislature, which was introduced in 1880, the section above quoted is substantially the same as section 158 of the old Practice Act, which stood from its adoption in 1851 until the adoption of the code. See Laws 1851, p. 75.

Section 1383, Revised Statutes of Arizona, provides that no application for a continuance shall be granted "except for sufficient cause, supported by affidavit, or by consent of parties, or by operation of law."

Section 177, Mills' Annotated Code of Colorado, provides that "a motion to postpone a trial on grounds of the absence of evidence shall only be made of the evidence," etc., "and that due diligence has been used to procure it." The moving party must also show the character of the evidence itself. The same section also authorizes the court to grant continuance for other causes than absence of evidence.

Section 4372, Revised Codes of Idaho, provides that "a motion to postpone a trial on the ground of the absence of evidence can only be made up on affidavit showing the materiality of the evidence expected to be obtained, and that due diligence has been used to procure it. The court may also require the moving party to state, upon affidavit, the evidence which he expects to obtain; and if the adverse party thereupon admit that such evidence would be given, and that it be considered as actually given on the trial, or offered and overruled as improper, the trial must not be postponed."

Section 6729, Revised Codes of Montana (section 1039, Code of Civil Procedure), is in almost the same language as the California and Idaho provisions with the addition of the following: "And upon terms the court may, in its discretion, upon good cause

materiality of the evidence expected to be obtained, and that due diligence has been used to procure it. A trial shall be postponed when it appears to the court that the attorney of record, party, or principal witness is actually engaged in attendance upon a session of the legislature of this state as a member thereof. The court may require the moving party, where application is made on account of the absence of a material witness, to state upon

shown, and in furtherance of justice, postpone a trial or proceeding upon other grounds than the absence of evidence."

Section 3255, Cutting's Compiled Laws of Nevada (section 160, Civil Practice), contains practically the same provisions as the California, Idaho and Montana codes, omitting the phrase of the last named with reference to postponement upon other grounds than that of the absence of evidence, with an additional provision for the postponement of actions involving the title to mining claims, upon certain conditions, in the court's discretion.

Section 2890, Compiled Laws of New Mexico, prescribes that "all applications for a continuance shall be supported by oath unless the facts be within the knowledge of the court, in which case it shall be so stated in the record." Section 2896 is as follows: " Every cause may be contnued by a court upon application of either party, verified by affidavit, showing good cause for such continuance."

Section 5836, Compiled Laws of Oklahoma, contains provisions substantially the same as those above outlined, except that more detailed provisions are made with regard to the contents of the affidavit. Section 5835 provides for the continuance of any action by any court, "for good cause shown, other than the absence of evidence," at the cost of the applicant; and section 6790 makes these provisions applicable to criminal causes.

Section 115, Lord's Oregon Laws, also contains the same general provisions, with the added provision allowing the imposition of terms.

Sections 306 and 307, Code of Civil Procedure of South Dakota, contain provisions substantially the same as those of California.

Section 3133, Compiled Laws of Utah, contains provisions substantially the same as those of Montana, providing for a continuance, upon terms, upon other grounds than absence of evidence.

Section 322, Rem. & Bal. Code of Washington (section 4977, Bal. Code), is practically identical with the Oregon section above cited; and sections 5139, 5140 and 5141, Compiled Statutes of Wyoming, are the same as the Oklahoma sections, above quoted.

Section 1788, Rem. & Bal. Code of Washington (section 6575, Bal. Code), provides for continuances in consequence of amendments.

No specific provision is made by the North Dakota statutes for continuances in civil cases. Nor are the grounds which are to be deemed sufficient in criminal cases specified by statute. The provision is simply that "the court may, upon sufficient cause shown by either party," etc., thus leaving the question to the judgment and discretion of the trial judge. Whatever grounds may be deemed sufficient will be deemed sufficient in either character of action. See State v. Murphy, 9 N. D. 175, 82 N. W. 738.

In connection with this provision it is proper to note the sections in the Penal Code with reference to postponement of criminal trials:

"Sec. 1052. When an action is called for trial, or at any time previous thereto, the court may, upon sufficient cause, direct the trial to be postponed to another day."

For corresponding provisions of other codes as to continuances in criminal cases, see section 901, Revised Statutes of Arizona; section 7795, Revised Codes of Idaho; section 9239, Revised Codes of Montana (section 2011, Penal Code); section 4283,

affidavit the evidence which he expects to obtain; and if the adverse party thereupon admits that such evidence would be given, and that it would be considered as actually given on the trial, or offered and overruled as improper the trial must not be postponed."

The express requirements of this section are that a motion for a continuance should be supported by an affidavit,[1a] and that the affidavit should show, first, the materiality of the evidence, and second, that due diligence was used to procure it.[2] There are other requirements in practice. The several requirements will be considered separately.

1. *The Affidavit must Show the Materiality of the Evidence.*— This is the express requirement of the section above quoted.[3] The language is that there must be an affidavit *showing* the materiality of the evidence expected to be obtained. It is not sufficient to merely state that the evidence which would be given is material.

Cutting's Compiled Laws of Nevada (section 318, Criminal Practice); section 3402, Compiled Laws of New Mexico; section 9950, Revised Codes of North Dakota; section 1513, Lord's Oregon Laws; section 316, Code of Civil Procedure of South Dakota; section 2135, Rem. & Bal. Code of Washington (section 6929, Bal. Code). The Oklahoma and Wyoming provision is the same as to both civil and criminal cases. See above.

Also (as to justice's and police courts):

"Sec. 1433. Before the commencement of a trial in any of the courts mentioned in this chapter, either party may, upon good cause shown, have a reasonable postponement thereof."

For corresponding provisions in other codes as to continuances in justices' and police courts, see section 1189, Revised Statutes of Arizona; section 8287, Revised Codes of Idaho; section 9596, Revised Codes of Montana (section 2692, Penal Code); section 8371, Revised Codes of North Dakota; section 2429, Lord's Oregon Laws (and see, also, section 2454, which makes the provisions of the general procedure applicable to proceedings in justices' courts); section 1932, Rem. & Bal. Code of Washington (section 6673, Bal. Code).

[1a] It is error to grant a continuance on the oral statement of the attorney. Whaley v. King, 92 Cal. 431, 28 Pac. 579; and see Stewart v. Sutherland, 93 Cal. 270, 28 Pac. 947. See, also, McGrath v. Tallent, 7 Utah, 256, 26 Pac. 574.

[2] This does not seem to apply where the witness is in attendance upon a session of the legislature.

[3] If the evidence be not material a continuance must be refused. Hawley v. Stirling, 2 Cal. 470; Harper v. Lamping, 33 Cal. 641; People v. Mellon, 40 Cal. 648; People v. Williams, 43 Cal. 344; Kern Valley Bank v. Chester, 55 Cal. 49. Also, Storch v. McCain, 85 Cal. 304, 24 Pac. 639; Cohn v. Brownstone, 93 Cal. 362, 28 Pac. 953; Harloe v. Lambie, 132 Cal. 133, 64 Pac. 88.

In Hewes v. Andrews, 12 Colo. 161, 20 Pac. 338, it was held that where the issues were not fully framed, it would be necessary to show in the affidavit for continuance that such issues would arise as that the proposed evidence would be material. Also Dawson v. Coston, 18 Colo. 493, 33 Pac. 189.

In Longnecker v. Shields, 1 Colo. App. 264, 28 Pac. 659, the court held that where it appeared that the proposed evidence would be inadmissible a continuance should not be granted.

The materiality must be shown by stating what the witness would swear to if present.[4] This may seem somewhat inconsistent with the latter portion of the section, which provides that "the court *may* also require the moving party to state upon affidavit the evidence which he expects to obtain," etc. But this probably has reference to different degrees of particularity in the statement of the evidence. The party applying for a continuance must state the evidence of the absent witness with sufficient particularity to *show* that it is material. Ordinarily it would be sufficient for this purpose to state the ultimate facts to which the witness would swear. The court may, however, require greater particularity where there is a question of admitting what the witness would swear to if present. This seems to be the natural construction of the section.

2. *The Affidavit must Show That the Facts cannot be Proved by Other Witnesses.*—This requirement is not mentioned in the statute, but is firmly established by the decisions both in civil and criminal cases. Thus in People v. Quincy,[5] Murray, C. J., after stating that there was no showing as to diligence, said: "In addition to this, it may be observed that the affidavit is fatally defective in another particular, viz., it does not state that there are no other witnesses by which the same facts can be proved." So in Pierce v. Payne,[6] where the action of the court below denying a continuance was affirmed, Field, C. J., delivering the opinion, said: "The affidavit upon which the continuance was asked set forth the materiality of the testimony of the witness absent in Utah Territory; but did not state that the same facts which the defendant expected to establish by him could not, to the knowledge of the defendant, be proved by other persons resident within the reach of the process of the court. The premises are situated

[4] Carey v. Petroleum etc. Co., 33 Cal. 694, 1 Morr. Min. Rep. 349; People v. Ah Fat, 48 Cal. 61; Kern Valley Bank v. Chester, 55 Cal. 49; People v. Baker, 1 Cal. 403.

See, also, Kent v. Favor, 3 N. M. 218, 347, 5 Pac. 470; Murphy v. Hood, 12 Okl. 593, 73 Pac. 261; State v. Newton, 29 Wash. 373, 70 Pac. 31; Jackson v. Ins. Co., 45 Wash. 244, 88 Pac. 127; Maloney v. Stetson, 46 Wash. 645, 90 Pac. 1046; Portland etc. Co. v. Ladd, 47 Wash. 88, 91 Pac. 573; Gauthier v. Wood, 49 Wash. 8, 94 Pac. 654.

The affidavit for continuance should set forth the facts which it is alleged the absent witness will testify to with sufficient certainty to enable the court to determine the admissibility of the evidence, and the adverse party to admit it and go to trial, if he thinks proper. See Glenn v. Brush, 3 Colo. 26.

[5] People v. Quincy, 8 Cal. 89.

[6] 14 Cal. 419.

within the county of Sacramento, and if McDougall, as alleged, distinctly marked their outer boundaries, and resided upon, cultivated, and improved a portion of them, it is highly probable that evidence of the fact could have been found there. The absence of any averment on the point was a fatal defect in the affidavit." So in Pope v. Dalton,[7] Currey, C. J., delivering the opinion, said:

"When the case came on to be tried the defendant moved for a continuance on the ground of the absence of certain witnesses named, whom he deposed were necessary and material witnesses for defendant, without whose testimony he could not safely proceed to trial, and that he had no other witnesses by whom he expected to prove the same state of facts. It is exceedingly doubtful whether the facts which the defendant stated in his affidavit he expected to be able to prove by the absent witnesses were material to any issue joined in the cause. But were it conceded to be otherwise, the affidavit does not show that the absent witnesses were the only persons by whom he could prove the same facts. He deposed that he had not at the time he made the affidavit any other witnesses by whom he expected to prove the same state of facts. This will not do. There may have been, and probably were, many persons by whom he could have proved the same facts, and he may not have subpoenaed them or otherwise procured their attendance at the trial, and hence he could truly say he had no other witnesses than those named by whom he expected to prove the specified facts."

And so in other cases.[8] But it would seem that there might be cases in which the absence of witnesses would be ground for a continuance, although there were other persons who would testify to the facts desired to be proved. Thus if the point was a contested one, and the other side could produce numerous witnesses to testify concerning it, and the best witnesses of the moving party were absent, it would seem that a continuance ought to be granted, al-

[7] 31 Cal. 218.

[8] See People v. Mortimer, 46 Cal. 114; People v. Ashnauer, 47 Cal. 98; People v. Gaunt, 23 Cal. 156; People v. Thompson, 4 Cal. 238. Also, Dunlap v. Plummer, 1 Cal. App. 426, 82 Pac. 445, where it was held error to refuse a continuance where the deposition of the absent witness was the sole evidence by which mental incapacity could be established, the affidavit for the continuance being sufficient in form, and due diligence being shown in the attempt to procure the desired evidence.

See, also, Mutzenburg v. McGowan, 10 Colo. App. 486, 51 Pac. 523; Taylor v. Nevada etc. Co., 26 Nev. 415, 69 Pac. 858; Maloney v. Stetson, 46 Wash. 645, 90 Pac. 1046.

It is not sufficient to show that no other witness to the facts can be so readily obtained. See Abby v. Dexter, 18 Colo. App. 498, 72 Pac. 892.

though there were one or two persons whom he could produce to the point. The rule, therefore, does not seem to be an unbending one. Indeed, in the case of People v. Ah Lee Doon,[8a] where the evidence sought was strictly cumulative, the supreme court said:

"It is true that a trial will not be postponed ordinarily for the purpose of obtaining cumulative evidence, but this rule, which is by no means absolute, has no application to a case in which the only evidence at hand is that of an interested party, especially when he is defendant under indictment for murder. The ruling of the court against a continuance cannot be sustained on the ground that the evidence was cumulative."

The rule itself is borrowed from the doctrine as to newly discovered evidence, and as will hereafter appear, is subject to similar restrictions there.[8b]

In this connection it is proper to note that materiality is not alone an essential. It must also appear to be sufficient, together with the evidence already adduced, to establish a *prima facie* case.[8c] Otherwise the refusal of a continuance for the purpose of securing the evidence in question would be, at most, error without injury.

3. *The Affidavit must Show That Due Diligence has been Used.*— As above stated, the statute expressly requires that the affidavit should show not only that the evidence is material, but also that "due diligence has been used to procure it." And a showing as to diligence is insisted on in all the cases.[9] And as a general rule, the

[8a] 97 Cal. 171, 31 Pac. 933.

But see Cochrane v. Parker, 12 Colo. App. 169, 54 Pac. 1027, where it was held that it was not a sufficient ground to warrant a continuance where the evidence would merely enable one side to have a preponderance upon a disputed point. So in Huber v. Mother Aurelia Hospital, 13 Idaho, 276, 89 Pac. 942, it was held that it was not abuse of discretion to deny a continuance where the proposed evidence would conflict with that of the same witness at an earlier trial, even though diligence appeared, as well as an unavoidable accident.

As to facts testified to by other witnesses (hence cumulative), see, also, Creech v. Aberdeen, 44 Wash. 72, 87 Pac. 44, 12 Ann. Cas. 370.

[8b] See chapter 12, herein particularly sections 90 and 91, *post.*

[8c] See Youree v. Youree, 1 Cal. App. 152, 81 Pac. 1023, where the husband in a divorce suit asked for a continuance to enable him to secure an affidavit to establish the *bona fides* of a transfer of property. The court held that no abuse of discretion appeared, since the offer of the evidence in question was not accompanied with an offer of an explanation of other significant facts in connection with the contention that the proposed alimony was excessive, and so the determination of the single fact could not be regarded as sufficient to require the court to deny the alimony granted.

[9] People v. Baker, 1 Cal. 403; Hawley v. Stirling, 2 Cal. 470; Pierson v. Holbrook, 2 Cal. 598; People v. Thompson, 4 Cal. 238; Frank v. Brady, 8 Cal. 47; Kuhland v. Sedg-

party must show that he has resorted to the proper process in due season; that everything necessary to insure the service of such process has been done; and that the case is not such that he was required to take the testimony of the witness by deposition or commission, or if it be such, that he has used diligence to obtain the testimony in that manner. These requirements will be considered separately.

(a) The party must have resorted to the process of the court to compel the attendance of the witnesses. As stated by Cope, J., delivering the opinion in Kuhland v. Sedgwick:[10] "The party must have resorted to the proper legal means for that purpose, or he must show to the satisfaction of the court that a resort to such means would have been unavailing." The ordinary process to enforce the attendance of witnesses is subpoena. The party must show such a service as the witness is bound to obey.[11] Where an order of court is necessary in addition to the subpoena, the affidavit must show that such order was made.[12] And if a person who has been properly served does not appear, and he is within reach of an attachment, the party should move for an attachment.[13] It does not appear to be definitely settled whether the promise of the witness to attend excuses the failure to have him subpoenaed. In People v. Baker[14] and Frank v. Brady[15] it was held that the promise of the witness to attend did not excuse the failure to resort to the process of the court. But in People v. Brown,[16] the fact that the witnesses

wick, 17 Cal. 123; People v. Williams, 24 Cal. 31; People v. Jocelyn, 29 Cal. 562; People v. Francis, 38 Cal. 183; Leszinsky v. White, 45 Cal. 278; People v. Ashnauer, 47 Cal. 98. Also, People v. Beam, 66 Cal. 394, 5 Pac. 677; People v. Lampson, 70 Cal. 204, 11 Pac. 593; Tompkins v. Montgomery, 123 Cal. 219, 55 Pac. 997; People v. Logan, 123 Cal. 414, 56 Pac. 56; People v. Breen, 130 Cal. 72, 62 Pac. 408; Harloe v. Lambie, 132 Cal. 133, 64 Pac. 88; People v. Lang, 142 Cal. 482, 76 Pac. 232; Dunlap v. Plummer, 1 Cal. App. 426, 82 Pac. 445.

See, also, Solomon v. Norton, 2 Ariz. 100, 11 Pac. 108; Litchfield v. Daniels, 1 Colo. 268; Cody v. Butterfield, 1 Colo. 377; Tiger v. Lincoln, 1 Colo. 394; Koch v. Story, 47 Colo. 335, 107 Pac. 1093; Hart v. Green, 16 Colo. App. 70, 65 Pac. 344; Banker etc. Co. v. Allen, 20 Colo. App. 351, 78 Pac. 1070; Rankin v. Caldwell, 15 Idaho, 625, 99 Pac. 108; Walsh v. Winston, 18 Idaho, 768, 111 Pac. 1090; Perea v. Life Ins. Co. (N. M.), 110 Pac. 559; Swope v. Burnham, 6 Okl. 736, 52 Pac. 924; Charter Oak Co. v. Gisborne, 5 Utah, 319, 15 Pac. 253; Kearney Works v. McPherson, 5 Wyo. 178, 38 Pac. 920.

[10] 17 Cal. 123.

[11] People v. Jocelyn, 29 Cal. 562.

[12] People v. Williams, 24 Cal. 31.

[13] People v. Weaver, 47 Cal. 106.

[14] 1 Cal. 403.

[15] 8 Cal. 47; and see Lightner v. Menzel, 35 Cal. 452.

[16] 46 Cal. 102. The authorities cited in this case do not touch the point under consideration.

promised to attend, and that the defendant relied upon their promises, was held to have relieved him from the necessity of taking their deposition. Probably if the witnesses were reputable and well-known citizens of the community, a party would be entitled to rely on their promise to attend.[16a]

(b) The process must have been resorted to in due season. If process be taken out too late it might as well have not been taken out at all. Where a party did not apply for process until the evening before the trial, it was held that he had not exercised diligence.[17] What is "due season" must depend to a great extent upon the circumstances of each case. If the witnesses are well-known members of the community, with a known residence or place of business, and there is no reason to apprehend that they will not be at such place when wanted, and no reason to suspect that they will seek to avoid appearing, it would probably be sufficient to take out subpoenas the morning before the trial; but it would even in such case be more prudent to take them out a day before that. And the circumstances might be such that a longer time would be required.

(c) Everything necessary to insure the service of the subpoenas must have been done. Merely placing them in the hands of the sheriff is not sufficient, for the sheriff is not ordinarily supposed to know the whereabouts of the witness as well as the party. Thus where the affidavit was that "four days before the date of the affidavit the subpoena for the witness had been issued and placed in the hands of the sheriff, and that the sheriff had not been able to find the witnesses," it was held that the showing was insufficient.[18] So where the affidavit simply stated that a subpoena had been issued and placed in the hands of the sheriff of Sacramento county, that said witnesses were residents of said county, and that the sheriff had returned said subpoena not served on said witnesses, no reason being assigned as to why it was not served, and it not appearing that the sheriff was notified as to what place in Sacramento county the witnesses resided, or whether any effort was made to find them, the showing was said to be insufficient.

(d) The party must show that the case is not such that it was incumbent upon him to take the testimony of the witness by deposi-

[16a] The following decisions also illustrate the principle involved: Abby v. Dexter, 18 Colo. App. 498, 72 Pac. 892; Corporation etc. v. Watson, 30 Utah, 126, 83 Pac. 731; Kearney Works v. McPherson, 5 Wyo. 178, 38 Pac. 920; and see Lux v. McLeod, 19 Colo. 465, 36 Pac. 246.

[17] People v. Quincy, 8 Cal. 89; look at Frank v. Brady, 8 Cal. 47; People v. Baker, 1 Cal. 403.

[18] Jacks v. Buell, 47 Cal. 162.

tion or commission, or if it be such, that he has used diligence to obtain it in that mode. The Code of Civil Procedure provides that the testimony of a witness may be taken in certain cases by deposition or commission.[19] And where there is reason to apprehend that the witness cannot be present at the trial, the party is ordinarily required to take his testimony by deposition or commission as the case may be. This, however, is not an unbending rule. When there is a reasonable expectation of obtaining the presence of the witness, the party may delay a reasonable time in order to obtain such presence. This was held in People v. Dodge.[20] In that case the witness was in another county of the state, and for several weeks had been too ill to attend the trial; but her physician testified that if quiet was secured to her she might possibly be able to attend the trial within two months; the court below refused a continuance, but the supreme court reversed the judgment, and Sanderson, C. J., delivering the opinion, said:

"A defendant in a criminal action is undoubtedly entitled to the personal attendance of his witnesses at the trial, if the same can be obtained without unreasonable delay. Such is the policy of the law, not merely from considerations affecting the defendant alone, but also from considerations affecting the ends of public justice, irrespective of individual interests, which is manifest from the fact that the depositions of such witnesses are allowed to be read in evidence only upon further evidence at the trial that their personal attendance cannot be obtained. (Sec. 582.) It is to the interest of the people as well as the defendant that the witnesses of the latter should be made to give their testimony in the presence of the jury, for we all know by daily experience how much weight is added to or taken from testimony by the personal appearance, bearing, and manner of the witness while under examination; if these add to the weight of his testimony, the defendant ought not to be deprived of such effect except upon grounds of necessity; if they detract therefrom, such effect should be secured to the people, in order that the ends of public justice may be subserved. Thus this rule requiring the personal attendance of witnesses, if the same can be had, is founded upon considerations of the wisest policy, and the provisions of the statute whereby the defendant is enabled to examine condi-

[19] Sections 2020, 2021, Code of Civil Procedure of California.

[20] 28 Cal. 445; look at People v. Francis, 38 Cal. 183, and People v. Brown, 46 Cal. 102. See, also, Yori v. Cohn, 26 Nev. 206, 65 Pac. 945, 67 Pac. 212.

tionally on commission a witness who is about to leave the state, or is sick or infirm, as to afford reasonable grounds for apprehending that he will be unable to attend the trial, were not designed to impair the rule or abridge the previous rights of the defendant, but, on the contrary, to enlarge those rights by enabling him to secure testimony of which he would otherwise be deprived, and at the same time preserve the rule in full force so far as the same could be done in view of the right conferred by the statute. When, therefore, it is made to appear that the personal attendance of the absent witness may be procured without unreasonable delay, a resort to the statutory mode of taking his testimony ought not to be forced upon the defendant against his will under penalty of going to trial without it. What would be an unreasonable delay must of course depend upon all the circumstances of the case; but it is certain that a delay of one term of court upon a first application would not be unreasonable."

The foregoing reasoning applies to civil as well as criminal cases, although perhaps to a less extent. But the doctrine is exceptional in character, and the chance of obtaining the personal attendance of the witness ought to be very good in order to excuse the omission to take his testimony by deposition or commission.[21]

When the circumstances are such that the party ought not to wait for the personal attendance of the witness, he must use diligence to take his testimony by deposition or commission. With reference to commissions this is expressly provided by the statute.[22]

And the same rule undoubtedly applies to depositions. What amounts to diligence must depend upon the circumstances of each case. Where the answer of the defendant was filed on May 10th, and the application for a continuance to take the testimony of a witness in New York was made June 14th, of the same year, it was held that no diligence was shown.[23]

[21] An affidavit showing that at the preceding term the case had been continued on account of the absence of a material witness; that as the party was about proceeding to have a commission issued to take the testimony of the witness, he learned from persons who would be likely to know that the witness intended to return to the state, and would be present at the trial; and that he had inquired for the last month as to whether said witness had returned, and had only learned within a few days before the trial that the witness had not returned to the state, is not a sufficient showing of diligence. Kuhland v. Sedgwick, 17 Cal. 123; and look at People v. Francis, 38 Cal. 183.

[22] Section 2027, Code of Civil Procedure of California.

[23] Pierson v. Holbrook, 2 Cal. 598; and look at Hawley v. Stirling, 2 Cal. 470. See, also, Tompkins v. Mont-

4. *The Affidavit must Give Some Assurance That the Testimony of the Absent Witness can be Procured Within a Reasonable Time.* The only object of the continuance is to enable the party to obtain the testimony of the absent witness. If there be no probability of obtaining his testimony within a reasonable time, there is no reason for a continuance.[24] Thus in People v. Cleveland,[25] the fact that the absent witness was a fugitive from justice, whose testimony could not probably be obtained, was one of the reasons upon which it was held that the showing was insufficient. So in People v. Ah Yute,[26] where the affidavit showed that the absent witness had left for Portland, Oregon, about nine months before the motion for a continuance was made, but did not state that he had been heard from since his departure, or any fact tending to show that his attendance could be procured, the showing was held to be insufficient, the court saying: "He should have stated facts from which the court might infer that there was reasonable ground to believe that the attendance of the witness or his testimony could be procured at a future day."

And the party should not merely state that he can procure the attendance or obtain the deposition of the witness by a certain time; he should state the facts which render it probable that he can do so. In this regard Crockett, J., delivering the opinion in People v. Francis,[27] said: "The affidavit of the defendant is extremely vague and unsatisfactory. It does not state explicitly his belief that the personal attendance of the witnesses can be procured; but as we construe it, he intends only to depose in the alternative, that he can procure either their personal attendance or their depositions for the next term. If he knew when he made the affidavit that he could *not* procure their personal attendance, but believed in good faith that he could obtain their depositions for the next term, he could not be convicted of perjury on this affidavit. But if the affidavit had stated explicitly his belief that he could procure their personal attendance at the next term, it would still have been insufficient unless the reasons for his belief had been set forth to enable the court to decide whether his belief was

gomery, 123 Cal. 219, 55 Pac. 997; Baldwin etc. Co. v. Davis, 15 Colo. App. 371, 62 Pac. 1041.

[24] Harper v. Lamping, 33 Cal. 641; People v. Ashnauer, 47 Cal. 98; People v. Francis, 38 Cal. 183; People v. Cleveland, 49 Cal. 577; People v. Ah Yute, 53 Cal. 613; People v. Ah Fat, 48 Cal. 61.

[25] 49 Cal. 577.

[26] 53 Cal. 613.

[27] 38 Cal. 183.

well founded; or if he acted on the information of others, he should have stated the nature and particulars of the information. In applications for continuance 'the allegation that the party has used all the diligence in his power is not sufficient. It should be shown to the court of what such diligence consisted—whether by exhausting the process of the court or otherwise.' (People v. Thompson, 4 Cal. 238.) For the same reason, if a party states on information and belief that he can procure the personal attendance of a witness from a distant foreign country, he should set forth the reasons for his belief and the nature of his information, that the court may decide whether or not there is reasonable ground to believe that the witness will attend. If continuances could be procured on such affidavits as this, the delays in the administration of justice would soon become intolerable.''

So in Stewart v. Sutherland,[27a] where the defendant asked for a continuance until he could secure certified copies of certain papers from the United States land office at San Francisco, stating that the register was dead and the office vacant, and that the copies required could not be obtained until the appointment of a new register, the court held that in the absence of a showing as to when the register died, or why the defendant had not procured the needed evidence before the case was called for trial, or when it could probably be procured, it was not error to refuse a continuance on the ground stated. So in People v. Ah Lee Doon,[27b] where the continuance was asked in order that a witness, absent in China, might testify in defendant's behalf, a showing that omitted such facts as would satisfy the court of the witness' intention or ability to return, or his right to enter the country, if he did return, was held to be insufficient for the purpose. So in People v. Leyshon,[27c] where the continuance was asked to enable a witness outside the state to appear and testify, a showing that defendant was merely informed that the witness would return to the state was held insufficient, in the absence of an additional showing of the grounds for the belief that the witness would return, and the source of the information. So in People v. Sanders,[27d] where the continuance was asked to enable the defendant to procure the attendance of a material witness, a showing that such materiality had been known for a year, and diligent search had been made

[27a] 93 Cal. 270, 28 Pac. 947.
[27b] 97 Cal. 171, 31 Pac. 933.
[27c] 108 Cal. 440, 41 Pac. 480.
[27d] 114 Cal. 216, 46 Pac. 153.

during that time to obtain his presence at the trial, both by the prosecution and the defense, without success, and there was no reasonable assurance that further search would be more successful, or that further postponement of the trial would enable the parties to procure the attendance of the absent witness, was held not to justify a continuance for that purpose. And so in other cases.[27e]

5. *Avoiding a Continuance by Admitting What the Witness Would Swear to if Present.*—As above shown, section 595 of the code provides that "the court may also require the moving party, where application is made on account of the absence of a material witness, to state upon affidavit the evidence which he expects to obtain; and if the adverse party thereupon admits that such evidence would be given, and that it be considered as actually given on the trial, or offered and overruled as improper, the trial must not be postponed." A substantially similar clause was in section 158 of the old Practice Act from the time of its adoption in 1851. The provision that the court may require the moving party to state upon affidavit the evidence he expects to obtain is for the purpose of preventing any ambiguity in the evidence or doubt as to what it is admitted the witness would swear to.[28] The admission must be as broad as the affidavit; an admission of a part only of what it is stated the witness would swear to is not sufficient.[29] But if the admission of the opposite party does cover all that the affidavit shows is to be proved by the testimony of the absent witness, it is sufficient; and in such case there remains, of course, no need for a continuance for the purpose of securing the attendance of the witness himself, and it is not error, under such circumstances, to deny the same.[29a]

[27e] People v. Lewis, 64 Cal. 401, 1 Pac. 490; People v. Wade, 118 Cal. 672, 50 Pac. 841; People v. Breen, 130 Cal. 72, 62 Pac. 408. See, also, Doll v. Stewart, 30 Colo. 320, 70 Pac. 326; Purse v. Purcell, 43 Colo. 50, 95 Pac. 291; Murphy v. Hood, 12 Okl. 593, 73 Pac. 261; Shannon v. Consolidated etc. Co., 24 Wash. 119, 64 Pac. 169; Leghorn v. Nydell, 39 Wash. 17, 80 Pac. 833; Keffer v. State, 12 Wyo. 49, 73 Pac. 556.

[28] See section 61, subdivision 1, *ante*.

[29] Peck v. Lovett, 41 Cal. 521; People v. Brown, 54 Cal. 243.

[29a] Loftus v. Fischer, 113 Cal. 286, 45 Pac. 328. See, also, Simpson v. Simpson (Cal.), 41 Pac. 804, of similar purport. See, also, Hartford etc. Co. v. Hammond, 41 Colo. 323, 92 Pac. 686; Zobel v. Rawlings etc. Co. (Colo.), 111 Pac. 843; Baldwin etc. Co. v. Davis, 15 Colo. App. 371, 62 Pac. 1041; Tague v. Caplice Co., 28 Mont. 51, 72 Pac. 297; Chandler v. Colcord, 1 Okl. 260, 32 Pac. 330; Waldron v. Home etc. Co., 16 Wash. 193, 47 Pac. 425; Benson v. Hamilton, 34 Wash. 201, 75 Pac. 805; McNeally v. State, 5 Wyo. 59, 36 Pac. 824.

The affidavit is considered as the deposition of the witness, and is not entitled to any more credence than if the testimony of the witness had been regularly taken by deposition.[30]

§ 62. Continuance for Absence of Counsel.—The fact that the counsel supposed that the case could not be reached until a subsequent term, and therefore did not attend, is no ground for a continuance.[1] Nor is the absence of the attorney on other professional business a ground for a continuance.[2] But the absence of counsel from some sudden and unforeseen cause (there being no reasonable opportunity to employ other counsel) is ground for a continuance. This was held with reference to criminal causes in People v. Logan.[3] In that case a continuance was moved for on the affidavit of the junior counsel, to the effect that the senior counsel was too ill to try the case, and that he, the junior counsel, was not only too unwell to try the case, but was incompetent to do so, being entirely ignorant of the facts, and of the grounds of defense. The judgment was reversed for the denial of a continuance, and Murray, C. J., delivering the opinion, said:

"We regard the absence of counsel under the circumstances shown in the record as good cause for the postponement of the trial; particularly so in a criminal case, where the life of the party is in jeopardy. In such cases the counsel who has been employed is supposed to have possessed himself of all the facts of the case; his client, as a general rule, has explained every circum-

[30] This is clear from the terms of the section. See, also, Blankman v. Vallejo, 15 Cal. 638. The avoidance of a continuance by admitting that the witness, if present, would swear as claimed, would not be permissible in the absence of a statute to that effect. People v. Diaz, 6 Cal. 248. Also, People v. Leyshon, 108 Cal. 440, 41 Pac. 480.

[1] Lightner v. Menzel, 35 Cal. 452. It is said in this connection that counsel will not be allowed to speculate upon the probable, or the ordinary, course of events, and then complain because they did not go as expected. See Perea v. Life Ins. Co. (N. M.), 110 Pac. 559.

[2] Haight v. Green, 19 Cal. 113; and look at Mulholland v. Heynemann, 19 Cal. 605. It has been for some time the practice in San Francisco, to accept the actual engagement of counsel in another court as ground for a continuance. While in some cases unexpected engagements ought to be grounds for a continuance, the practice is capable of great abuse. For a lawyer in large practice may so arrange his engagements as to put off a case for a long time. Such an excuse ought not to be accepted more than once, or, at most, twice. Also, People v. Collins, 75 Cal. 411, 17 Pac. 430; People v. Goldenson, 76 Cal. 328, 19 Pac. 161; Baumberger v. Arff, 96 Cal. 261, 31 Pac. 53; People v. Warren, 130 Cal. 678, 63 Pac. 87; Tiffin v. Cummings, 144 Cal. 612, 78 Pac. 23.

[3] 4 Cal. 188. And, as to civil cases, see Eltzroth v. Ryan, 91 Cal. 584, 27 Pac. 932; Peachey v. Witter, 131 Cal. 316, 63 Pac. 468.

stance, so as to enable him to unravel the tangled web of contradictory evidence; to explain the points of testimony, or controvert them, as they are developed; in short, to do all that may be necessary to a skillful and successful defense. Under such circumstances, it would operate not only a great hardship, but in fact a total denial of justice when some sudden accident or indisposition, over which he had no control, and in which he had no participation, had deprived him of his counsel, to compel him to go to trial without at least affording him sufficient time to employ other counsel, and prepare for his defense. The reason of the rule, and the practical injustice of any other, are too obvious to every lawyer to require argument at the hands of this court. It is said that counsel may feign sickness, or purposely absent themselves to prevent a trial. We cannot readily yield to the suggestion that any officer of this court or member of the bar would resort to dishonest or dishonorable means to defeat the ends of justice. Such cases will rarely occur; the power of the court over its officers will be found a sufficient restraint against them, and if they should, the injury resulting will be far less than the wrong resulting from an arbitrary enforcement of the rule contended for."

In the case of Thompson v. Thornton,[4] the rule above laid down was applied to a civil case. There the trial was in Stockton, the defendant's counsel residing in San Francisco. The ground of the application for a continuance was the illness of the counsel's family, so extreme in its character that the attending physician forbade him to leave, saying that "no prudent man could think of leaving his family for any length of time in the condition they were in." The clients received information of this by a telegraphic dispatch on the morning of the trial. They asked for time to enable them to employ other counsel, but the court would grant no postponement whatever. The supreme court reversed the judgment, saying that time at least sufficient to enable the defendant to procure other counsel and to enable such counsel to prepare the case for trial should have been granted.

In the more recent civil case of Berentz v. Belmont Oil Min. Co.[4a] it was held not an abuse of discretion to deny a motion for a continuance based upon the sole ground that counsel for the

[4] 41 Cal. 626.

[4a] 148 Cal. 577, 113 Am. St. Rep. 308, 84 Pac. 47.

moving party was detained by previous professional engagements in another county. The court said:

"It should have been made to appear that under the circumstances other professional advice was unavailable, and that there was a meritorious defense to the action, which could not be effectively presented without the presence of the absent attorney."

The rule to be extracted from these cases seems to be this: that where the counsel is prevented from attending by some sudden and unforeseen cause, the court should allow sufficient time for the preparation of the case for trial by some other counsel.[4b] Continuances for the absence of counsel, as for other causes, is in the discretion of the court, and the action of the court will be disturbed only for abuse of discretion.[5]

Inability of counsel, though present, to conduct the trial, as by reason of inflamed eyes, is not necessarily ground for a continuance.[5a]

Continuances are seldom asked on account of absence of the party himself, but it is sometimes done. When offered as a ground for the motion, it is entitled to the same consideration as absence of counsel, or other grounds, and is controlled by the same rule as to exercise of discretion as governs in all other cases. In Jaffe v. Lilienthal,[6] where absence of the plaintiff was offered as a ground for a continuance, and it appeared from affidavits in support of the motion that he was a nonresident, was confined to his bed by an attack of acute rheumatism, to which he was subject, that it would probably be two months before he could attend at the trial of his case, and that it was necessary for him to be present, his attorney not being informed as to the whereabouts of the witnesses, a denial of the motion was held on appeal to have been

[4b] The following cases illustrate the principles involved: Tiffin v. Cummings, 144 Cal. 612, 78 Pac. 23; Reynolds v. Campling, 23 Colo. 105, 46 Pac. 639; Hartford etc. Co. v. Hammond, 41 Colo. 323, 92 Pac. 686; Keegan v. Donnelly, 11 Colo. App. 31, 52 Pac. 292; Colorado etc. Co. v. Oliver, 20 Colo. App. 257, 78 Pac. 308; Rankin v. Caldwell, 15 Idaho, 625, 99 Pac. 108; York v. Steward, 30 Mont. 363, 76 Pac. 755; Luke v. Coffee, 31 Nev. 165, 101 Pac. 555; Skagit etc. Co. v. Cole, 1 Wash. 330, 26 Pac. 535; Catlin v. Harris, 7 Wash. 542, 35 Pac. 385; Zelinsky v. Price, 8 Wash. 256, 36 Pac. 28; Van Horn v. State, 5 Wyo. 501, 40 Pac. 964.

[5] Kern Valley Bank v. Chester, 55 Cal. 49; Wiedekind v. Water Co., 53 Cal. 198, 23 Pac. 311; People v. Ward, 105 Cal. 335, 38 Pac. 945; In re Nasson's Estate, 141 Cal. 33, 74 Pac. 436; Lindy v. McChesny, 141 Cal. 33, 74 Pac. 436; In re Bollinger's Estate, 145 Cal. 751, 79 Pac. 427.

[5a] See Hawes v. Clark, 84 Cal. 272, 24 Pac. 116.

[6] 101 Cal. 175, 35 Pac. 636. Also, Morehouse v. Morehouse, 136 Cal. 332, 68 Pac. 976.

an abuse of discretion, no counter-affidavits having been filed. The court said:

"With all the care that can reasonably be taken by both attorney and client, some matter of vital importance is liable to be overlooked by them until the trial calls it to the recollection of the plaintiff, and this is especially true in relation to matters purely in rebuttal. It is the right of the parties to be present at the trial of their cases. This right may be waived, and should be held to be waived where the absence of the party is voluntary and under circumstances which ought not to induce a reasonable man, having a due regard for the rights and interests of others and of the public, all of whom are interested in the due and prompt administration of justice, to absent himself."

At the same time, it is essential that the affidavit accompanying the motion for a continuance for absence of a party should contain some sort of a showing that the interests of the party would be materially jeopardized by his absence during the trial of the cause. In Queirolo v. Queirolo,[7] where no such showing was made and the motion was based solely on illness and consequent inability to attend the trial, and it did not appear that there was even any denial of the averments of the petition, or any showing that, if present, and testifying, she would testify contrary to such averments, or that her presence was in any wise necessary at the hearing, the court held that the continuance was properly refused.

The sickness of a party, preventing his attendance at the trial, does not, *ipso facto*, require the court to grant a continuance.[8]

§ 63. Miscellaneous Matters in Relation to Continuances—Terms—New Pleadings—Filing of Remittitur in Another Case, etc.—A continuance may be granted on condition that certain items of costs be paid by the moving party;[1] and where a continu-

[7] 129 Cal. 686, 62 Pac. 315.

[8] Lynch v. Superior Court, 150 Cal. 123, 88 Pac. 708. But see cases cited in note 6, above. See the following cases in which sickness was made the basis for the request: Harloe v. Lambie, 132 Cal. 133, 64 Pac. 88; Light v. Richardson (Cal.), 31 Pac. 1123; Rubens v. Mead (Cal.), 53 Pac. 432; Gainsley v. Gainsley (Cal.), 44 Pac. 456; Elliott v. Field, 21 Colo. 378, 41 Pac. 504; Hamill v. Hall, 4 Colo. App. 290, 35 Pac. 927; McMahan v. Norick, 12 Okl. 125, 69 Pac. 1047; and see generally, upon the subject of the absence of parties as a ground for the motion of continuance, and a basis for the exercise of discretion, McConnell v. Fox, 2 Cal. App. 329, 83 Pac. 259; Miller v. Brown, 18 Idaho, 200, 109 Pac. 139; Robertson v. Woolley, 6 Wash. 156, 32 Pac. 1060; Portland v. Ladd, 47 Wash. 88, 91 Pac. 573.

[1] See section 1029, California Code of Civil Procedure. And see Eltzroth

ance is so granted, its acceptance is in effect an agreement to pay the same, and having accepted the postponement the party cannot be heard to say that the imposition of any item of costs was beyond the power or discretion of the court.[2] When such a condition is attached to the granting of a continuance, it is not error to proceed with the trial upon the refusal of the moving party to pay the costs or abide by the conditions thus imposed.[3]

New Pleadings and Issues.—Continuances are sometimes asked for the purpose of filing new pleadings and making new issues, and procuring evidence in support thereof.[4] This not infrequently happens where amendments are allowed the adverse party at the beginning of the trial, or at such a time that the moving party is otherwise at a disadvantage.[4a]

Filing of Remittitur in Another Case.—It sometimes happens that a party to an action asks for a continuance to enable him to introduce as evidence a judgment in another pending action. Such a request is addressed to the discretion of the court. If the action is pending on appeal, the application should be for a continuance to a day subsequent to the filing of the *remittitur* in the other case. In Chamberlain v. Loewenthal [5] the refusal of the trial court to grant the continuance was sustained, it appearing that the adverse party had expressed a willingness to allow the judgment to be introduced as evidence notwithstanding the appeal; from which it did not appear that the appellant (moving party) had been precluded from introducing any evidence upon the issue as a result of the refusal of the continuance; besides the character of the evidence and its materiality was not made to appear in the record.

Continuance to Await Determination of Other Actions in Which the Same or Dependent Issues are Involved.—In Macomber v. Bigelow [6] it was held to be the duty of the trial court to continue the trial of an action between the parties to a void building con-

v. Ryan, 91 Cal. 584, 27 Pac. 932; Pomeroy v. Bell, 118 Cal. 635, 50 Pac. 683; Bashore v. Superior Court, 152 Cal. 1, 91 Pac. 801. And see Warehime v. Schweitzer, 51 Wash. 299, 98 Pac. 747.

[2] Bashore v. Superior Court, 152 Cal. 1, 91 Pac. 801.

[3] Eltzroth v. Ryan, 91 Cal. 584, 27 Pac. 932; Pomeroy v. Bell, 118 Cal. 635, 50 Pac. 683.

[4] See Schultz v. McLean, 109 Cal. 437, 42 Pac. 557.

[4a] See, in illustration, Polk v. Coffin, 9 Cal. 56; Ellen v. Lewison, 88 Cal. 253, 26 Pac. 109; Marr v. Rhodes, 131 Cal. 267, 63 Pac. 364.

[5] 138 Cal. 47, 70 Pac. 932.

[6] 123 Cal. 532, 56 Pac. 449.

tract, where it was shown that other actions were pending for the foreclosure of liens in favor of subcontractors with respect to the same transaction. So, in an action to recover lands claimed under United States patent alleged to have been fraudulently obtained, a continuance for a reasonable time is proper to await the determination of a suit to set aside the patent on the ground of fraud.[6a]

Of a similar nature is a case where a continuance is asked in a subsequent action for the same cause, where the prior action is pending after judgment, and has not become final. The continuance should be granted, unless the action itself is dismissed.[7]

Miscellaneous.—The mistaken advice of counsel as to the time the case would be called for trial is not ground for continuance.[8] Effect of agreeing to set case for trial.[9] Continuance under peculiar circumstances as to time and place of trial.[10] The party obtaining a continuance may be required to consent that the testimony of his adversary's witnesses shall be taken by deposition.[11] Upon the motion for new trial on the ground of the denial of a motion for a continuance for absence of witnesses, the affidavits of the witnesses should, if possible, be produced.[12] A party must make his motion for a continuance promptly. He is not allowed to wait until he sees how the case is going before he makes his motion.[13]

Where a defendant is already represented by counsel, it is wholly discretionary as to whether a continuance will be granted to enable him to secure additional counsel.[14] As to a continuance for want of time to prepare for a defense.[15] The exercise of discretion applies to short postponements or adjournments.[16] As to

[6a] Rose v. Superior Court, 65 Cal. 570, 4 Pac. 577.

[7] Brown v. Campbell, 110 Cal. 644, 43 Pac. 12.

[8] Musgrove v. Perkins, 9 Cal. 211; Lightner v. Menzel, 35 Cal. 452.

[9] Meagher v. Gagliardo, 35 Cal. 602.

[10] Ross v. Austill, 2 Cal. 183.

[11] Section 506, Code of Civil Procedure of California. And see Thomas v. Black, 84 Cal. 221, 23 Pac. 1037.

[12] Pilot Rock Creek Co. v. Chapman, 11 Cal. 161; People v. De Lacey, 28 Cal. 589; People v. Jocelyn, 29 Cal. 562.

[13] McLear v. Hapgood, 85 Cal. 555, 24 Pac. 788. Also, Ferrer v. Home etc. Co., 47 Cal. 416.

[14] People v. Putnam, 129 Cal. 258, 61 Pac. 961.

[15] People v. Ward, 105 Cal. 335, 38 Pac. 945. And see Dusy v. Prudom, 95 Cal. 646, 30 Pac. 798. See People v. Winthrop, 118 Cal. 85, 50 Pac. 390, where continuance was asked and denied, and abuse of discretion claimed because defendant was forced to go to trial "with unseemly haste."

[16] People v. Shaw, 111 Cal. 171, 43 Pac. 593. And see Schultz v. McLean, 109 Cal. 437, 42 Pac. 557, where the action of the court in limiting continuance to twenty-four hours was sustained.

want of good faith.[17] Objections to granting or refusing continuances may be waived.[18]

Where material evidence, such as a letter, has been in the possession of a party, its absence, by reason of having been inadvertently mislaid, is not ground for a continuance.[19]

The rule as to probable difference of result has been held to apply to the subject of continuances, where the ground of the motion is a want of material evidence, in the same way as to newly discovered evidence.[20]

[17] People v. Mortimer, 46 Cal. 114; Barnes v. Barnes, 95 Cal. 178, 30 Pac. 298, 16 L. R. A. 660; People v. Leyshon, 108 Cal. 440, 41 Pac. 480.

[18] For instances and grounds of waiver, see Myers v. McDonald, 68 Cal. 162, 8 Pac. 809; Schultz v. McLean, 109 Cal. 437, 42 Pac. 557.

[19] Kuhland v. Sedgwick, 17 Cal. 123.

[20] See Jackson v. Mercantile etc. Co., 45 Wash. 244, 88 Pac. 127.

CHAPTER X.

GROUNDS OF THE MOTION—MISCONDUCT OF THE JURY.

§ 64. The statute—Scope of subject.
§ 65. Sleeping during the trial.
§ 66. Jury on retiring must not take documents not permitted by the court.
§ 67. Jury must not receive any information about the case other than that furnished upon the trial in open court.
§ 68. Communications with third persons during trial, and any communications whatever while deliberating, not allowable.
§ 69. Separation of jury.
§ 70. Jurors drinking liquor.
§ 71. Verdict must be the result of mutual consultation and deliberation, and not of chance.
§ 72. Disclosure of verdict.
§ 73. Affidavits of jurors not admissible to impeach their verdict, except where arrived at by resort to chance.
§ 74. Affidavits of jurors are admissible to sustain their verdict.
§ 74a. Miscellaneous.

§ 64. The Statute—Scope of the Subject.—The second subdivision of the section specifying the grounds of the motion[1] is as follows:

"Misconduct of the jury; and whenever any one or more of the jurors have been induced to assent to any general or special verdict, or to a finding on any question submitted to them by the court, by a resort to the determination of chance, such misconduct may be proved by the affidavit of any one of the jurors."

A substantially similar provision has been in the statute since 1862. Before that the second subdivision was "misconduct of the jury."[2] The clause as to the affidavit of the jurors was added by the amendment of 1862.[3]

As already stated,[4] it is impossible to distinguish, upon any intelligible principle, cases of "misconduct of the jury" from cases of "irregularity of the jury." For convenience the latter term has been limited to occurrences in the formation of the jury, and the former term will be considered to include improper occurrences after the jury has been accepted and sworn. This is merely for

[1] Section 657, California Code of Civil Procedure. See section 23, *ante*, as to corresponding provisions of other states.

[2] See Laws of 1851, p. 81, sec. 193 (California).

[3] See Laws of 1862, p. 38 (California).

[4] See section 42, *ante*.

convenience of arrangement. Improper conduct of the jury after the commencement of the trial could in all probability be presented under either subdivision; the prudent practitioner will apply for relief under both subdivisions. Nothing will be attempted in this chapter beyond giving some of the leading rules in relation to "misconduct" of the jury.

The rule stated with reference to irregularities, viz., that if the occurrence be such that it *may* have prevented a fair trial, the verdict must be set aside, unless the prevailing party can show that as a matter of fact it had no such effect,[5] applies to cases of "misconduct."

A distinction has sometimes been referred to between "intentional misconduct of the jury" and misconduct of some other kind.[6] Such a distinction might properly be drawn in reference to certain kinds of misconduct, where the intention of a juror is of the essence of the misconduct, as in improper communications, or unauthorized separation involving prejudice; or, it might properly enter into a question of punishment of the juror himself, as for contempt; but it is not easy to understand why the question of intent should enter into a case of misconduct resulting in prejudice to the losing party, where the result would have been the same whether accompanied by intention or inadvertence, if such a case were possible. In practice, it is perhaps not far away from the absolute truth to say that all misconduct of a prejudicial character is essentially intentional misconduct. But the cases are few and not very clear.

§ 65. **Sleeping During the Trial.**—It can scarcely ever occur that a new trial ought to be granted for the sleeping of jurors during the trial. For such thing could hardly happen, except for a short time, without its being noticed by the parties; and if the losing party knew of the occurrence and omitted to call attention to it, he would not be allowed to make it a ground for new trial.[1] The point was made in several cases, but was not considered worthy of consideration.[2] In the case of Hogshead v. State,[3] a new trial was

[5] See section 26, subdivision 2, *ante*.

[6] Gaynor v. Clements, 16 Colo. 209, 26 Pac. 324. And see Shannon v. Tacoma, 41 Wash. 220, 83 Pac. 186, where nonattention, not willful in character, was held not to be ground for a new trial.

[1] See section 27, *ante*.

[2] Pelham v. Page, 6 Ark. 535; Baxter v. People, 8 Ill. 368; Cogswell v. State, 49 Ga. 103.

[3] 6 Humph. 59.

granted on account of the mental condition of one of the jurors. The habits of the juror were such as frequently to bring on delirium tremens. During the trial he seemed to be in a state of dull and stupid abstraction, and while the jury were in charge of the officer he was threatened with a spasm, and was on the verge of an attack of delirium tremens. The physician who usually attended him on such occasions, on being sent for, found his patient in such a condition as enabled him to testify that he could not have been in a condition to have possessed himself of the facts of the case so as to perform the duties of a juror in a rational manner. The verdict was set aside "upon the ground that it is probable that during the investigation of the cause in court, and the deliberations of the jury upon their verdict, the juror in question was not in a state of mental and bodily health enabling him to perform his duties intelligently," and that the fact was unknown to court and counsel during the trial.

This case, however, is different from sleep. The juror was more or less permanently incapacitated by disease, the result of which was not so apparent as the result of sleep would have been. No case has been found where a new trial was granted because a juror slept during the trial.

§ 66. The Jury must not Take With Them on Retiring Other Documents Than Those Permitted by the Court.—In California the documents which the jury may take with them on retiring are specified in section 612 of the Code of Civil Procedure, which is as follows:

"Sec. 612. Upon retiring for deliberation the jury may take with them all papers which have been received as evidence in the cause, except depositions or copies of such papers as ought not in the opinion of the court to be taken from the person having them in possession; and they may also take with them notes of the testimony or other proceedings on the trial taken by themselves, or any of them, but none taken by any other person."[1]

[1] See section 191, Mills' Annotated Code of Colorado, which is practically the same as the California provision, with the addition, after the word "depositions," of the phrase, "accounts and account books." Also, section 4388, Revised Codes of Idaho, and section 6749, Revised Codes of Montana (section 1083, Code of Civil Procedure), which are identical with the California section. Also section 3264, Cutting's Compiled Laws of Nevada (section 169, Civil Practice), which is the same as the California Penal Code section. See note 1a, below.

Section 3002, Compiled Laws of New Mexico, is as follows: "When

This section is substantially the same as secetion 167 of the old Practice Act, which stood unchanged from the time of its adoption in 1851.[1a] The section permits the jury to take with them on retiring all papers introduced in evidence (except depositions), copies being substituted for originals, if in the opinion of the court the originals ought not to be taken from the custody of the party to whom they belong. The reason why depositions are not permitted to be taken is supposed to be to prevent undue weight being given to any part of the testimony. The mass of testimony is usually oral, and it would, as a matter of course, be impracticable to have it written out and given to the jury; and if they were allowed to have portions of the testimony in the form of depositions, such portions by being read in the jury-room, and so kept fresh in the minds of the jury, might acquire an undue prominence.

This provision does not lay a direct command upon the jury to take with them upon retirement the papers designated; nor does it either direct or empower the court to require them to do so. It is permissive only. The discretion of the jury is in entire control, except as to those "papers,"[2] and "public records and private documents,"[3] which are left to the discretion of the court to say whether the originals or copies shall be taken. In every case the

the jury retires to consider its verdict it shall be allowed to take the pleadings in the cause, the instructions of the court, and any instruments of writing admitted as evidence, except depositions."

Section 7025, Revised Codes of North Dakota, is practically the same as the California section. Section 143, Lord's Oregon Laws, and section 351, Rem. & Bal. Code (section 5004, Bal. Code), of Washington, are also substantially the same, with the addition of "pleadings."

The rule as to pleadings in North and South Dakota is that the jury will not be allowed to take them to the jury-room. See Harding v. Ins. Co., 10 S. D. 64, 71 N. W. 755; Mt. Terry etc. Co. v. White, 10 S. D. 620, 74 N. W. 1060.

In Oregon, it has been held that it was bad practice to allow the jury to take with them the written charge. See Smith v. Lownsdale, 6 Or. 79.

[1a] See Laws of 1851, p. 77.

With respect to trials in criminal cases the provision of the Penal Code of California is as follows:

"Sec. 1137. Upon retiring for deliberation, the jury may take with them all papers (except depositions) which have been received as evidence in the cause, or copies of such public records or private documents given in evidence as ought not, in the opinion of the court, to be taken from the person having them in possession. They may also take with them the written instructions given, and notes of the testimony or other proceedings on the trial, taken by themselves, or any of them, but none taken by any other person."

The provisions of the two sections are practically identical except that in criminal trials the jury may take the written instructions given in the cause.

[2] See section 612, Code of Civil Procedure of California.

[3] See section 1137, Penal Code of California.

initiative is with the jury, or some member thereof, and neither the court, nor a litigant, can insist that any paper, whether in evidence or not, shall be taken upon retirement.[4] Nor can either the court or a party to the action interpose to prevent the jury or a member thereof from taking any paper in evidence which may be desired for use while deliberating upon the verdict, unless the paper is within the express exception above referred to, and even then, only the original can be wholly withheld, and a copy must be furnished, if desired.[5]

Whether, if a deposition which had been introduced in evidence, or notes of the evidence made by a person other than a juror, should be taken to the jury-room, a new trial would have to be granted, has not been decided in this state. The court would, in such case, have to apply the general rule, viz., that if it could be seen from the record that no injury was done, the verdict would not be disturbed; but that if it is doubtful whether injury was done or not, a new trial must be granted.[6] What the result of the application of this rule would be must depend in great measure upon the circumstances of each case. If notes of the evidence, made by a person other than a juror, should be taken by the jury upon retiring, and they should turn out to be grossly incorrect, a new trial would probably have to be granted, unless the presumption of injury should be rebutted. But whether a presumption

[4] In People v. Cochran, 61 Cal. 548, the court, in the concurring opinion of McKinstry, J., clearly sustains the position taken in the text:

"Section 1137 of the California Penal Code permits the jury, on retiring, to take with them 'all papers which have been received as evidence in the case,' and 'the written instructions given.' A diagram—not claimed or purported to be an accurate representation—used only to illustrate the testimony of a witness, is not 'received in evidence' within the meaning of the section. But even with respect to papers introduced in evidence, and to written instructions, their contents are usually made known to the jury before their retirement. In aid of their recollection of the contents of a paper given in evidence, or of an instruction given, the jury may ask for the paper or instruction; but, if they believe themselves sufficiently acquainted with the contents, they may decline to take the paper or instruction with them. It is not the absolute right of the prosecution or defense to have the papers or instructions sent to the jury, unless the jury demand it."

[5] For instances of papers within and without designation of statute: Clark v. Phenix Ins. Co., 36 Cal. 168; People v. Cochran, 61 Cal. 548, as to a diagram not in evidence; People v. Thornton, 74 Cal. 485, 16 Pac. 244, as to what constitutes taking with them by the jury; Cockrill v. Hall, 76 Cal. 192, 18 Pac. 318, as to whether certain promissory notes were attached to depositions so as to constitute their taking by the jury error; McLean v. Crow, 88 Cal. 644, 26 Pac. 596, as to pleadings; Powley v. Swensen, 146 Cal. 471, 80 Pac. 722, same; Castor v. Bernstein, 2 Cal. App. 703, 84 Pac. 244, generally.

[6] See section 26, subdivision 2, *ante*.

of injury would arise from the taking of correct notes made by a person other than a juror, or from the taking of a deposition which had been introduced in evidence,[7] admits of more question. However this may be, it is certain that the presumption of injury, arising from the taking of an unauthorized document, may be rebutted by showing that the document was not read or referred to by any of the jurors.[8] Counsel should exercise some degree of care in seeing that none but proper papers are taken by the jury when they retire.[9]

The effect of taking on retirement, or afterward procuring, documents not in evidence is considered in the next section. The distinction between the two classes of documents is clear.[10]

[7] Where a jury sent for a deposition which had been read in evidence in order to refresh their minds on a point concerning which there was no controversy, it was held (reversing the decision of the court below) that the verdict should not be set aside. Andrews v. Tinsley, 19 Ga. 303.

[8] Hackley v. Hastie, 3 Johns. 252; Hix v. Drury, 5 Pick. 296.

[9] Maynard v. Fellows, 43 N. H. 255; but see Flanders v. Davis, 19 N. H. 139. Any attempt by the party to get improper papers to the jury, or to suppress proper papers, would be an irregularity of the adverse party. As to irregularities of the adverse party, see chapter 6. As to attempts to suppress proper papers, see Hastings v. McKinley, 2 E. D. Smith (N. Y.), 45.

[10] In People v. Thornton, 74 Cal. 482, 16 Pac. 244, it seems to have been held that only those portions of a document actually read to the jury could be regarded as being in evidence, even though the document was by consent considered read as a whole. The deliberations of the jury seem to have taken place in the court-room. While deliberating one of the jurors picked up a pamphlet which had been admitted in evidence, "and by consent considered read in evidence," although only portions had been read, and those portions apparently by counsel in argument only, and read portions to the other jurors. This was held to be receiving evidence out of court. The court said:

"The pamphlet was received in evidence as a whole, while parts of it only were read in the presence of the jury before they retired. If the portions read in the presence of the jury after they had retired were not read in their presence before they retired, we think they may have received evidence out of court, as the paragraph upon which the charge of libel is based *is one of the mildest of an innumerable number of libels contained in the pamphlet. No part of it could be read without reading a libel of a very damaging character.* The propriety of permitting the jury on retiring for deliberation to take with them said pamphlet was not considered by the court or counsel. *The jury did not take it with them. They found it after they had retired.* By listening to the reading of it, we think they must have received evidence out of court, which on retiring for deliberation they *did not* take with them." (Italics ours.—Eds.) For this a new trial was granted.

In a concurring opinion, Paterson, J., said:

"There is significance in the words 'upon retiring for deliberation,' and a substantial observance of the provision will subserve a wise and just purpose. The court and the attorneys should know what papers are taken by the jury. The defendant certainly has a right to know what documents the jury desire to take with them—or which they call for during their deliberation—in order that he may submit to them for their consideration any other papers which may tend to explain the contents of the papers asked for."

§ 67. The Jury must not Receive Any Information About the Case Other Than That Furnished upon the Trial in Open Court.[1]— The theory of jury trials is, that all the information about the case must be furnished to the jury in open court, where the judge can separate the legal from the illegal evidence, and instruct them as to the law of the case, and where the parties can counteract the effect of any particular evidence by producing such other evidence as they may have. If the jurors were permitted to investigate the case outside of the courtroom, there would be great danger of their getting a one-sided and illegal view of the case. Accordingly, the great preponderance of authority is to the effect that if such investigations have taken place a new trial must be granted, unless it is shown affirmatively that they did not affect the result.[1a] Information concerning the case may be conveyed to the jury either by oral communication or by documents relating either to the facts or to the law of the case. These modes of unlawful communication will be considered separately.

1. *Oral Communications as to the Case.*—The reception by the jury of evidence concerning the case otherwise than in open court is so palpable a case of misconduct as to require but little authority to show its impropriety. There are many cases upon the subject. Thus where after the case had been submitted one of the jurors asked a witness whether he had not made a certain statement, and the witness answered that he had, the verdict was set aside.[2] So where the jury sent for a witness who had testified on the trial and examined him, a new trial was granted, although he was the witness of the losing party, for the jury may not have confined themselves to legal testimony.[3] So where in an action against a town for damages for a fall from a wagon, alleged to have been caused by an obstruction in a road, one of the jurors went to the place of the accident and conversed with inhabitants of the town in relation to the accident, who told him that the road was wide enough and passable for anybody, and showed him where the obstruction was at the time of the accident, and measured the place, and the juror communicated the information thus received to one of his fellows, the verdict was set aside.[4]

[1] Subdivision 2 of section 1181, Penal Code of California.

[1a] See Rodgers v. C. P. Rd. Co., 67 Cal. 607, 8 Pac. 377; and compare Harrison v. Sutter St. Ry. Co., 116 Cal. 156, 47 Pac. 1019.

[2] Vanmeter v. Kitzmiller, 5 W. Va. 380.

[3] Luttrell v. Marysville etc. R. R. Co., 18 B. Mon. (Ky.) 291.

[4] Bowler v. Washington, 62 Me. 302.

Oral communications, to come within the rule under consideration, must be such as relate to the case;[4a] and if this requirement be satisfied, the giving of information by one juror to his fellows is within the rule.[5] It is not only misconduct for a juror to give information about the case to his fellows, but it has been said to be an impropriety for members of the jury to discuss the merits of a case before its submission to them.[5a] If it appears that the result has been materially affected by the giving of information in this manner, whether before or after submission, a new trial must be granted. Thus where one of defendant's witnesses had several conversations with a juror concerning the case, and the juror stated to his fellows, as facts within his own knowledge, some matters relating to the case, a verdict in favor of the defendant was set aside, principally on the ground of the statements of the juror.[6] So where a juror stated in the jury-room that one of the witnesses for the prosecution, whose credibility had been attacked, had made the same statements to the grand jury as he made on the trial, a verdict against the prisoner was set aside.[7]

But if it can be seen that the statement did not have any effect upon the result, a new trial will not be granted. Thus where the statement was not made to the jury until after they had agreed upon their verdict, a new trial was refused.[8] So where a juror undertook to show to his fellows by illustration how the accident may have happened, the court thought the illustrations made use of were merely of self-evident facts, and therefore that they could not have improperly influenced the verdict.[8a] So where the communications consisted of an examination by the foreman of the jury, in the jury-room, of entries in a memorandum-book or diary, by means of a magnifying glass, and then giving to his fellows orally information as to the result of the examination, the supreme court held that it was manifest that no improper influence could

[4a] See Steward v. Hinkel, 72 Cal. 187, 13 Pac. 494, cited below.

[5] See generally Schmidt v. New York Mut. Ins. Co., 1 Gray, 529. Section 948, Criminal Practice of Arizona, provides that a juror must disclose whatever personal knowledge he may have of the case in open court, before retirement.

[5a] The case of Monaghan v. Rolling Mill Co., 81 Cal. 190, 22 Pac. 590, fairly illustrates this particular impropriety. A question by a juror of another if his understanding of the evidence was as he himself understood it, held not to be prejudicial in People v. West, 73 Cal. 345, 14 Pac. 848. Discussion of the case by the jurors after its submission cannot be abridged, though prior thereto it may.

[6] Simpson v. Kent, 9 Phila. 30.

[7] Donston v. State, 6 Humph. (Tenn.) 275.

[8] Wise v. Bosley, 32 Iowa, 34.

[8a] Monaghan v. Rolling Mill Co., 81 Cal. 190, 22 Pac. 590.

be predicated of such conduct, since the memorandum-book had been introduced in evidence, and it had not been shown that the magnifying glass was not used in the courtroom; but even if the glass was not used in the courtroom its use in the jury-room could not be regarded as illegitimate.[8b]

In determining whether such communications as are here defined constitute misconduct, it has been said that where the statement was irrelevant it could not be presumed to have influenced the verdict. Thus where one juror remarked to certain of his fellows that the defendant's testate was a rich man, it was held an irrelevant remark which could not be presumed to have influenced the verdict.[8c]

2. *Documents Other Than Those Introduced in Evidence.*—The taking by the jury upon retiring, or the procurement by them afterward of documents not regularly furnished to them on the trial, is the same in principle as their examining witnesses out of court. Whether such documents relate to the facts or to the law of the case, the proceeding is improper, and will vitiate the verdict unless it appears from the record that no injury resulted therefrom. For convenience, documents concerning the facts will be considered separately from documents concerning the law.

(a) The jury should not receive documents concerning the facts of the case unless regularly furnished to them on the trial. This has been frequently held. Thus where the jury sent for a deposition not introduced in evidence, but which had a material bearing on the case, a new trial was granted.[9] So where evidence which had been excluded on objection was permitted by the judge to go to the jury while they were deliberating, the verdict was set aside.[10] So where a paper not read in evidence but which was material to the issue was delivered to the jury by accident, the verdict was set aside.[11] So where a paper drawn up by the plaintiff for the assistance of his counsel, containing items and statements of the amount of damages claimed, got to the jury by accident, the verdict was set aside.[12] So where a pamphlet which had been admitted in evidence, but which had been read to the

[8b] Estate of Thomas, 155 Cal. 488, 101 Pac. 798.

[8c] Steward v. Hinkel, 72 Cal. 187, 13 Pac. 494.

[9] Stewart v. Burlington & M. R. R. Co., 11 Iowa, 62.

[10] Alger v. Thompson, 1 Allen, 453. But query: Is not this an irregularity of the court rather than misconduct of the jury?

[11] Whitney v. Whitman, 5 Mass. 405.

[12] Benson v. Fish, 6 Greenl. (Me.) 141.

Oral communications, to come within the rul
tion, must be such as relate to the case;[12a] and
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on of the declaration, and proof of all the items
duced.[16] So where a deposition which was taken
had not been introduced in evidence, but was also
evant and immaterial to the issue, it was held that the
ght not to be disturbed.[17] So where the jury were per-
o take to their room a paper containing a calculation by
of the amount due, with an instruction that it was not evi-
by me , and all the materials for the calculation were fully disclosed
the evidence, it was held that, although the practice was not
be approved, it was not ground for setting aside the verdict.[18]
where the judge's notes got to the jury and were read by them
hile deliberating, it was held that inasmuch as the notes were
eneficial rather than prejudicial to the losing party the verdict
would not be set aside.[19] So where the jury sent for and examined

[12a] People v. Thornton, 74 Cal. 482, 16 Pac. 244. See note 11 in the preceding section.

[13] See section 26, subdivision 2, *ante*,

[14] Hackley v. Hastie, 3 Johns. 253; Hix v. Drury, 5 Pick. 296.

[15] Morris v. Howe, 36 Iowa, 490; and look at Wise v. Bosley, 32 Iowa, 34; United States v. Reid, 12 How. (U. S.) 362, 13 L. ed. 1023.

[16] Hall v. Rupley, 10 Pa. 231.

[17] Lonsdale v. Brown, 4 Wash. C. C. 148, Fed. Cas. No. 8494.

[18] Alexander v. Dunn, 5 Ind. 122.

[19] Graves v. Gans, 25 Wis. 41.

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spected them, the court held that it could not be seen
impropriety influence could have followed such inspection,
if the contention of the defendant that it was receiving evi-
dence out of court in contravention of the statute was well founded,
which could not be regarded as established.[21a] So a diagram drawn
by a juror, in the jury-room, from memory, was held not objec-
tionable as being evidence out of court, or that the jury was im-
properly influenced thereby.[21b] So where horns, introduced as
having been the horns of a cow alleged to have been stolen by
defendant, were handled and examined by members of the jury,
during a recess of the court, it was held not to be evidence out of
court, and not to suggest improper influence.[21c]

And it must be remembered that it is not to be presumed, in the absence of a showing, that the jurors violated their duty by reading evidence not regularly before them. The presumption, in the absence of a showing to the contrary, is that they did their duty in accordance with their oath. To overthrow this presumption there must be some evidence tending to show the misconduct alleged. It is not enough to show that objectionable matter was inadvertently left in the room, where they might by chance have

[20] Lott v. Macon, 2 Strob. (S. C.) 178.

[21] United States v. Reid, 12 How. (U. S.) 362, 13 L. ed. 1023.

[21a] People v. Antony, 146 Cal. 124, 79 Pac. 858.

[21b] People v. Gallaner, 3 Cal. App. 431, 86 Pac. 814.

[21c] People v. Tipton, 73 Cal. 405, 14 Pac. 894.

found it. There must be some evidence tending to show that the jurors read the document, or at least that they found it, or had their attention called to it, or were aware of its presence.[22] So where the clothes of the prosecuting witness were shown to have been in the jury-room during the deliberations of the jury, but were not shown to have been inspected by the jurors, following the principle of an earlier case as to newspaper articles,[22a] the court held that knowledge must be brought home to the jurors, and that the mere fact of the presence of the clothes in the room where the jury was deliberating, without a showing that they had been inspected by some one or more of the jurors, would raise no presumption that such inspection had taken place, any more than the publication of the newspaper article would raise a presumption that the jurors had read it.[22b]

The above rules have been held to control in other states.[22c]

Where, however, the irregularity is shown, it is presumed to have been injurious unless the court can see the contrary from the record.[23] And as a general rule the statements of jurors as to whether they were influenced or not by any circumstances is entitled to very little consideration.[24] Where the party consented to the act complained of, a new trial will not be granted.[25] Thus where counsel for defendant consent to the jury's taking with them to the jury-room on retiring the bloodstained garments of the deceased, which had been exhibited and identified at the trial, but had not been introduced in evidence, it was held that whatever irregularity or misconduct may have occurred, and any objection thereto, was by such consent, waived.[25a]

And as in other cases, silence after knowledge of the misconduct, if it might have been corrected at the time, is held to be a waiver of it.[26] Thus where, after the testimony was all in and argument of counsel concluded, the jury were permitted, at their own request, to inspect certain articles of clothing referred to in the testimony, it was held, in the absence of a showing that objection had been

[22] People v. Williams, 24 Cal. 31.

[22a] People v. Feld, 149 Cal. 464, 86 Pac. 1100.

[22b] People v. Hower, 151 Cal. 638, 91 Pac. 507.

[22c] Cranmer v. Kohn, 11 S. D. 245, 76 N. W. 937.

[23] See section 26, subdivision 2, *ante*.

[24] Hix v. Drury, 5 Pick. (Mass.) 296; Killen v. Sistrunk, 7 Ga. 283; State v. Tindal, 10 Rich. (S. C.) 212.

[25] Alcott v. Boston Steam Flour Co., 11 Cush. (Mass.) 91; Shields v. Guffey, 9 Iowa, 322; Turner v. Kelley, 10 Iowa, 573; Davenport v. Cummings, 15 Iowa, 219.

[25a] People v. Mahoney, 77 Cal. 529, 20 Pac. 73.

[26] See section 27, *ante*.

made by either side, that it would be presumed that the inspection was made by consent of all parties.[26a]

Slightly different in form, but requiring a similar application of principle, is that kind of misconduct which originates in independent investigation. No matter at what stage of the proceedings a juror undertakes an inquiry of his own, if it appears that information of a character calculated to exert any influence upon the verdict is obtained, a new trial will be granted, unless it is shown affirmatively that no such result followed. An illustration of the rule is to be found in the case of People v. Conkling,[26b] a murder case, where members of the jury procured a rifle, presumably of a pattern identical with that used in the homicide under investigation, and carried on experiments of a somewhat exhaustive character, with the purpose of studying the effect of shots upon clothing at varying distances, and making comparisons with that observed upon the garments of the deceased. A new trial was granted.

If the court can see that no improper influence has resulted, the conduct in question will be disregarded. Thus in People v. Rowell,[26c] where a member of the jury visited the saloon which was averred to have been the place of the defendant's alibi at the time the crime was committed, apparently with the expectation of securing some information at first hand relative to the event that possibly had not been put into the testimony. It did not appear that his expectations had been at all realized, and the court thought the mere visit was not to be regarded as prejudicial, particularly in view of the juror's affidavit that he went there on legitimate business. So in Siemsen v. Oakland etc. Co.,[26d] which was an action for damages incurred as the result of a railroad accident, where a juror visited the scene of the accident with the purpose of conducting a personal investigation as to the probable cause of the accident, the court were of the opinion that there was not a sufficient showing of prejudicial misconduct.

It is as improper in the jury to make researches into the law as it is for them to make inquiries into the facts out of court. This

[26a] People v. McCurdy, 68 Cal. 576, 10 Pac. 207.

[26b] 111 Cal. 616, 44 Pac. 314.

[26c] 133 Cal. 39, 65 Pac. 127.

[26d] 134 Cal. 494, 66 Pac. 672. The conclusion of the court in this case seems to have been due to the fact that there was no dispute upon the matters which were open to the inspection of the juror upon the occasion of the visit, as, for example, the place where it occurred, etc.

was clearly explained in Merrill v. Nary,[27] in which case Bigelow, C. J., delivering the opinion, said:

"Upon deliberate consideration we are constrained to say that we cannot give our sanction to the action of the court below in allowing, without the consent of the parties to the cause, the volume of the general statutes to be sent to the jury after they had retired to consider their verdict. This was not only irregular and contrary to the uniform practice in our courts, but it tends directly to confound the proper provinces of the court and jury, which ought in the trial of civil cases to be kept carefully distinct, and it also practically deprived the parties of the right of knowing the principles of law on which the jury acted in the rendition of their verdict. No one doubts that on the civil side of the court the jury are bound to follow the instructions of the court in matters of law. This is the only legitimate mode in which they can receive the information necessary to enable them to apply the facts before them to the rules by which they are to be guided and governed in the performance of their duty. They cannot properly seek such knowledge or advice on matters of law involved in an issue from any other source. Nor can they act on their own preconceived opinions. They are bound to follow with scrupulous fidelity the instructions of the court. A strict adherence to and observance of this principle is essential not only on the grounds of public policy, in order that there may be a uniform, consistent, and stable interpretation and application of the rules of law; but also that it may be made certain that the rights and duties of litigant parties are protected and enforced in courts of justice. These important ends cannot be nearly attained unless the advice and direction of the court on all questions of law arising in the course of a trial by jury are given in open court, and suitable precautions are taken in order to prevent the minds of jurors from being instructed or influenced by information or knowledge derived from other sources. If this course is not taken and strictly adhered to, there would be no safety in the ordinary presumption that the instructions of the court are fully understood and properly applied by the jury. On the contrary, it would be quite as reasonable to suppose that they acted on views and opinions derived from other sources involved in an issue submitted to them as that they followed those which they received in the instructions of the court. The practical result would be that, although the law might be laid

[27] 10 Allen (Mass.), 416.

down with precision and accuracy by the court, there could be no certainty that the rules prescribed would be acted on by the jury, and parties would be deprived of the right to know the principles on which their cases had been determined, and the privilege of obtaining a revision of them if they were erroneous or mistakenly applied. The only regular and safe mode of trials is for the court to instruct the jury in all material points before they retire to deliberate upon their verdict, and if they have occasion for further information they should return into court and state the questions on which they wish for further advice, and receive in open court such directions as may seem to the judge material and necessary. This was the course adopted by Lord Tenterden in Burrows v. Unwin, 3 Car. & P. 310. In that case after the jury had retired they sent a message to the court requesting that Selwyn's Nisi Prius might be sent to them. The counsel for both parties consented that the book should be sent to the jury, but the court refused the request, and further instructions were given in open court. Everyone familiar with the practice of the law and the administration of justice in our courts knows that cases not unfrequently turn on nice distinctions, and that the most simple and common rules are difficult of application, and that it often requires careful study, nice discrimination, and a well-instructed mind to perceive the distinction on which the decision of cases depends. Certainly they cannot be apprehended in the brief time allotted to the deliberations of the jury-room. Indeed, we know of no method that could be adopted which would more effectually tend to confuse the minds of jurors and to mislead them in the proper discharge of their duty than to permit them to read or refer to law-books during their consultations, for the purpose of ascertaining the rules of law which were applicable to the cases which are submitted to them for their determination. Nor are we able to see that there would be any difference in this respect, whether the books which they were allowed to read were treatises, or books of reports, or volumes of statutes. The latter are often quite as difficult to interpret and apply as are the rules and principles contained in the former. In the case before us the provisions of the statutes on which the rights of the parties depended are by no means clear or easy of application. They have already been before us for construction on questions which arose between the same parties; and it is apparent that in their application to the facts in controversy their exposition was not free from diffi-

culty, or such that jurors would be likely to arrive at it correctly by a reference to the statutes themselves. We cannot know that after reading these in their room they followed the instructions which the court had given them as to the true interpretation and application of the provisions in question. On the contrary, from the fact that they sent for the volume, the inference is that they did not intend to follow these instructions, or that they had forgotten them and sought to act on such aid as they might obtain from reading the clauses on which the decision of the case turned. On the ground that there is reason to believe that the verdict may have been founded on erroneous views of the law, and that the action of the court, if sanctioned by us, would be a bad precedent, we are of opinion that there must be a new trial."

In the foregoing case, the jury had the law-book by permission of the judge. In such case it is possible that the motion for new trial should be on the ground of irregularity of the court. But if it be improper for the jury to have a law-book by permission of the judge *a fortiori*, it is so for them to have it without his permission.[28] Upon the same principle it has been held that where the jury procured and read a condensed newspaper report of the judge's charge, the verdict should be set aside.[29]

Receiving evidence out of court is specifically made a ground for new trial in criminal cases.[30] A single exception is specified—view of the *locus in quo*.[30a] Upon a visit of inspection of this kind not only the jury must be present, in charge of an executive officer of the court, and a person designated and instructed to point out the various objects deemed proper to be called to the attention of the

[28] As to jury having law-books, see, also, State v. Smith, 6 R. I. 33; Newkirk v. State, 27 Ind. 1. As to conversation with counsel about the law of the case, see Oleson v. Meader, 40 Iowa, 662.

[29] Farrer v. State, 2 Ohio St. 54. Such a proceeding is different from taking the written charge of the judge, which it is not improper for them to do. Wood v. Aldrich, 25 Wis. 695.

[30] Section 1181, subdivision 2, Penal Code of California. And the same may be said of most other states.

[30a] The various code provisions are: Section 610, Code of Civil Procedure of California; section 188, Mills' Annotated Code of Colorado; section 4386, Revised Codes of Idaho; section 6747, Revised Codes of Montana (section 1081, Code of Civil Procedure); section 7023, Revised Codes of North Dakota; section 5796, Compiled Laws of Oklahoma; section 133, Lord's Oregon Laws; section 258, Code of Civil Procedure of South Dakota; section 3152, Compiled Laws of Utah; section 344, Rem. & Bal. Code of Washington (section 4998 Bal. Code); section 4500, Compiled Statutes of Wyoming.

jury,[31] but the trial judge himself,[32] and the defendant also,[33] must attend. It would seem, therefore, that all the essential elements of the court are thus assembled, as much so as though in the courtroom itself, and that, by consequence, the court being present, there could really be no question of receiving evidence out of court in such a case.

However this may be, it has been doubted if an inspection of the *locus in quo* can be regarded as in any sense receiving evidence, notwithstanding the legislature clearly so regarded it, and the courts, by referring the necessity of the defendant's presence to the constitutional provision as to confrontation,[34] so treat it. The point was first raised in Wright v. Carpenter,[35] where the supreme court held that the purpose of this proceeding was not to make of the jurors themselves silent witnesses, "acting on their own inspection of the land,[36] but only to enable them the more clearly to

[31] Section 1119, Penal Code of California, provides that the jury must be taken in a body to the place where the offense was committed, or in which any material fact occurred, in charge of the sheriff, and that the premises may be shown to the jurors by a person appointed by the court for that purpose, and that the officer in charge must be sworn to suffer no person (other than the one so appointed) to speak to them, or to speak to them himself. Similar provisions are to be found in nearly all other jurisdictions.

See section 947, Revised Statutes of Arizona; section 7878, Revised Codes of Idaho; section 9298, Revised Codes of Montana; section 4342, Cutting's Compiled Laws of Nevada (section 377, Criminal Practice); section 10018, Revised Codes of North Dakota; section 6849, Compiled Laws of Oklahoma; section 377, Penal Code of South Dakota; section 4870, Compiled Laws of Utah; section 2160, Rem. & Bal. Code of Washington (section 6948, Bal. Code); section 6238, Compiled Statutes of Wyoming. Section 1525, Lord's Oregon Laws, provides in effect that section 133 (see note 30a, *supra*) shall be applicable to criminal actions.

[32] See People v. Yut Ling, 74 Cal. 569, 16 Pac. 489. Also, People v. Tupper, 122 Cal. 424, 68 Am. St. Rep. 44, 55 Pac. 125; People v. White, 5 Cal. App. 329, 90 Pac. 471.

[33] See People v. Bush, 68 Cal. 623, 10 Pac. 169. Also, People v. Milner, 122 Cal. 171, 54 Pac. 833.

In State v. Reed, 3 Idaho, 754, 35 Pac. 706, it was held that if the defendant requests the view, the fact that he did not accompany the jury is not ground for a new trial, unless permission was refused him; but this doctrine was doubted in the later case of State v. McGinnis, 12 Idaho, 336, 85 Pac. 1089. An even more liberal view was adopted in a line of Oregon decisions, and it was held that omission to provide for the defendant or his counsel on a view in company with the jury was not error, in a murder case, no application having been made. See State v. Ah Lee, 8 Or. 214; State v. Moran, 15 Or. 262, 14 Pac. 419; State v. Chee Gong, 17 Or. 635, 21 Pac. 882.

[34] See article 1, section 13, California, Constitution of 1879. See note 1, section 34a, *ante*.

[35] 49 Cal. 607.

[36] In this case the jury were instructed to view the premises, and that they might use the evidence of the witnesses before them *and their examination of the lands in "determining whether they were rendered unfit for cultivation by reason of overflow."*

understand and apply the evidence"; and it was reasoned that, "if the rule were otherwise, the jury might base its verdict wholly on its own inspection of the premises, regardless of an overwhelming weight of evidence to the contrary, and the losing party would be without remedy upon motion for new trial, since it would be impossible to determine how much weight was due to the inspection by the jury, as contrasted with the opposing evidence, or (treating the inspection as in the nature of evidence) whether it was sufficient to raise a substantial conflict."[36a] This view received the support of a bare majority of the court, two of the justices not participating; but in People v. Green [37] the principle seemed to have been regarded as the correct one. In the later case of People v. Bush,[38] where it was declared to be error to receive a view of the premises in the absence of the defendant, the decision was clearly placed upon the ground that the viewing of the premises was receiving evidence, and in People v. Miller [39] the court specifically held that inspection of the *locus* was receiving evidence, and that the doctrine of Wright v. Carpenter and People v. Green, *supra,* must be regarded as set aside "by the later utterances of the court." This was again held, by inference, in the recent case of People v. White,[40] and must be regarded as settled doctrine.

§ 68. The Jurors Should not, During the Trial, Hold Communications With Third Persons Concerning the Case, and Should not Hold Any Communication With Anyone While Deliberating upon Their Verdict.—As has been shown under the head of irregularities of the adverse party, the verdict will be set aside for attempts by a party to the cause to improperly influence jurors. And as explained in the preceding section, the jurors must not receive any information concerning the facts or the law of the case, otherwise than upon the trial in open court. It remains to be shown that they must not, during the trial, hold communication with third persons concerning the case, or hold communication with any person while deliberating upon their verdict.[1]

[36a] The quotation in the text is taken from People v. Milner, 122 Cal. 171, 54 Pac. 833, where the cases have been fully assembled.

[37] 53 Cal. 60.

[38] 68 Cal. 623, 10 Pac. 169.

[39] 122 Cal. 171, 54 Pac. 833.

[40] 5 Cal. App. 329, 90 Pac. 471. And see the following in addition to the cases cited in notes 32 to 40, inclusive: People v. Bush, 71 Cal. 602, 12 Pac. 781; People v. McCoy, 71 Cal. 395, 12 Pac. 272; People v. Fitzgerald, 137 Cal. 546, 70 Pac. 554; and compare People v. Fitzpatrick, 80 Cal. 538, 22 Pac. 215.

[1] As to the right of the jury to take with them on retiring documents in evidence, see previous section.

1. *Communications Before Retiring to Deliberate.*—It is not the practice in civil cases to shut up jurors during the recesses of the court, before the case is submitted to them. Upon the recess of the court they are dismissed to their ordinary avocations and abodes. It is usual for the judge upon dismissing them to caution them not to talk about the case, either among themselves or with third persons, and not to permit anyone to talk to them, or in their hearing, concerning it. But whether this admonition be given or not, any communication concerning the case is improper. There are many cases in the reports upon this subject. Thus where the defendant was indicted for the unlawful disposal of warrants on the city treasury, while mayor of the city, and one of the jurors, after being preliminarily examined, and while waiting for the jury to be completed, attended a public meeting at which the defendant was bitterly denounced, it was held to be misconduct sufficient to vitiate the verdict.[2] So where, while the case was on trial, a stranger said to a juror that if the trial should continue fifteen or twenty days, and the plaintiff should recover five thousand dollars damages, he would have nothing left after paying the expenses of the trial, and the juror assented to this and said in reply that he had learned from a party out of court what the expenses of the trial would be, and expressed his opinion derived from such information that the expenses would be five thousand dollars, and the same juror had a similar conversation with another person, the verdict was set aside.[3] So where two of the jurors during the trial "not only conversed with persons not jurors about the case, but discussed its merits, and commented upon the evidence in presence of a number of persons at the table, and misstated it by saying that the defendant, sworn as witness, had contradicted himself," a new trial was granted.[4] So where, during the trial of a contest concerning the validity of a will, different persons, sometimes in conversation with the jurors and sometimes in their hearing, made use of expressions to the effect that the will was valid, such as the following: "I have heard the whole case so far, and I don't see how they are going to get around that will"; "I don't see how in the devil the jury can get rid of sustaining that will, as it is undoubtedly the old man's will"; "That Major Hodges thought it was the old man's

[2] People v. Turner, 39 Cal. 370; see section 69, *post*, concerning separation, and next subdivision of present section.

[3] Tomlinson v. Town of Derby, 41 Conn. 268.

[4] Blalock v. Phillips, 38 Ga. 216.

will"; "That this was just such a will as they would make," etc.—a verdict in favor of the will was set aside.[5] So where the controversy was concerning a heifer, and it was claimed that she could be identified by the fact that the point of one of her horns was broken off, and during an inspection of the heifer by the juror one of the plaintiff's witnesses said in their hearing that the horn had been scraped so as to conceal the place where it was broken, a verdict in favor of the plaintiff was set aside.[6]

So where a person who was summoned as a juror, but was not drawn upon the case, said to several of the jurors that "he guessed the defendant was a hard case, and that he had heard that when he was in the book business at the south, a doctor refused to take a book subscribed for because it was not bound according to contract, and the defendant drew two pistols, and threatened to blow the doctor's brains out if he did not take it," a verdict against the prisoner was set aside, although the jurors testified that they paid but little attention to the story, and that it had no effect on their minds.[7]

The same rule applies to communications between jurors and third persons as to other cases of their misconduct, viz., that if it be doubtful as to whether or not it had any effect upon the verdict a new trial must be granted, but that if the court can see that it had no effect, the verdict must stand.[8] And there are many cases in which verdicts have been allowed to stand, although the jurors had communication with other persons.[9]

Thus where one of the jurors said to the *losing* party that the cross-examination of one of his witnesses had been most severe, but that the witness bore it well, it was held that there was no ground for setting aside the verdict.[10] So where one of the jurors, before retiring, publicly inquired of the clerk of the court as to the amount of damages given in similar cases which had been before the court, and the clerk answered the inquiry in the presence of the judge and the counsel, no objection being raised, it was held that there was no ground for a new trial.[11] So where, the jury having made up their minds as to the rights of the parties, but being in doubt as to the proper mode of computing the amount due, sent

[5] McDaniels v. McDaniels, 40 Vt. 363.

[6] Erwin v. Bulla, 29 Ind. 95, 92 Am. Dec. 341.

[7] State v. Andrews, 29 Conn. 100, 76 Am. Dec. 593.

[8] See section 26, subdivision 2, *ante*.

[9] See remarks of Lumpkin, J., in Epps v. State, 19 Ga. 102, approved in Cohron v. State, 20 Ga. 752.

[10] Pettibone v. Phelps, 13 Conn. 445, 35 Am. Dec. 88.

[11] Allen v. Blunt, 2 Wood & M. 121, Fed. Cas. No. 217.

for the clerk of the court, who informed them as to the proper mode, it was held that there was no ground for setting aside the verdict.[12] So where one of the jurors said to one of plaintiff's witnesses that "they could throw the costs upon the defendants, of course," to which the witness replied that "they could of course," it was held that although such conduct was improper, it afforded no ground for a new trial.[13] So where a person said to one of the jurors, during a recess of the court that "there was a party in the county who were trying to put down the plaintiff, Small, but that it could not be done, for Small was a man of more sense than any other in the county," it was held that there was no ground for setting aside the verdict.[14] So where a juror and the prosecuting witness were observed to engage in earnest conversation during the trial, the court characterized such conduct as very reprehensible, but not sufficient in itself to raise a presumption of misconduct, or that the juror was improperly influenced.[14a] So where the jury were permitted to separate during the trial, and while separated one of them conversed with a brother of the deceased, the nature and subject of the conversation not appearing, the court said:

". . . . It was not legal misconduct in a juror to engage in conversation with a brother of deceased upon a subject disconnected with the case on trial, but it was a grave impropriety, exposing the juror to suspicion and reflecting upon the administration of the law. It is not going too far to say that his conduct called for explanation. But this was a matter resting in the discretion of the trial court, and since it does not appear that the conversation related to the case on trial, we cannot hold that there was an abuse of discretion."[14b]

So where there was a conversation over the telephone between a juror and an outsider, in the presence of the officer in charge, and presumably with his permission, but without permission of the court, the conversation being in regard to business of a private character, the court held that, while highly improper, it was not, under the circumstances, prejudicial.[14c]

It is regarded as particularly reprehensible for jurors to hold any kind of communication with the parties to the litigation dur-

[12] Dennison v. Powers, 35 Vt. 39.
[13] McIlvaine v. Wilkins, 12 N. H. 474.
[14] Stewart v. Small, 5 Mo. 525.
[14a] People v. Dunne, 80 Cal. 34, 21 Pac. 1130.
[14b] People v. Phelan, 123 Cal. 551, 56 Pac. 424.
[14c] Saltzman v. Sunset Tel. Co., 125 Cal. 501, 58 Pac. 169.

ing the trial, and more particularly to accept favors from them, and whenever such conduct is shown, injury will be presumed. With respect to this kind of misconduct, when established, it has been said:

"The court should set aside the verdict in justice to itself, as well as to the parties, that the trial may be conducted fairly, so that the verdict, when rendered, may be entitled to the respect of both parties and the confidence of the court." [14d]

Also: "Where the jury has been treated, fed, or entertained by the successful party or his counsel, or at the expense of either, a new trial will, in nearly all cases, be granted. The rule is, by most courts, deemed indispensably necessary to preserve the integrity of juries; it being, as already stated, a rule of public policy, it will be enforced without reference to the question whether or not the verdict was right." [14e]

The case of Wright v. Eastlick [14f] presents a most flagrant instance of this particular kind of misconduct. There one of the

[14d] McDaniels v. McDaniels, 40 Vt. 363.

[14e] Section 2564, Thompson on Trials.

[14f] 125 Cal. 517, 58 Pac. 87. See, also, Scott v. Tubbs, 43 Colo. 221, 95 Pac. 540, 19 L. R. A., N. S., 733, where it was held that the respondent in a condemnation suit should be given a new trial without payment of costs, for misconduct, where four of the jurors, after an official inspection of the property, separated from the officer in charge, and went with the petitioner, at his invitation, to a saloon, and drank with him, without regard to whether the verdict was influenced by such misconduct. Also, Vollrath v. Crow, 9 Wash. 374, 37 Pac. 474, where the plaintiff and one of the jurors were playing cards and drinking together in a saloon, and out walking together, and talking—though not about the case—during the time of its trial, a verdict in his favor was set aside, the supreme court saying: "Trials of causes should have the appearance of fairness, and it would tend greatly to bring judicial proceedings into disrepute if matters of this kind should be overlooked or tolerated. We fully agree with the contention of appellant that a verdict rendered by a jury, a portion which were found to have been promenading the street, conversing, playing cards, and drinking with the successful litigant, has the appearance of anything but fairness; and let it be once understood that such things are permissible, and we will be treated to the spectacle of litigants vying with each other, in both private and public places, in attempts to win the goodwill and favor of the jury, and the administration of the law greatly scandalized thereby." See, also, Repath v. Walker, 13 Colo. 109, 21 Pac. 917.

The case of Finlen v. Heinze, 28 Mont. 548, 73 Pac. 123, is an instance of the application of the rule to improper communications to a judge when acting as a jury in the trial of a question of fact.

See, also, Burke v. McDonald, 3 Idaho, 296, 29 Pac. 98, where it was shown that the jurors, or some of them, were treated to drinks, lunches, beer, wine, cigars, etc., during the progress of the trial, by one of the parties in interest, it was held that even though improper influence might not be apparent, a new trial should be granted upon grounds of public policy. Also, Palmer v. Utah etc. Co., 2 Idaho, 290 (315), 13 Pac. 425.

Also, Buchanan v. Laber, 39 Wash. 410, 81 Pac. 911, where a new trial was granted for misconduct, where a

jurors, the foreman in fact, during the trial, went to and returned from a dance with one of the defendants. While together they drank and got drunk, and were quite intimate, it appearing even that the juror borrowed money from the party litigant upon whose case he was deliberating. The trial court, upon this showing, denied the motion for a new trial. The supreme court, however, held that the ruling should have been to the contrary, and ordered a new trial.

Where, however, both parties combine to feast the jury, neither can complain, in the absence of proof of such a degree of intoxication resulting from such entertainment as to disqualify the jury, or a juror, for the proper discharge of his duty.[14g] This would, of course, involve a question of intoxication rather than improper communications.[14h]

2. *Communications After the Jury have Retired.*—Communications after the jury have retired may be with the officer in charge of them or with other persons.

(a) Under the construction before explained, to the effect that the term "irregularity of the court" includes irregularities of other officers than the judge,[15] it is probable that communications from the officer to the jury should be presented under the first subdivision as for an irregularity of the court. The provision of the statute is, that when the jury have retired, "unless

juror, during the progress of the trial, engaged in conversation and drank in a saloon in company with one of the parties.

It is probable that accepting a bribe is such misconduct of a juror as would be deemed ground for a new trial, and that the existence of an express agreement between one of the jurors and a party to disregard the law and the evidence and render a decision in favor of such party would not affect the real character of the misconduct any more than would a tacit understanding to the same effect. The essence of the misconduct lies in the doing of the act which subjects the juror to improper influence, and creates a condition of bias in his mind in favor of the party from whom the favor has been accepted. No case is found bearing directly upon the point. Nor is there any apparent reason for making misconduct of this kind an exception to the rule which permits the successful party to show affirmatively that no prejudicial effect resulted therefrom. As to bribery of a juror as an irregularity of an adverse party, see section 48, *ante;* and as to an excessive verdict resulting from bias created by bribery of a juror, see section 95, *post.* Where the misconduct or irregularity is confined to the corruption of a single juror, and the verdict is the result of an agreement between nine other jurors, it is readily apparent that the bribery was ineffective. In the case of a trial where the judge acts as jury, however, corruption of this kind cannot very readily be localized.

[14g] Copper Queen Co. v. Arizona Prince Copper Co., 2 Ariz. 10, 7 Pac. 718. And see, to same effect, Bradshaw v. Degenhart, 15 Mont. 267, 48 Am. St. Rep. 677, 39 Pac. 90.

[14h] See section 71, *post.*

[15] See section 28, *ante.*

by order of the court, the officer having them under his charg must not suffer any communication to be made to them, or mak any himself, except to ask them if they or three-fourths of them are agreed upon a verdict."[16] It will be observed of this pro vision that it does not in terms forbid communications from th jury to the officer, but only from the officer to the jury. Bu this construction would be too narrow, for under it the jury coul communicate with strangers, although strangers could not com municate with them. A fair and reasonable construction of th provision requires that no communication should pass to or fron the jury, except the one specified as to whether they are agreed Even in relation to the calls of nature, permission from the cour should be had, if it is necessary to leave the jury-room. But i such cases it could usually be seen that no opportunity for im proper communication had occurred.

The subject of communications from the officer to the jury has been considered in another place.[17] Except where the communi cation purports to be official in character,[18] communications be tween the officer and jury would be the same in effect as com munications between the jury and third persons.[18a]

(b) As above stated, it is improper for the jury to have com munications with anyone after they have retired. But where it is shown what the communication was, the rule already so frequently referred to applies, viz., that where the case is such that the result may have been affected, the verdict must be set aside, but that where the court can see that it was not affected, it must stand.[19] There are many cases in which it has been held that mere passing remarks between jurors and third persons are harmless.[20]

[16] Section 613, Code of Civil Procedure of California.

[17] Section 39a, *ante*.

[18] Such as instances given in section 39a, *ante*.

[18a] For instance of harmless communication, see Nelson v. Mitchell, 10 Cal. 92.

[19] See section 26, subdivision 2. See Lee v. McLeod, 15 Nev. 158, where it was held that a conversation between one of the counsel and juror about immaterial matters was not prejudicial. (But in this case were other features calculated to throw suspicion upon the verdict, and the decision of the court appears to have been based upon the failure of the movant to call the attention of the court to the facts at the time). Also, Tiernan v. Trewick, 2 Utah, 393, where it was held that a conversation not calculated to affect his mind with respect to the issues before the court was not sufficient ground for a new trial. A verdict will not be set aside because of the interference of strangers unless such interference has been attended with corruption, or promoted by a party to the action. Also, Deighton v. Hover, 58 Wash. 12, 137 Am. St. Rep. 1035, 107 Pac. 853.

[20] See People v. Kelly, 46 Cal. 355, 357, 358; People v. Dennis, 39 Cal. 625; People v. Symonds, 22 Cal. 348;

As elsewhere appears,[21] the publication of articles in newspapers, of such a character that they are calculated to, or actually do, improperly influence the verdict of a jury, is regarded as an irregularity, and as such ground for a new trial, under subdivision 1, of section 657 of the Code of Civil Procedure. The word "publication" includes, of course, the process whereby the newspaper containing the article is placed within reach of the jury; for, it is clear, the mere printing of the article, either with or without intent to improperly influence the verdict, is not sufficient.[22] If, however, the newspaper reaches a member of the jury, and the article in question is read, the reading becomes misconduct of the juror who reads, unless it appears that no improper influence resulted from such reading. The supreme court, in People v. McCoy[23] say:

"There is no doubt, however, that the reading of newspapers by jurors, while engaged in the trial of a cause, is an inattention to duty which ought to be promptly corrected; and if the newspaper contains any matter in connection with the subject matter of the trial which would be at all likely to influence jurors in the performance of their duty, the act would constitute a ground for a motion for a new trial."

The distinction between the irregularity heretofore considered,[24] and the misconduct of the jury here referred to, has been already noted. The same set of facts constitutes both grounds for a new trial, and it is inconceivable that either should exist without the other. Neither the irregularity nor the misconduct is complete without both publication (including introduction of the article within the jury's reach) and reading. Either ground for a new trial would be incomplete if either element were wanting. What was said with reference to the irregularity applies, therefore, to the subject of the misconduct under consideration here.[25]

Kennedy v. Commonwealth, 2 Va. Cas. 510; look at People v. Brannigan, 21 Cal. 337, 341, 342; People v. Hughes, 29 Cal. 257; People v. McCurdy, 68 Cal. 576, 10 Pac. 207; People v. West, 73 Cal. 345, 14 Pac. 848; and see Saltzman v. Sunset Tel. Co., 125 Cal. 501, 58 Pac. 169, as to conversation about private business over telephone in presence of officer. See, also, Brennan v. Seattle, 46 Wash. 427, 90 Pac. 434, where a prejudicial remark by a juror was met by a prompt instruction of the court to disregard it, and it was held not to be prejudicial or ground for a new trial.

[21] See section 48, *ante*.

[22] See People v. Feld, 149 Cal. 464, 86 Pac. 1100. And see section 48, note 18d, *ante*.

[23] 71 Cal. 395, 12 Pac. 272.

[24] See section 48, *ante*.

[25] See the following cases: People v. McCoy, 71 Cal. 395, 12 Pac. 272; People v. Murray, 85 Cal. 350, 24

§ 69. **Separation of the Jury.**—In civil cases it is not the practice to keep the jury together during the trial of the case. Before the case is submitted to them, they are at liberty, during the recesses of the court to go to their usual avocations and abodes. When the case is submitted to them, however, and they retire for deliberation upon their verdict, the code provides that "they must be kept together in some convenient place under charge of an officer until at least three-fourths of them agree upon a verdict, or are discharged by the court. Unless by order of the court, the officer having them under his charge must not suffer any communication to be made to them, or make any himself, except to ask them if they, or three-fourths of them, are agreed upon a verdict."[1] Where there is an unauthorized separation more or less communication with third persons usually occurs. The subjects, however, are distinct; for there may be a separation without communication with third persons, or communication with third persons without a separation. The separation is a distinct act of misconduct. The purpose of keeping the jury together while deliberating

Pac. 666; People v. Stokes, 103 Cal. 193, 42 Am. St. Rep. 102, 37 Pac. 207; People v. Fernandez, 3 Cal. App. 689, 86 Pac. 899; People v. Feld, 149 Cal. 464, 86 Pac. 1100. And see People v. Goldenson, 76 Cal. 328, 19 Pac. 161; People v. Leary, 105 Cal. 486, 39 Pac. 24; People v. Durrant, 116 Cal. 179, 48 Pac. 75.

[1] The quoted language is from the California code, section 613, Code of Civil Procedure. The corresponding sections of other codes, having substantially the same scope and effect, but in some instances differing slightly in form of expression, are as follows: Sections 1397 and 1398, Revised Statutes of Arizona (sections 188 and 189, Civil Practice); section 190, Mills' Annotated Code of Colorado; section 4389, Revised Codes of Idaho; section 6750, Revised Codes of Montana (section 1084, Code of Civil Procedure); section 3263, Cutting's Compiled Laws of Nevada (section 168, Civil Practice); section 7026, Revised Codes of North Dakota; section 5797, Compiled Laws of Oklahoma; section 141, Lord's Oregon Laws; section 261, Code of Civil Procedure of South Dakota; section 3155, Compiled Laws of Utah; section 349, Rem. & Bal. Code of Washington (section 5002, Bal. Code); section 4501, Compiled Statutes of Wyoming. The corresponding sections of the California Penal Code are as follows:

"Sec. 1121. The jurors sworn to try an action may, at any time before submission of the cause to the jury, in the discretion of the court, be permitted to separate or be kept in charge of a proper officer. The officer must be sworn to keep the jurors together until the next meeting of the court, to suffer no person to speak to them or communicate with them, nor to do so himself, on any subject connected with the trial, and to return them into court at the next meeting thereof.

"Sec. 1122. The jury must also, at each adjournment of the court, be admonished by the court, whether permitted to separate or kept in charge of officers, be admonished by the court that it is their duty not to converse among themselves or with anyone else on any subject connected with the trial, or to form or express any opinion thereon until the cause is finally submitted to them."

is to preserve them from all contaminating influences;[1a] and in this regard the rule applicable to all irregularities applies, viz., that where the moving party shows an irregularity which may have affected the result, the verdict must be set aside unless the successful party shows that as a matter of fact it had no such effect. This rule has been fully considered in another place.[2] It will be sufficient here to give decisions showing its application to cases of separation of the jury.

1. *Cases Where the Verdict was Set Aside for Unauthorized Separation of the Jury.*—As above stated, if the circumstances are such that the court cannot be assured that nothing improper occurred, the verdict must be set aside. In People v. Backus[3] the jury were ordered by the court to be kept together during the trial; one of them "absented himself from the jury-room without the custody of the sheriff for the period of two hours" without obtaining permission so to do. For this misconduct the verdict was set aside. In a subsequent case it was said of People v. Backus, that it went "to the verge of the true rule, if not beyond," but the case in which this was said was distinguished on the ground that it there affirmatively appeared that nothing improper occurred.[4]

In People v. Brannigan[5] a new trial was granted because of the separation of the jury, but the report does not show the circumstances of the separation.

[1a] This would seem to be the test as to what shall be deemed to constitute a separation. In State v. Harris, 12 Nev. 414, Beatty, J., thus outlined the principle involved:

"It may be that the fact that one of the jurors was where he could exchange a single word with the stranger without being unheard by the officer in charge is sufficient to establish a technical separation of the jury. We are inclined to think that it was, and we think the officer was to blame for permitting a stranger to have access to the juror out of his sight and hearing, and thus affording an opportunity, however slight, for tampering with or prejudicing him in respect to the case. This is a matter in respect to which officers cannot be too particular; for although it does not follow necessarily that a new trial must be granted whenever there has been a slight accidental separation of one juror from his fellows and from the officer in charge, under circumstances that admit of private communication between him and a stranger, still such things are highly improper and dangerous. The juror may be spoken to and improperly influenced in regard to his verdict, and, even if nothing of the kind happens, the state may not be able to show satisfactorily, as it would be bound to do, that in fact there has been no tampering with the juror, and no misconduct upon his part."

See, also, Beals v. Cone, 27 Colo. 473, 83 Am. St. Rep. 92, 62 Pac. 948, 20 Morr. Min. Rep. 591; Edward Thompson Co. v. Gunderson, 10 S. D. 42, 71 N. W. 764.

[2] See section 26, subdivision 2, *ante*. And see Saltzman v. Sunset Tel. Co., 125 Cal. 501, 58 Pac. 169. Also, State v. Jones, 7 Nev. 408; Carnaghan v. Ward, 8 Nev. 30; State v. Harris, 12 Nev. 414.

[3] 5 Cal. 275.

[4] People v. Bonney, 19 Cal. 426.

[5] 21 Cal. 337.

In M'Lain v. State[6] it was shown that "a part of the jury did very frequently of a night, after they had retired from the court, absent themselves from the balance of the jury without being under the charge of an officer, and remain absent for the space of fifteen or twenty minutes," and it was not shown what occurred during such absences. *Held,* that the verdict must be set aside.

In Short v. West[7] the circumstances were as follows: After the jury had retired, being unable to agree, and not wishing to remain out all night, they agreed to return a finding that they had agreed to disagree, and this "verdict" was sealed up and handed to the officer who allowed them to go home. The next morning at 8 o'clock the jury reassembled and agreed upon a verdict, which they substituted for the statement of the night before that they had agreed to disagree. It was not shown that anything improper occurred during the separation, but the verdict was set aside.

In People v. Hawley,[7a] where the jury were permitted to separate and go home for the night after deliberating several hours, the case being a felony, a new trial was granted.

In People v. Dinsmore,[7b] where the jury were allowed to separate and go home on account of the illness of one of their number, and were separated sixty-three days, the case being a felony, a new trial was granted.

In Nickelson v. Smith,[7c] the jury presented a paper which purported to contain their verdict, but which failed to express their real intention, and the case was continued to the following day without correcting it. In the meantime the jury were permitted to separate. It was held that the verdict was irregular, and that it must be set aside.

[6] 10 Yerg. (Tenn.) 241, 31 Am. Dec. 573.

[7] 30 Ind. 367; and see Aetna Ins. Co. v. Grube, 6 Minn. 82. In addition, see Jumpertz v. People, 21 Ill. 375; Organ v. State, 26 Miss. 78;

[7a] 111 Cal. 78, 43 Pac. 404. The ground here stated was not, however, solely misconduct; nor, indeed, the chief ground for granting the new trial. Inasmuch as the separation was by authority of the court, it was held to be an irregularity of the court. See latter part of this section, and cases cited in note 20 et seq.

[7b] 102 Cal. 381, 36 Pac. 661. See, also, People v. Logan, 123 Cal. 414, 56 Pac. 56. See note 7a, above, and latter part of section—cases cited in note 20 et seq.

[7c] 15 Or. 200, 14 Pac. 40. The Oregon code (section 200, Civil Code) provides, "After hearing the charge, the jury may decide in the jury-box, or retire for deliberation. If they retire, they must be kept together in a room provided for them, or some other convenient place, under the charge of one or more officers, until they agree upon their verdict, or are discharged

2. *Cases of Harmless Separation of the Jury.*—As above stated, if the case be such that the court can see (either from the showing of the moving party, or from a showing by the successful party) that as a matter of fact the separation was harmless, the verdict must not be disturbed. There are many cases to this effect.

In People v. Lee [8] the occurrence was as follows: "A witness, during her examination, fainted and fell to the floor; some of the jurors sitting near lifted her up and carried her into the adjoining chamber and laid her upon a sofa. The deputy sheriff in attendance upon the court accompanied the jurors, who were absent not exceeding one minute." *Held,* no ground for a new trial.

In People v. Bonney [9] three of the jurors retired for a few moments to a privy, the officer accompanying them, and no one spoke to them during their absence from their fellows. *Held,* no ground for a new trial.

In People v. Symonds [10] the court, per Norton, J., gave the showing upon which a new trial was moved for as follows: "In the case before us the evidence of the separation is contained in the affidavits of two persons, O'Connor and Penny. It is questionable whether the facts stated by the former show a separation. His statement is that he saw the jury walking on the platform of the St. George Hotel, and that a portion of said jurors were separate and apart from the others of said jurors. The same thing might be said of them if they had been confined in a room by themselves.

by the court. The officer shall, to the utmost of his ability, keep the jury thus together, separate from other persons, without drink, except water, and without food, except ordered by the court. He must not suffer any communication to be made to them, nor make any himself, unless by order of the court, except to ask them if they have agreed upon their verdict."

The opinion of the court is as follows: "We think it was an erroneous exercise of the judicial functions of the justice to allow the jury to separate without the consent of the parties, and to permit them, on the next or some subsequent day, to return and complete their verdict against the objections of either party. Such a practice, if permitted, is liable to great abuse, and we think we ought to give full effect to the requirements of the section above quoted. The justice had ample power to permit the jury to put their verdict in proper form at the time of the disagreement. He could have sent them out for further deliberation, or they could have then decided in the jury-box; but the practice of allowing the jury to separate after a cause has been submitted, and without the consent of the parties, would be clearly in contravention of our statute."

[8] 17 Cal. 76.

[9] 19 Cal. 426. So where they retired for the same purpose without an officer. People v. Moore, 41 Cal. 238.

[10] 22 Cal. 348; look at People v. Kelly, 46 Cal. 355. With reference to People v. Boggs, 20 Cal. 432, see remarks in section 26, subdivision 2.

Penny says he saw the jury separate and apart, and without the keeping of the sheriff. This, too, is equivocal, and rather means that the sheriff had left the jury together and absented himself, than that the jurors had separated one from another. He, however, states that one of the jurors came by himself to the store in which the witness was engaged, and had a conversation with him. This shows a separation, and only leaves a question whether the accused, by presenting an affidavit stating what took place in part, to wit, that the witness had a conversation with the juror, but not stating the character of the conversation, does not impliedly admit that the conversation was harmless, and that the separation caused him no injury. But it is not necessary to consider critically the effect of these affidavits as it might have been if they had stood alone, because the prosecution assumed the burden of showing that no injury resulted to the accused from the facts set forth in the affidavits. The testimony of the juror who had the conversation with Penny is, that he was taken sick and went to a water-closet, and in returning passed through the store where Penny was, and had a few words of conversation with Penny's employer, and perhaps with him, but it was of an entirely innocent character. The testimony of Penny, and also that of the sheriff, who had the jury in charge, and that of several of the jurors, was produced by the prosecution. It is voluminous, and it is unnecessary here to recapitulate it. It is sufficient to say that it shows fully that the jury were not subjected to any improper influences, and that the accused suffered no injury from the separation." And a new trial was refused.

In State v. O'Brien[11] the officer took the jury to the home of one of them, and allowed the juror, whose house it was, to go upstairs to change his shirt, the other jurors remaining below; the juror who went upstairs was gone about five minutes; the officer saw him go up and come downstairs, and testified that he believed no one could have conversed with the juror without his knowledge. *Held,* that a new trial must be refused.

In Coker v. State,[12] several persons made affidavit that when the jury retired to the woods to deliberate upon their verdict, the affiant saw some of the jurors in one place, but could not see the others. *Held,* no ground for a new trial.

[11] 7 R. I. 336.

[12] 20 Ark. 53.

In Thompson's case[13] a juror made affidavit that before the rest of the jury (confined together for the night) had risen, he rose, dressed himself, and went downstairs to the pavement for the purpose of meeting with some passer-by in order to send a message to his family; but that after remaining about five minutes and seeing no one, he returned to the rest of the jury. *Held*, no ground for a new trial. In the same case the jury were lodged in the third story of a hotel; they were distributed in five different rooms opening upon a common passage, which communicated with the street below by flights of stairs; the doors of the chambers were unlocked during the night, and there were no doors or fastening at either end of the passage. *Held*, no ground for a new trial.

In Philips v. Commonwealth[14] the jury was ordered to be kept together during the trial. One day, during the trial, a portion of them were allowed to take a walk under the charge of an officer. Those who remained in the jury-room were in charge of another officer. Another, who complained of a sick headache, was allowed by the judge to go on the hotel piazza accompanied by an officer. Subsequently the judge himself came on the piazza and sat near the juror; and the officer, being wanted for something, the judge told him to go, and that he himself would look after the juror. The judge allowed the juror to remain about three or four minutes after this, and then took him back to the jury-room. While the juror was on the piazza other persons were there, but nothing was said by them, and no conversation took place between the judge and the juror concerning the trial. *Held*, that the facts did not require the verdict to be set aside.

In People v. Yut Ling,[15] where, while making a view of the *locus in quo*, some of the jurors were occasionally out of sight of others, it was held not to be such a separation as constituted misconduct, if they were kept as much in a body as the nature of the premises would permit.

In People v. Wheatley,[16] where a juror went to a water-closet adjacent to the jury-room when the jury left the box and started for the jury-room, the other eleven going into the latter, a new trial was refused on the ground that this constituted separation, it appearing that the juror in question was accompanied by a bailiff

[13] 8 Gratt. (Va.) 637; see, also, Kennedy's Case, 2 Va. Cas. 510.

[14] 19 Gratt. (Va.) 485.

[15] 74 Cal. 569, 16 Pac. 489. And People v. Tarm Poi, 86 Cal. 225, 24 Pac. 998, where there was a similar separation and a similar ruling.

[16] 88 Cal. 114, 26 Pac. 95.

that he was not gone more than five minutes, and did not speak to any person during that time. Moreover, it appeared that no discussion took place in the jury-room during this short absence, and no ballot was taken.

In Saltzman v. Sunset Tel. Co.,[17] where a juror separated himself from his fellows to the extent of going to a telephone in the room where his fellows were dining, and holding a private conversation with various outside persons on personal matters, it was held improper, but not prejudicial.

In People v. Rowell [18] a juror separated himself from his fellows and visited a saloon which was the place of defendant's alibi, apparently in search of information about the case. The supreme court thought this was not prejudicial.

So in other cases.[19]

In Beals v. Cone,[19a] where there was an inspection of the mine involved in the litigation by the jury in charge of the sheriff, and the latter told the jurors that those who did not desire to go down need not do so, and some did not go down, there being no explicit instructions as to the manner of making the view, such separation was held not such misconduct as would warrant a new trial. In Menzies v. Kennedy,[19b] the jury were allowed to separate in the presence of the parties and their counsel, during a recess of the court, and it was held not misconduct, since, under the conditions shown, consent must be presumed, and that the verdict would not be disturbed there being no affirmative showing of injury or harm. In State v. Jones,[19c] after retirement, a juror went to his house from the jury-room in company with an officer, passed through the streets, spoke to and was spoken to by a number of persons, but no showing was made, or apparently attempted, that anything was said to him about the case, and he was all the time constantly by the officer's side; held, there was no ground for setting the verdict aside, no opportunity appearing for the juror to be tampered

[17] 125 Cal. 501, 58 Pac. 169.

[18] 133 Cal. 39, 65 Pac. 127.

[19] Steward v. Hinkel, 72 Cal. 187, 13 Pac. 494; People v. Bemmerly, 98 Cal. 302, 33 Pac. 263; People v. Ebanks, 117 Cal. 652, 49 Pac. 1049, 40 L. R. A. 269; People v. Coyne, 116 Cal. 295, 48 Pac. 218; People v. Chaves, 122 Cal. 134, 54 Pac. 596; In re McKenna's Estate, 143 Cal. 580, 77 Pac. 461.

[19a] 27 Colo. 473, 83 Am. St. Rep. 92, 62 Pac. 948, 20 Morr. Min. Rep. 591. See, also, Keller v. Bley, 15 Or. 429, 15 Pac. 705, where, on a view of the premises, one juror, unable to walk over the same, remained on the outside, but in view of the greater part of his fellows. *Held*, not to be prejudicial misconduct.

[19b] 9 Nev. 152.

[19c] 7 Nev. 408.

with. In Carnaghan v. Ward,[19d] a juror, after retiring to deliberate, found it necessary to leave the room, and did leave the room, and go to the rear of the court-house, returning immediately; it appearing affirmatively that during such separation he had no opportunity to converse with anyone respecting the trial, it was held no ground for disturbing the verdict. In Cook v. Territory,[19e] it was held that where a member of the jury was all the while in charge of the officer, and within hearing of the other jurors, it could not be regarded prejudicial misconduct due to separation, even though such juror conversed with outsiders, but upon subjects unconnected with the case. In Edward Thompson Co. v. Gunderson,[19f] it was held that a verdict would not be set aside for separation where the jurors held no communication with anyone during a brief separation.[19g]

As above suggested, the well-recognized distinction between separation *per se* and separation involving misconduct, as ground for new trial, must be constantly borne in mind. The first is not ground for new trial in civil cases, but in criminal only.[20] The second may or may not be ground for new trial in criminal cases, the point remaining more or less open to judicial interpretation.[21] In civil cases separation involving misconduct, as ground for relief by way of new trial, is well established. The rule may thus be stated: Separation of the jury is never, of itself, ground for a new trial in civil cases, but it is always regarded as probable occasion for misconduct of the jury, and this misconduct may or may not be prejudicial, and may or may not entitle a party to a new trial. If the circumstances attending the separation give rise to a reasonable presumption of improper influence, or reasonably tend to show that the substantial rights of a party have been materially affected, or, if the circumstances are such that the court cannot see that the separation did not involve prejudicial misconduct, the burden rests upon the successful party to show affirmatively that there was no such misconduct.[22] If, on the other hand, the circumstances do not indicate prejudicial misconduct, the moving party may, if he can, make an affirmative showing thereof.

[19d] 8 Nev. 30.
[19e] 3 Wyo. 110, 4 Pac. 887.
[19f] 10 S. D. 42, 71 N. W. 764.
[19g] See note 1a, *supra*.
[20] See the first clause of subdivision 3 of section 1181, California Penal Code: "When the jury has separated without leave of the court after retiring to deliberate upon their verdict," etc.
[21] See below, notes 24 and 26.
[22] See Saltzman v. Sunset Tel. Co., 125 Cal. 501, 58 Pac. 169. And see first part of section, above. See also, as to the general rule, sections 26 and 27, *ante*.

Upon the point as to whether, in civil cases, any distinction is to be recognized between separation with and separation without leave of the court, there is no direct expression. Upon principle it would seem that no such distinction can properly be drawn. If the separation is with leave, even after submission and retirement[22a] there can hardly be misconduct of the jury involved therein,[23] though it may be that gross misconduct may result therefrom. If the separation is without leave, this fact alone cannot, in view of the principle above stated, be held prejudicial; though if misconduct result, the fact that the separation was without leave would probably be regarded as an aggravating element, and whether it did or not, the presumption of misconduct would be so far indulged as to put upon the successful party the burden of proving that there was none in fact.[24]

As ground for new trial in criminal actions a distinction is to be drawn not only between separation with and separation without leave, but also between separation before and separation after submission of the cause, or retirement for deliberation. Separation after retirement without leave is a specific ground for new trial.[25] Separation after retirement, but with leave, is not ground

[22a] If the court should disregard the provisions of section 613, Code of Civil Procedure, and grant leave to separate after submission, it could hardly be regarded as misconduct of the jury, but rather an irregularity of the court.

[23] There would seem to be no difference in this respect between civil and criminal cases. See People v. Hawley, 111 Cal. 78, 43 Pac. 404; and People v. Dinsmore, 102 Cal. 381, 36 Pac. 661.

[24] See Saltzman v. Sunset Tel. Co., 125 Cal. 501, 58 Pac. 169. The California code contains no provision regulating separation in civil cases prior to submission or retirement, except that which makes it the duty of the court "either during the trial, or after the case is submitted to them," when they do separate, to admonish them as to their duty, etc. Separation is nowhere prohibited, but doubtless the matter is within the discretion of the court, and a rule requiring the jury to be kept together in a civil case before submission may be so far justified by the circumstances of the particular case that it would not be disturbed, and its disobedience held to raise a presumption of misconduct against the successful party requiring an affirmative showing to overturn, but the point has not been passed upon. The code sections are 611 and 613, Code of Civil Procedure.

As to what would be the effect of a separation in a civil case after submission and retirement there is no direct expression. Such separation cannot be authorized by the court without contravening the provisions of section 613, Code of Civil Procedure; and while separation is not *per se* a ground for a new trial in civil cases, yet, if separation without leave can ever raise a presumption of misconduct sufficiently strong to require an affirmative showing to overturn the same, certainly a separation under such circumstances should be so regarded.

The sole support of the text is to be found in the *dictum* in Saltzman v. Sunset Tel. Co. on page 508.

[25] See section 1181, subdivision 3, 1st clause, California Penal Code. And see the following cases: People v. Hawley, 111 Cal. 78, 43 Pac. 404;

for a new trial. It cannot be said to be even misconduct of the jury. It may be an irregularity of the court, or an abuse of discretion,[26] neither of which has been made a ground for a new trial in criminal cases. Separation before retirement, with the consent of the court, is neither misconduct of the jury, nor irregularity of the court, but, since separation at this particular time is within the discretion of the court, it can be disturbed only for an abuse of discretion.[26a] Separation prior to retirement without leave is

People v. Coyne, 116 Cal. 295, 48 Pac. 218; People v. Ebanks, 117 Cal. 652, 40 Pac. 1049, 40 L. R. A. 269; People v. Chaves, 122 Cal. 136; People v. Adams, 143 Cal. 208, 101 Am. St. Rep. 92, 76 Pac. 954, 66 L. R. A. 247; and see People v. Dinsmore, 102 Cal. 381, 36 Pac. 661.

[26] People v. Hawley, 111 Cal. 78, 43 Pac. 404; and see People v. Dinsmore, 102 Cal. 381, 36 Pac. 661.

[26a] In Dezenback v. Raymer, 13 Colo. 451, 22 Pac. 787, after the case was entirely closed, ready for the retirement of the jury, at 10 o'clock in the evening, the court suggested that the jury be allowed to separate, go to their respective homes, and return in the morning for the completion of their duties. Plaintiff's attorneys objected, submitting their reasons in writing to the court and counsel for the defendant. The latter remained neutral, expressing their consent to either separation or the retirement of the jury. The court overruled the plaintiff's request, and permitted the jury to separate. After their departure, plaintiff's attorneys excepted to the action of the court. Section 172 of the code (General Statutes of 1883) provided, "After hearing the charge a jury may either decide in court or retire for deliberation." The practice of charging the jury before argument obtained, however, and it was regarded impossible to enforce the provision strictly. After considering the general question of separation in connection with misconduct, the supreme court said:

"This being true, it only remains for us to determine whether the action of the court in this case, of allowing the jury to separate, was an abuse of discretion. Considering the time occupied in the trial of the cause, and the late hour when the cause was concluded, we are not prepared to say that the action of the court in permitting the jury to separate for the night and reconvene the following morning for their deliberation, under a sworn officer, was an abuse of discretion vested in it by the law. More especially do we feel unauthorized to disturb the verdict when the affidavits satisfactorily establish the fact to be that the jurors, during the separation, were in no way approached or influenced. The rule seems to be that the mere separation of a jury will not *per se* be sufficient ground for setting aside the verdict and granting a new trial. Something else must appear; that is, that there was a strong probability that the jury had been tampered with or influenced to return the verdict which is sought to be set aside. This is the accepted doctrine in civil cases in nearly all of the states of the Union."

But in most states provision is made for allowing the jury to separate, by consent, prior to final submission of the case, but such permission must be accompanied with the usual caution or admonition (see note 1, *supra*); and it is error, and ground for a new trial, to omit such admonition, unless it is affirmatively shown that nothing transpired during the irregular separation, to prejudice the rights of the defendant. The rule was thus expressed in Redman v. Territory, 2 Okl. 360, 37 Pac. 826: "If the court has failed to admonish the jury, upon adjournments, as required by law, a motion for a new trial on that ground should allege such failure, and the motion for new trial should be supported by competent evidence showing that fact." Again, quoting from a Kan-

doubtless governed by the same rules which control in civil cases. If there is a showing of improper influence, or if the circumstances attending the separation suggest or tend to show the existence of improper influence, the separation would involve misconduct, and the misconduct would doubtless be regarded as having prevented "a fair and due consideration of the case" within the meaning of the second clause of subdivision 3 of section 1181 of the Penal Code.[27]

§ 70. Jurors Drinking Liquor.—All the authorities are agreed that if any of the jurors are intoxicated, either while listening to the case or while deliberating upon it, the verdict must be set aside.[1] There is, however, a disagreement as to whether the mere fact of drinking liquor by the jurors will be ground for setting aside the verdict, without regard to the quantity drunk or the effect produced. Some courts have decided that verdicts are not to be set aside because the jurors drank liquor, unless the quantity is such that it might have produced at least some degree of intoxication, while others hold that if liquor is shown to have been used at all they will not inquire as to the effect produced, but will set aside the verdict. Some cases take a distinction between drink-

sas case (State v. Mulkins, 18 Kan. 16): "Of course, if shown affirmatively by the facts brought into the case at the time of the hearing of the motion for a new trial, that nothing transpired, during the irregular separation of the jury, prejudicial to the defendant's rights, then the court would not err in overruling the motion. This view of the question, of course, throws the burden of proving that no prejudice occurred by reason of the failure of the court to admonish the jury, upon the state." As stated elsewhere, "If it were a fact that the court did not admonish the jury, appellant should have set that fact out in his motion for a new trial, and supported the charge by competent evidence. Then, unless the prosecution could have shown that his rights had not been substantially prejudiced, the motion should have been sustained." And see, to the same effect, Brink v. Territory, 3 Okl. 588, 41 Pac. 614.

[27] People v. Bemmerly, 98 Cal. 299, 33 Pac. 263.

[1] In Repath v. Walker, 13 Colo. 109, 21 Pac. 917, where the jury were seen on the street, when they should have been deliberating upon their verdict, and one of them, together with the judge, who was in company, were intoxicated, and the judge was also intoxicated when he passed upon the motion for a new trial, the case was reversed, and a new trial granted. This is hardly a fair illustration of the rule, since by far the stronger ground of the two was the irregularity, or misconduct, of the judge. In Hedican v. Penn Fire Ins. Co., 21 Wash. 488, 58 Pac. 574, where a juror became intoxicated after the close of the testimony and remained so during the argument of the case, although the next morning the attention of the court having been called to the fact, the juror being then sober, counsel were given an opportunity to reargue the case, a new trial was held to be proper.

ing during temporary adjournments and drinking while deliberating upon the verdict. And it is sometimes said that a stricter rule should prevail in criminal than in civil cases. The leading case in support of the doctrine that the mere fact of drinking liquor is not ground for setting aside the verdict, but that it must be shown that the quantity used was such that it might have affected the result, is Wilson v. Abrahams,[1a] in New York. The leading case in support of the doctrine that the mere fact of drinking liquor is ground for setting aside the verdict, without regard to the quantity used, is Ryan v. Harrow,[2] in Iowa. As these cases give very fairly the reasoning on their respective sides of the question, the opinions will be quoted here.

The earlier New York cases, particularly Brant v. Fowler[3] and People v. Douglass,[4] maintained the strict rule laid down in Ryan v. Harrow. But these cases were overruled in Wilson v. Abrahams. In that case the facts were that before the evidence was closed, and during an adjournment for dinner, one of the jurors went to a tavern and drank about half a gill of brandy. This was held to be no ground for setting aside the verdict, and Bronson, J., delivering the opinion, said:

"In civil cases, when the court adjourns for refreshment in the progress of a trial, and before the cause is finally committed to the jury, it is now the usual course to allow the jury to separate and return to their families or boarding-house for food and rest; and if one of them drink a glass of spirituous liquor while so absent from court, I cannot think it sufficient ground for setting aside the verdict, unless there is some reason to suppose that the juror drank to excess, or at the expense or on the invitation of one of the parties. I agree that it would be well that all men should abstain from the use of intoxicating drinks; but until that sentiment becomes nearly or quite universal I think it should not be imposed as a law upon a juror in those cases where he is permitted, for a night or an hour, to go wherever he pleases without being attended by an officer. To adopt the language of Parke, J., in Everett v. Yonells, 4 Barn. & Adol. 681, where food was secretly delivered to the foreman after the jury had retired to consider of their ver-

[1a] 1 Hill, 207.
[2] 27 Iowa, 494, 1 Am. Rep. 302.
[3] 7 Cow. 562.
[4] 4 Cow. 26, 15 Am. Dec. 332; see, also, Kellogg v. Wilder, 15 Johns. 455; Dennison v. Collins, 1 Cow. 111; Rose v. Smith, 4 Cow. 17, 15 Am. Dec. 331.

dict, 'it would be a fearful thing if verdicts could be set aside on such grounds as this.'

"This case is distinguished in principle from those on which plaintiff relies. The People v. Douglass, 4 Cow. 26 [15 Am. Dec. 332], was a capital case, and the jurors were only allowed to leave the court-room under the charge of two sworn constables, with the direction of the court to keep together and return speedily. Contrary to their duty, two of the jurors separated from their fellows and the officers, and while so separated ate, drank spirituous liquor, and conversed with bystanders on the subject of the trial. The jurors knew that they were disregarding the instructions of the court, and doing that which the officers could not rightfully permit to be done; and for this misbehavior the verdict was set aside. So, too, in Brant v. Fowler, 7 Cow. 562, the jurors were not allowed to separate, but were permitted to leave the court-room accompanied by an officer. One of the number separated from the officer and drank brandy, and for that cause the verdict was set aside. This case certainly goes very far, for it appears that the juror did not intend to disregard his duty. He mistook the charge of the judge, and only drank a small quantity of brandy as a remedy for disease. But still the jurors were not, as in this case, at liberty to go where they pleased, nor had they the right to take either food or drink without the permission of the court. It should also be added that the judge had delivered his charge, and the trial, as to everything but the verdict, was at an end before the jurors were permitted to retire.

" The case of Brant v. Fowler cannot, I think, be supported. The mere fact that some of the jurors 'of their own head' drank spirituous liquor in the course of the cause, if, as was admitted in that case, there 'has been no mischief,' cannot be a sufficient ground for setting aside the verdict. There is no authority, ancient or modern, so far as I have observed, which goes far enough to uphold such a doctrine. The case of People v. Douglass must be considered as having turned upon all the grounds of irregularity which were urged against the verdict, and not on the single objection that some of the jurors drank spirituous liquors. In addition to the fact of drinking, two of the jurors, contrary to their duty, separated from their fellows, and one of them conversed with the bystanders on the subject of the trial. It is worthy of remark that in the two cases which have just been noticed not a

single authority, or even *dictum*, was referred to for the purpose of showing that the drinking of the jurors at their own expense, where there is no reason to suppose there has been any excess, is in itself a sufficient ground for disturbing the verdict. The earlier cases in this court had gone upon the principle that notwithstanding a trifling irregularity on the part of the jury, the verdict should stand, unless there was some reason to suppose that the party moving might have suffered by the misconduct of which he complained. (Smith v. Thompson, 1 Cow. 221; Horton v. Horton, 2 Cow. 589; Ex parte Hill, 3 Cow. 355.) This rule is in accordance with the ancient cases to which I have already referred. When in the course of a trial a juror has in any way come under the influence of the party who afterward has the verdict, or there is reason to suspect that he has drank so much at his own expense as to unfit him for the proper discharge of his duty, or where he has so grossly misbehaved himself in any other respect as to show that he has no just sense of the responsibility of his station, the verdict ought not to stand.[4a] But every irregularity which would subject the juror to censure, whether in drinking spirituous liquor, separating from his fellows, or the like, should not overturn the verdict, unless there is some reason to suspect that the irregularity may have had an influence on the final result."

The other side of the question has been ably presented by the supreme court of Iowa. The first case in that state upon the subject is State v. Baldy.[5] In that case, after the jury had retired to deliberate, one of them, during a temporary absence for a necessary purpose, went to a grocery store and drank a glass of ale or lager beer, and then returned with the bailiff to the jury-room. For this the verdict was set aside, the court mentioning with approval the cases of Brant v. Fowler and People v. Douglass, above cited. The case of Wilson v. Abrahams does not appear to have been called to the attention of the court. In the subsequent case of Ryan v. Harrow,[6] the subject was re-examined in the light of subsequent decisions. The court, however, adhered to the rule laid down in State v. Baldy, and Beck, J., delivering the opinion, said:

[4a] See People v. Leary, 105 Cal. 486, 39 Pac. 24, where similar arguments were made use of by counsel for defendants in support of a contention that the clandestine introduction into a jury-room of intoxicating liquors for use, even without consideration of their actual use was an act casting grave suspicion on the verdict as evincing a total misconception of the importance of the duties of a juror.

[5] 17 Iowa, 39.

[6] 27 Iowa, 494, 1 Am. Rep. 302.

"The fact that during the progress of the trial and after the cause is submitted to the jury, and before they had agreed upon their verdict, two or more of the jury drank intoxicating liquors, seems to be conclusively established by the evidence embodied in the record. The liquors appear to have been procured by the jury without the knowledge or aid of any of the parties, none of whom are blamable for this misconduct of the jury in this respect. Whether any of the jury were intoxicated is a question of doubt, several of the jurors, and the bailiff attending them, giving it as their opinion that one or two were under the influence of intoxicating liquors, while the person thus charged and several others deny the fact. The view we take of the case will relieve us of the duty of determining whether the charge of intoxication is sustained by the record.

"This court has ruled that a juror, separating from his fellows while considering of their verdict and drinking ale or lager beer, without the charge that he became intoxicated, is misconduct, requiring the verdict to be set aside. (State v. Baldy, 17 Iowa, 39.) The ruling of the court is based upon the fact of the drinking of the liquor by the juror, and no weight seems to be given to the fact of separation without permission. The authorities cited in support of this decision are Brant v. Fowler, 7 Cow. 562, and People v. Douglass, 4 Cow. 26 [15 Am. Dec. 332], which are directly in point and fully sustain the doctrine adopted by this court. It is urged that these cases were, at the time of the decision of this court in State v. Baldy, overruled by Wilson v. Abrahams, 1 Hill, 207, and the following cases, holding a contrary doctrine, are cited: State v. Sparrow, 3 Murph. [7 N. C.] 487; Pope v. State, 36 Miss. 121; Gilmanton v. Ham, 38 N. H. 108; Commonwealth v. Roby, 12 Pick. 496. Wilson v. Abrahams, it may be admitted, does overrule Bryant v. Fowler and People v. Douglass. The other cases cited by the defendant's counsel hardly go the length and in the direction claimed for them. In New York the rule adopted by this court in State v. Baldy seems to have been the received doctrine until Wilson v. Abrahams. That case overrules not only Brant v. Fowler and People v. Douglass, but also two other prior cases which recognize the rule, viz., Bullard v. Spoor, 2 Cow. 430, and Rose v. Smith, 4 Cow. 17 [15 Am. Dec. 331]. Prior to any of these cases, however, it had been held, in the same state, that a verdict would not be set aside, because during

a suspension of proceedings in a cause the jurors drank spirituous liquors furnished by both parties in the cause. (Dennison v. Collins, 1 Cow. 111.)

"The foregoing are all the cases that have fallen under our notice which serve to elucidate the question under consideration. It must be admitted that they are very far from agreement, and cannot be reconciled. It may be said, however, that all admit that the drinking of intoxicating liquors by jurors while in the discharge of their duties as such is a very dangerous practice, that ought to be discouraged; it is uniformly condemned. All unite in holding, too, that if it appear that a juror was under the influence of spirituous liquor while sitting in the case, the verdict cannot be sustained. The rule which this court adopted in State v. Baldy is supported by reason, and will certainly tend to insure purity and correctness in the verdicts of juries by removing the possibility of the effects of excessive indulgence in intoxicating drinks, admitted on all hands to be dangerous and evil. There is absolute safety in the rule, there is admitted danger without it. Prudence and a desire to secure a pure administration of the law demand that we adhere to it. It is in harmony with other rules intended to secure unbiased and dispassionate verdicts of juries, and is supported by precisely the same reasons. If a juror has communications in regard to the cause with a party or an attorney therein; if he receives refreshments from a party to the suit, or is exposed to other temptations that might operate upon him to corrupt his verdict, the courts will not enter into an inquiry in order to determine whether indeed such was the result, but in fear of possible improper influences wrought thereby, will set aside the verdict.[6a] In such cases jurors of ordinary intelligence and integrity would not be influenced by these things, but the courts hold it far safer, and as more certainly conducing to the correct administration of justice, to remove temptation entirely out of the reach of jurors than to weigh the temptations to which they may be exposed, and their ability to resist them, and thereupon to determine whether in fact the pure fountain of justice has been corrupted. Doubtless, ardent spirits to a certain amount may be drank without inflaming the passions or beclouding the reason, but beyond a certain amount they indisputably produce these results. Where that limit is with different men cannot be

[6a] See section 48, *ante*. Also People v. Leary, 105 Cal. 486, 39 Pac. 24.

certainly known. Courts will not assume to determine the limit and whether, in cases where jurors have indulged in the use of the dangerous liquid, it has been passed. Inasmuch as in such a case there can be no certainty of the purity and correctness of the verdict, that it is the result of cool and dispassionate deliberation and the honest exercise of reason, it will be set aside. In the business affairs of the country these very reasons often constrain those who employ men to discharge duties requiring coolness, deliberation, and the calm exercise of judgment for their performance with safety to life and property, to impose strict abstinence from intoxicating beverages upon those so employed. Engineers upon railroad locomotives, pilots upon steamboats, etc., are often the subjects of such restrictions, not because indulgence in intoxicating liquors within the very indefinite bounds of what is called moderation would absolutely unfit them for the careful discharge of their duties, but because there is absolute certainty of perfect safety from the maddening influence of alcohol in entire abstinence from the use of all the liquors in which it exists, and without such abstinence there can be no safety. Bronson, J., in Wilson v. Abrahams, 1 Hill, 207, uses the following language: 'If one of the jurors drank a glass of spirituous liquors while absent from court, I cannot think it a sufficient ground for setting aside the verdict, unless there is some reason to suppose that the juror drank to excess, or at the expense of or on the invitation of one of the parties. I agree that it would be well that all men should abstain from using intoxicating drinks, but until that sentiment becomes nearly or quite universal, I think it should not be imposed as a law upon a juror in those cases where he is permitted for a night or an hour to go wheresoever he pleases without being attended by an officer. When there is reason to suspect that he has drank so much at his own expense as to unfit him for the proper discharge of his duty, the verdict ought not to stand.' These views ignore the very reasons of the rule which they attack, and put out of sight the acknowledged fact that it is the only certain escape from danger to the purity of the verdict from the use of intoxicating drinks. They require the court to determine the fact that these drinks have not been used to excess, from which expression we infer is meant to an extent that would not affect the mind and passions—a most difficult task, that might well puzzle a physiologist. The just administration of the law ought not to rest upon

such uncertainties. The mere act of drinking at the expense of a party is given as a reason for setting aside the verdict. Yet the practical experience of all men teaches that ordinarily the danger of improper influences over the juror from drinking at the expense of a party to the suit would not be as great as the danger of arousing his passions and beclouding his judgment by the drinking itself, even to an extent that would not be called excessive, but considered within the bounds of moderation. The argument, too, in the above extract, to the effect that the restraint ought not to be imposed on jurors while the use of such beverages is free to others, is unsound. If the safe and correct administration of the law requires the rule, it is no argument against it that it will require jurors to submit to restraint not imposed upon others or themselves when not in discharge of the duties of jurors. That they may properly discharge those duties, they do in fact submit to many restraints. We are well satisfied that the rule in State v. Baldy is sustained by reason, and that it is in accordance with sound legal principles, and it is not unsupported by authority, if indeed the weight of authority is not in accordance therewith."

In other states the courts follow, some the rule in Wilson v. Abrahams,[7] and some that in Ryan v. Harrow.[8] In California the question arose in People v. Gray.[9] In that case the facts were that during a confinement beginning on the evening of June 3d, and ending on the morning of June 12th, the jury procured at their own expense, and consumed from time to time, seventeen and a half gallons of beer, two gallons of wine, three bottles of claret, and some whisky at each meal. For this the verdict was set aside, and Thornton, J., said:

"It may well be doubted whether it was the intention of the court in Wilson v. Abrahams to establish a rule in capital cases

[7] See Pope v. State, 36 Miss. 121; Creek v. State, 24 Ind. 151; Purinton v. Humphreys, 6 Greenl. (Me.) 379; State v. Cucuel, 31 N. J. L. 249; Thompson's Case, 8 Gratt. 637; Richardson v. Jones, 1 Nev. 405; State v. Jones, 7 Nev. 408; Rowe v. State, 11 Humph. 491; Pelham v. Page, 6 Ark. 535; Davis v. People, 19 Ill. 74; Westmoreland v. State, 45 Ga. 225; State v. Caulfield, 23 La. Ann. 148; Perry v. Bailey, 12 Kan. 532; Larimer v. Kelly, 13 Kan. 79; Kee v. State, 28 Ark. 155; Jones v. People, 6 Colo. 452, 45 Am. Rep. 526.

[8] Jones v. State, 13 Tex. 168, 62 Am. Dec. 550; Leighton v. Sargent, 31 N. H. 119, 64 Am. Dec. 323; Davis v. State, 35 Ind. 496, 9 Am. Rep. 760; Gregg v. McDaniel, 4 Har. (Del.) 367; State v. Bullard, 16 N. H. 139; but as to New Hampshire, see Gilmanton v. Ham, 38 N. H. 108.

[9] 61 Cal. 164, 44 Am. Rep. 549.

different from that held in Iowa and Texas. We express ourselves in this way in consequence of the guarded language of the opinion. The opinion opens by stating the rule in civil cases, and when it comes to remark on the case of People v. Douglass, in the 4th Cowen, holding a rule similar to that established in Iowa and Texas, it is said that the case under consideration is distinguished from it, and the feature of distinction first mentioned is that it is a capital case. The cases cited by counsel either follow the rule in the Iowa and Texas cases, or Wilson v. Abrahams. If any have gone further in a direction opposed to Ryan v. Harrow, and Jones v. State, above cited, we are not disposed to follow them. It is not necessary in this case to say which rule should be adopted as the law in this state; but following the rule of Wilson v. Abrahams, 'that where there is reason to suspect that' a juror 'has drank so much as to unfit him for the proper discharge of his duty,' the verdict ought not to stand. In our judgment there is strong reason to suspect this of one of the jurors, and therefore a new trial should be had."

It will be observed of the foregoing case that the language quoted was not concurred in by the majority of the court;[10] and the justice who wrote the main opinion expressly stated that it was not necessary for the purposes of the decision to decide between the rule laid down in Wilson v. Abrahams and that maintained in Ryan v. Harrow.

Upon principle it is thought that the doctrine of Wilson v. Abrahams is the correct one. The fallacy in the ably written opinion in Ryan v. Harrow is that it assumes that the question is whether the jurors should be permitted to drink liquor or not, and because the effect of liquor is different with different men and difficult to determine, concludes that the mere fact of taking liquor is ground for setting aside a verdict, without regard to the quantity taken. The real question, however, is not whether the jurors should be permitted to drink liquor, but what should be done in case they do. It may be conceded that the drinking of any liquor whatever by a juror, at any stage of the trial, and by whomsoever furnished, is misconduct, and should be treated as contempt of court, and punished by reprimand, or fine and imprisonment, or both.

[10] Myrick, McKee, McKinstry, and Ross, JJ., concurred specially. Sharpstein, J., concurred specially, but thought the introduction of liquor into the jury-room "constituted misconduct *per se*."

But if the misconduct had no influence upon the result, why should such result be set aside on account of it? There are many cases in which the court can see that the drinking could not have affected the verdict. Thus where, as in Brant v. Fowler, a juror drinks a third of a gill of brandy to check a diarrhea, or where, as in Wilson v. Abrahams, he drinks a half of a gill during a recess of the court, or where a glass of ale or claret is taken with dinner, or where, during an adjournment from Saturday to Monday, he takes his customary wine or beer, or a social glass with a friend to cheer his day of rest—in such cases the court can determine with reasonable certainty that the drinking had no effect whatever upon the verdict. Now, such being the case, the only possible reason for setting aside the verdict (aside from the punishment of the juror, which can be more effectually done in another way) is the prevention of drinking by jurors in other cases—this result being supposed to be attainable by the establishment of a rule applicable to all cases, that the mere fact of drinking, without regard to quantity, will vitiate the verdict. The objection to this course is that it punishes the wrong party; it is a comparatively light punishment to the juror, and a very severe one to the successful party, who is entirely innocent. It is a very grave question whether any court has the right to set aside a verdict which is free from defect, and entirely untainted by the irregularity, merely for the sake of the effect upon jurors in other cases. In California the statute provides that a new trial can be granted only for a cause "materially affecting the substantial rights" of the losing party; and it seems a palpable violation of this provision to grant a new trial where, as in the cases put, the court can see that no right of the party was materially or otherwise affected. But assuming that the court may rightfully take such a course, it is very questionable whether it would accomplish the desired end. For, not being lawyers, the great majority of the jurors in other cases would not know about the rule, and if they knew about it, would in all probability be much less concerned at the setting aside of their verdict than at the prospect of the more direct punishment of a fine or an imprisonment. The rule, therefore, even if it may rightfully be made by a court, is not likely to accomplish its only possible purpose, and involves a heavy punishment of an entirely innocent party. Moreover, if such a rule is to be applied to jurors, it is not easy to see it should not be applied to

the judge. His duties are as delicate and difficult of performan as those of the jurors, and the effect of alcohol on his mind is n more easily ascertainable than on theirs.

In the case of People v. Lee Chuck,[10a] where this was assigne as ground for new trial under the second clause of subdivision of section 1181, Penal Code, the distinction above referred to b tween capital and other cases was reiterated. The court the said:

" We are of the opinion that where the proof of th drinking is clear and undisputed, and that it was done while th jury were actually deliberating upon their verdict in a capital cas a verdict of conviction should not be allowed to stand. This our conviction independent of authority, but the great weight o authority is to the same effect." (Citing People v. Gray, *supr* and other cases.)

With the exception of this case, however, the California cour have not followed this distinction. People v. Lee Chuck was sp cifically overruled and discredited in People v. Leary,[10b] and neve was really regarded as authority in this state. It received th acquiescence of only three of the seven justices of the cour Works, who wrote the opinion, and Thornton and Sharpstein Beatty, C. J., concurred specially; McFarland, J., dissented, Templ and Patterson, JJ., not participating. In the Leary case, whic was also a capital case, it was distinctly held that the mere fac of the jury or any of them drinking intoxicating liquors whil the case was being tried would not of itself vitiate the verdic In fact, counsel for defendant laid less stress upon the fact o drinking than upon the alleged clandestine and surreptitiou manner of introducing the liquor into the jury-room, contendin that a man who would thus wantonly and willfully "smuggle" into the jury-room intoxicating liquors without the knowledge o the court or parties "evinces such a total misconception o the importance of their (his) duties and obligations as of itsel to cast grave suspicion on the verdict and warrant a new trial."

The doctrine of Wilson v. Abrahams has been followed consist ently in California (the Lee Chuck case being apparently the only departure, if it can be regarded as a departure). In People v Deegan,[10c] which was a larceny case, one of the jurors was shown

[10a] 78 Cal. 317, 20 Pac. 719.
[10b] 105 Cal. 486, 39 Pac. 24.
[10c] 88 Cal. 602, 26 Pac. 500.

to have taken whisky during the noon recess of the day on which the verdict was rendered in the afternoon, but not to have been noticeably intoxicated. The court thought that while the juror might have drunk more than he ought, it did not appear that he was unable to render an intelligent verdict. In other words, the mere fact of drinking whisky while the case was being tried, and immediately preceding the retirement of the jury, was not regarded as, of itself, ground for a new trial. So in People v. Sansome [10d] the court held that the indulgence of jurors in intoxicating liquors could not successfully be maintained as ground for new trial unless it could be shown that such indulgence had resulted in their being incapacitated. So in other cases.[10e]

[10d] 98 Cal. 235, 33 Pac. 202.

[10e] People v. Van Horn, 119 Cal. 323, 51 Pac. 538; People v. Leary, 105 Cal. 486, 39 Pac. 24. But see People v. Bemmerly, 98 Cal. 299, 33 Pac. 263, where drinking was one of the grounds treated, although the new trial appears to have been granted for separation of the jury; and People v. Mitchell, 100 Cal. 328, 34 Pac. 698, where almost every species of misconduct and irregularity, upon the part of the jury and adverse parties, was catalogued, and where the opinion of the supreme court relative to drinking as a ground for a new trial is fully set forth; People v. Lyle (Cal.), 4 Pac. 977.

The decisions of other states are in accord with the principle here outlined. In Jones v. People, 6 Colo. 452, 45 Am. Rep. 526, it was held that the use of liquor by jurors, even in the jury-room, while it might subject the juror to punishment for contempt of court, is not, in itself, ground for a new trial, unless it appears that the interests of the losing party have been injuriously affected thereby. The same rule was applied as has been held to govern in other cases of misconduct. In May v. People, 8 Colo. 210, 6 Pac. 816, the same rule was stated, and a new trial was refused because two of the jurors drank intoxicants, no prejudicial effect being shown.

In Davis v. Cook, 9 Nev. 134, the subject was thus treated: "In some of the states of this Union the use of spirituous liquors by the jury without the permission of the court will avoid the verdict, but in this and other states, the rule has been so far modified that the moderate use of liquors, unless furnished by the prevailing party, does not constitute such misconduct as will vitiate the verdict. No court, however, should hesitate to set aside a verdict formed by a jury, any one of whom has during the performance of his duties, used liquor to an intoxicating extent. Although it requires but three-fourths of their number to agree upon a verdict, the correct administration of justice demands the exercise of cool, unclouded sober judgment of the twelve men who are selected to investigate the facts at issue. In vindication of the character of courts, and the purity of jury trials a verdict participated in by a juryman with passions inflamed and reason impaired by ardent spirits should not be allowed to stand. Trial by jury, regarded by our ancestors as the principal bulwark of our liberties and the glory of the English law, would degenerate into a mockery of justice if verdict were capriciously determined by intoxicated jurors."

See, to same effect, Richardson v. Jones, 1 Nev. 405; State v. Jones, 7 Nev. 408; Schissler v. Chesshire, 7 Nev. 427, 5 Morr. Min. Rep. 309. Also, S. & M. Min. Co. v. Showers, 6 Nev. 291.

Even intoxication is not ground for a new trial, if it appears that such intoxication did not result in

The circumstances connected with the use of spirituous liquor by jurors often involve the real misconduct. Thus in Palmer v Utah etc. Co.,[10f] the liberal and conspicuous patronage of a saloon by a relative of one of the parties, the saloon being owned and kept by one of the jurors, who, with other jurors, drank liquor with said relative, and at his expense, although there was no showing of intoxication, was held ground for a new trial. So, it has been frequently held that drinking by jurors at the expense of the prevailing party would be held prejudicial.[10g] This subject is considered at greater length elsewhere.[10h]

Here, as elsewhere, it is essential that the interested party should be vigilant, and call the court's attention to the intoxication of a juror; failing which, he cannot avail himself of the ground to ask a new trial.[10k]

injury. Thus in Walsh v. Winston, 18 Idaho, 768, 111 Pac. 1090, where the intoxication occurred during a recess of the court, and when court convened, and it was apparent that the juror was not yet sober, the court took another recess until he should fully recover, and at no time was the jury called upon to consider the case while the intoxication lasted, and the parties did not object at the time to the method of disposing of the question, it was held that there was no ground for a new trial.

10f 2 Idaho, 290 (315), 13 Pac. 425.

10g See cases cited in note 10e, *supra*.

10h See section 48, *ante*.

It is always a difficult matter to lay the finger upon the real source of the prejudicial misconduct in cases involving the use of intoxicants. Mere intoxication seldom exists unaccompanied by other misconduct or irregularity. A case in point is that of Scott v. Tubbs, 43 Colo. 221, 95 Pac. 540, 19 L. R. A., N. S., 733. In that case, which was a condemnation suit, four of the jurors, after the inspection of the property by the jury, separated from their fellows, and the officer in charge, and went with the petitioner, on his invitation, to a saloon, and drank with him, but not to intoxication. Here was misconduct by separation, possible misconduct by drinking, and possible tampering, or irregularity of the adverse party. A new trial was granted and only misconduct by intoxication was expressly eliminated. A new trial was properly granted for such separation as involved presumptive prejudice in most states; and the same result might have followed acceptance of favors from one of the parties. Other illustrations might be offered, but the cases are to be found cited in their appropriate connection, either under the sections as to irregularity of court or adverse party, or misconduct of the jury.

10k In Bradshaw v. Degenhart, 15 Mont. 267, 48 Am. St. Rep. 677, 39 Pac. 90, where the defendant joined in drinking at plaintiff's expense with the jury, and did not bring the alleged misconduct to the attention of the court, he is not in a position to say that there was prejudice to his right to a fair and impartial trial.

In Grantz v. Deadwood, 20 S. D. 495, 107 N. W. 832, and Ewing v. Lunn, 22 S. D. 95, 115 N. W. 527, it was held that it must be shown that the movant was ignorant of the misconduct until after the trial, and in the last-cited case, it was held that where knowledge existed, and the attention of the court was not called to the misconduct, waiver resulted. Also, Kinneberg v. Kinneberg, 8 N. D. 311, 79 N. W. 337.

The question of intoxication of a juror is one of fact for the determination of the trial court, and such determination will not be interfered with on appeal, otherwise than as the determination of questions of fact in general may be reviewed by the appellate court.[101]

With reference to setting aside the verdict for drinking by jurors, the rule laid down by Bronson, J., in Wilson v. Abrahams is not difficult of application, and is entirely free from dangerous consequences. It is that where liquor is taken by a juror in such a quantity that the court can see that it had an injurious effect, or that the court cannot determine whether it had such effect or not, the verdict must be set aside; but that where the court can see that the quantity taken could not have had any effect, the verdict must stand. In the language of that distinguished judge, the verdict should not be overturned "unless there is some reason to *suspect* that the irregularity *may* have had an influence upon the final result." In other words, if there be doubt the verdict must be set aside, but if there be none, the verdict must stand. This doctrine is based upon sound reasons; it is in harmony with the general rule as to irregularities,[11] and is in accordance with the weight of authority.[12]

There can be no distinction upon any sound principle between drinking in criminal cases, and drinking in civil cases. The misconduct is the same; the effect on the mind and passions is the same; and the rights involved, if not always as important, are in many cases of immense value.

§ 71. The Jurors must Arrive at a Verdict by Mutual Consultation and Deliberation, and not by a Resort to the Determination of Chance.—Arriving at a verdict by a resort to the determination of chance is so repugnant to every sense of justice and every consideration of policy that the law allows it to be shown by the affidavits of the jurors, it being the only exception to the rule that the affidavits of jurors are not admissible to impeach their verdict.[1] Any expedient which involves the element of chance is

[101] See State v. Jones, 7 Nev. 408; State v. St. Clair, 16 Nev. 207.

[11] See section 26, *ante*.

[12] See note 7, *supra*. In relation to the subject in general, see Commonwealth v. Roby, 12 Pick. 496.

[1] Section 657, subdivision 2, California Code of Civil Procedure, and corresponding provisions of other Codes, section 23, *ante*. See, also, section 73, *post*.

within the prohibition.[1a] Thus where two of the jurors, being unable to assent to the conclusion of the others, agreed between themselves that one should cover a piece of money and the other should guess whether it was "heads or tails," and that if he guessed correctly they should assent to the conclusion of the rest, and the guess being correct they so assented, it was held that the verdict must be set aside.[2] So where the question dividing the jury was whether they should give fifteen hundred dollars or one thousand dollars, and they agreed to draw straws, and to render a verdict for fifteen hundred dollars if the long straw was drawn, and for one thousand dollars if the short straw was drawn, and the long straw was drawn, and in pursuance of their agreement they rendered a verdict for fifteen hundred dollars, a new trial was granted.[3] The rule that a resort to the determination of chance will vitiate a verdict is so well settled that it is not considered necessary to refer to the decisions in other states upon the proposition.[4]

A common mode of arriving at the amount of a verdict is for the jurors to agree that each shall set down the amount he thinks is proper, and that the sum of all the amounts shall be divided by the number of persons composing the jury. When this is done under a further agreement that the quotient shall be taken as the amount of the verdict, and the agreement is carried out, the verdict is a chance verdict and a new trial will be granted.

It was at one time held in this state that a verdict arrived at in this way, while improper and vicious and subject to be set aside,

[1a] A verdict determined by chance will be set aside, and a new trial granted, aside from any particular mode of showing the fact itself. Schoolfield v. Brunton, 20 Colo. 139, 36 Pac. 1103; Pawnee v. Adams, 1 Colo. App. 250, 28 Pac. 662; Giffen v. Lewiston, 6 Idaho, 231, 55 Pac. 545.

But it must appear that the assent of one or more of them was obtained as a result of the chance determination: Midgeley v. Bergerman, 30 Utah, 17, 83 Pac. 466; and if, after the resort to chance, the jury continues to deliberate in good faith, and afterward arrive at a verdict in consequence of such deliberation, the resort to chance cannot be said to have directly induced the verdict, and it will not be set aside. Pence v. California Min. Co., 27 Utah, 378, 75 Pac. 934. If the chance verdict itself is afterward voted on and accepted as the deliberate expression of the opinion of the jury, the verdict will be regarded as valid. Greeley Irr. Co. v. Von Trotha, 48 Colo. 12, 108 Pac. 985.

[2] Donner v. Palmer, 23 Cal. 40.

[3] Levy v. Brannan, 39 Cal. 485. For facts of this case, see vol. 57, Sup. Ct. Records, p. 268, in S. F. Law Library.

[4] See, generally, section 406 et seq., Proffatt on Jury Trial; Hilliard on New Trials, pp. 160, 161, 162; 2 Graham and Waterman on New Trials, p. 578 et seq.

was not technically a chance verdict, and that its irregularity could, therefore, not be shown by the testimony of the jurors themselves,[5] but in Dixon v. Pluns[6] the supreme court, overruling the former cases, determined that such a verdict came under the terms of the subdivision just cited and could be impeached by the affidavit of any one of the jurors, and this ruling has been followed by subsequent cases.[7]

If, however, the jurors do not agree to be bound by the result of the computation, but reserve to themselves the right to dissent from it in arriving at their verdict, there is no impropriety in their conduct, and the verdict will stand.[7a]

Authorities in other states are to the same effect.[8]

[5] Wilson v. Berryman, 5 Cal. 44, 63 Am. Dec. 78; Turner v. Water Co., 25 Cal. 397, 1 Morr. Min. Rep. 107; Boyce v. Cal. Stage Co., 25 Cal. 460.

[6] 98 Cal. 384, 35 Am. St. Rep. 180, 33 Pac. 268, 20 L. R. A. 698.

[7] Weinburg v. Somps (Cal.), 33 Pac. 341; King v. Elton, 2 Cal. App. 145, 83 Pac. 261.

[7a] Wilson v. Berryman, 5 Cal. 44, 63 Am. Dec. 78; Turner v. Water Co., 25 Cal. 397, 1 Morr. Min. Rep. 107; Hunt v. Elliott, 77 Cal. 588, 20 Pac. 132; McDonald v. Pescadero Stage Co., 120 Cal. 476, 52 Pac. 725.

[8] See Smith v. Cheetham, 3 Caines, 157; Dana v. Tucker, 4 Johns. 487; Grinnell v. Phillips, 1 Mass. 542; Dorr v. Fenno, 12 Pick. 521; Barton v. Holmes, 16 Iowa, 252; Harvey v. Jones, 3 Humph. 157; Thompson v. Commonwealth, 8 Gratt. 637.

The courts of other Pacific Coast states have closely followed the decisions of California upon the point. So long as the rule obtained in California that the so-called "quotient" or "average" verdict was not a chance verdict within the meaning of the statutory provision that affidavits of jurors were admissible to impeach verdicts arrived at by a resort to the determination of chance, the courts of other states contented themselves with following the rule of the older state. But the California rule was more or less severely criticised in Goodman v. Cody, 1 Wash. Ter. 329, 34 Am. Rep. 808, Pawnee Imp. Co. v. Adams, 1 Colo. App. 250, 28 Pac. 662, Flood v. McClure, 3 Idaho, 587, 32 Pac. 254, and others, and was never fully accepted as sound law anywhere. The following cases are cited as sustaining the rule, and as illustrating its history: Knight v. Fisher, 15 Colo. 176, 25 Pac. 78; Pawnee Imp. Co. v. Adams, 1 Colo. App. 250, 28 Pac. 662; Schoolfield v. Brunton, 20 Colo. 139, 36 Pac. 1103; Empson Packing Co. v. Vaughan, 27 Colo. 66, 59 Pac. 749; Colorado Springs v. Duff, 15 Colo. App. 437, 62 Pac. 959; Flood v. McClure, 3 Idaho, 587, 32 Pac. 254; Gordon v. Trevarthan, 13 Mont. 387, 40 Am. St. Rep. 452, 34 Pac. 185; Lee v. Clute, 10 Nev. 149; Murphy v. Murphy, 1 S. D. 316, 47 N. W. 142, 9 L. R. A. 820; Ulrick v. Dakota etc. Co., 2 S. D. 285, 49 N. W. 1054; Long v. Collins, 12 S. D. 621, 82 N. W. 95; Wright v. Union Pac. R. Co., 22 Utah, 338, 62 Pac. 317; Goodman v. Cody, 1 Wash. Ter. 329, 34 Am. Rep. 808; Watson v. Reed, 15 Wash. 440, 55 Am. St. Rep. 899, 46 Pac. 647; Conover v. Neher-Ross Co., 38 Wash. 172, 107 Am. St. Rep. 841, 80 Pac. 281.

In Dixon v. Pluns, 98 Cal. 384, 35 Am. St. Rep. 180, 33 Pac. 268, 20 L. R. A. 698, and Gordan v. Trevarthan, 13 Mont. 387, 40 Am. St. Rep. 452, 34 Pac. 185, are to be found treatments in detail of the signification of the word "chance" as applied to verdicts in this connection.

The method referred to as the quotient or average method of determination is sometimes commended as a convenient method of arriving at the amount of a verdict; but there must

But if the jury should resort to the proceeding here outlined it should clearly appear that the jury were not induced by it to agree upon the sum arrived at as their verdict. Thus in Illinois C. R. R. Co. v. Able,[9] although one of the jurors swore that there was "considerable consultation" after the calculation, the verdict was set aside, the court saying that it "was evidently arrived at under the pressure of such an agreement."

Even if the jury have resorted to the purest chance process to determine their verdict, it is competent for them to retrace their steps, repudiate such illegal verdict, and find a valid one upon due and candid deliberation. But if there be any resort to the determination of chance, the evidence of its repudiation and the subsequent finding of a proper verdict should be clear and satisfactory.[10]

A resort to the determination of chance is not the only improper mode of arriving at a verdict. The law requires mutual consultation and deliberation in case of disagreement among the jurors, and any other mode of settling differences of opinion is prohibited.

It has been held that the jurors must make up their minds together and not separately.[11]

§ 72. Disclosure of Verdict.—The code provides that the officer in charge of the jury "must not, before their verdict is rendered, communicate to any person the state of their deliberations, or the verdict agreed upon";[1] but there is no express provision prohibiting the jurors from communicating the state of their deliberations, or the verdict agreed upon. It is the evident intention of sections 614 and 618, however, that there should be no disclosure of the verdict before it is announced in court. But if the verdict be not changed after it was agreed upon, it is hard to see how its disclosure could work any injury to the losing party. In the case of Ingersoll v. Truebody[2] it was

be no antecedent agreement. Thus, in Colorado Springs v. Duff, 15 Colo. App. 437, 62 Pac. 959, it was said: "Whenever the suit is for unliquidated damages, and the jury find great difficulty in arriving at a conclusion, and they resort to this scheme to get at a result, and they do not antecedently agree, or if they do agree, if they subsequently discuss the question, and the court can see that the verdict is really the result of deliberation and discussion, the verdict will be upheld. Courts go a long way to sustain verdicts under such circumstances."

[9] 59 Ill. 131.

[10] Thompson v. Perkins, 26 Iowa, 486.

[11] Ætna Ins. Co. v. Grube, 6 Minn. 82.

[1] Section 613, California Code of Civil Procedure.

[2] 40 Cal. 603; see 2 Graham and Waterman on New Trials, p. 365; Fowler v. Tuttle, 24 N. H. 9.

held that the mere fact of the disclosure of a verdict was not sufficient grounds for a new trial. In that case the court told the jury that when they agreed upon a verdict they could seal it up and go home. The jury availed themselves of the permission; and in the morning of the following day, before the opening of court, one of the jurors informed the counsel of the defendant what the verdict was. This was held to be no ground for setting aside the verdict, and Crockett, J., delivering the opinion, said:

"There is no proof of any fraudulent or improper motive in the juror or the counsel, or any reason to infer that the plaintiffs were in any respect injured by the disclosure. The verdict had already been sealed up, and was delivered as previously agreed upon. The conduct of the juror was certainly reprehensible, and if there had been the least reason to infer that any damage to the plaintiffs had resulted from the premature disclosure of the verdict, it ought to have been set aside. But in the absence of any showing to that effect, or of any fraudulent conduct on the part of the juror, the mere fact of the disclosure was not, of itself, sufficient to invalidate the verdict."

Whether, if after the disclosure of the verdict, it should be changed, a presumption of injury would not arise, in the absence of a showing to the contrary, does not appear to have been decided. But if it would arise it could probably in many cases be rebutted.

§ 73. The Affidavits of Jurors are Inadmissible to Impeach Their Verdict, Except Where It was Arrived at by a Resort to the Determination of Chance.—It is well settled in California that the affidavits of jurors cannot be received to impeach their verdict, except in the case permitted by the statute. The general rule was first laid down in People v. Baker.[1] The report of that case does not show what was the particular misconduct complained of. Bennett, J., delivering the opinion, said: "We consider it a settled rule, founded upon considerations of necessary policy, that the testimony of a juryman cannot be received to defeat his own verdict." In the subsequent case of Amsby v. Dickhouse,[2] it was sought to be shown by the affidavit of a juror that "he was very averse to finding the verdict; that if there had been a

[1] 1 Cal. 403. [2] 4 Cal. 102.

third party he would have been in favor of giving them the ground in preference to either plaintiff or defendants; that one of the jurors in the jury-room came to him and endeavored to influence his verdict by stating that the plaintiffs were a parcel of gamblers who were trying to get the claims of honest miners." But the court held that this affidavit should not have been received, and Murray, C. J., delivering the opinion, said: "It is well settled that a juror cannot be allowed to impeach his own verdict. The reason of this wholesome rule of law is too obvious to require any explanation." In Castro v. Gill [3] it was sought to be shown by the affidavit of a juror, that "the verdict as recorded was not the verdict agreed upon by the jury." But the court, per Heydenfeldt, J., said: "The record shows what is the verdict, and the affidavits of jurors will not be taken to contradict it." In Wilson v. Berryman [4] it was held that the affidavits of the jurors could not be received to show that the amount awarded was arrived at by dividing the sum of the several amounts each juror was in favor of giving by twelve, and agreeing to adopt the quotient as the verdict. In People v. Wyman [5] the affidavits of some of the jurors were offered to show that the verdict "was not a fair expression of the opinion of the jury." But it was held that the affidavits were inadmissible, the court, per Cope, J., saying: "We have repeatedly held that this cannot be done."

This last case was decided in 1860. In 1862 the Practice Act was amended so as to provide that "whenever any one or more of the jurors shall have been induced to assent to any general or special verdict, or to a finding upon any question or questions submitted to them by the court, by a resort to the determination of chance, such misconduct may be proved by the affidavits of any one or more of the jurors." [6] Substantially the same provision is in the Code of Civil Procedure.[7] This provision was con-

[3] 5 Cal. 40.
[4] 5 Cal. 44, 63 Am. Dec. 78.
[5] 15 Cal. 70.
[6] Laws of 1862, p. 38. As to operation of this amendment, see Donner v. Palmer, 23 Cal. 40.
[7] Section 657, subsection 2, Code of Civil Procedure of California. In some of the other states this is permitted in the absence of a statute. In Wright v. Illinois Tel. Co., 20 Iowa, 195, it was held that the affidavits of the jurors were admissible to show that the verdict had been arrived at by the determination of chance, and the court said: "To allow a juror to make affidavit against the conclusiveness of the verdict by reason of, and as to the effect and influence of, any of these matters upon his mind, which in their very nature are. though untrue, incapable of disproof, would be practically to open the jury-room to the importuni-

sidered in Turner v. Tuolumne Co. W. Co.[8] In that case the court reaffirmed the rule of the previous decisions, saying: "Although there is some conflict of authority upon this question the better opinion seems to be that by the common law, the affidavits of jurors cannot be received for the purpose of impeaching their verdict, but may be admitted in support of it." The court held, however, that the effect of the provision of the amendment of 1862 was to establish an exception to the general rule; but that a verdict arrived at by dividing the sum of the several amounts proposed by each juror by twelve, and agreeing to take the quotient as the verdict, was not a chance verdict within the meaning of the provision. The same point was ruled in Boyce v. California Stage Co.[9] In that case the counsel, on petition for rehearing, attacked the rule that the affidavits of jurors could not be received to impeach their verdict. The court, however, reaffirmed the rule, and after referring to the California cases, said:

"As stated in Turner v. Tuolumne W. & M. Co., the authorities elsewhere are conflicting. We do not attempt to reconcile them; to do so would be impossible. We ground the rule upon the decision and upon the legislation of this state, and we declare the law to be in this state, however it may be elsewhere, to the effect that the affidavits of jurors cannot be received in any case to impeach their verdict, except as provided in the second subdivision of the one hundred and ninety-third section of the Practice Act. And in conclusion upon this branch of the case we may add that a line of judicial decision, which struggles to multiply exceptions to a plain and simple rule, founded on considerations of the wisest policy, is not to be favored; on the contrary, the struggle should be to bring every case within the rule, lest the rule itself become shadowy, and in time wholly disappear in a multitude of exceptions."

ties and appliances of parties and their attorneys. and of course thereby to unsettle verdicts and destroy their sanctity and conclusiveness. But to receive his testimony as to the independent fact that the verdict was obtained by lot, or given by chance, or the like, is to receive his testimony as to a fact, which, if not true. can be readily and certainly disproved by his fellow-jurors; and to hear such proof would have a tendency to diminish such practices, and to purify the jury-room by rendering such improprieties probable of exposure, and consequently deterring jurors from resorting to them." The whole opinion is worthy of perusal.

[8] 25 Cal. 397, 1 Morr. Min. Rep. 107.

[9] 25 Cal. 460. But as to this being a chance verdict, see Dixon v. Pluns, 98 Cal. 384, 35 Am. St. Rep. 180, 33 Pac. 268, 20 L. R. A. 698.

The general rule was again laid down in Polhemus v. Heiman.[10] In that case it was sought to be shown by the affidavits of the jurors that they had not understood the form in which they were to render their verdict, and that as rendered it did not express their intentions. But it was held that the affidavits were properly rejected, and the court said: "In this state the affidavits of jurymen cannot be received to impeach or defeat their verdict. The prohibition extends beyond cases of willful misconduct on the part of jurors, and to every case in which the affidavits are attempted to be used as ground for setting aside a verdict, because of a misunderstanding of its effect by some or all of the jurors who united in its rendition. The only exceptions to this rule are those in which the legislature has by express enactment authorized such attack upon the verdict by those who rendered it, and it is not pretended that the present case is within any such exception. (Boyce v. Cal. Stage Co., 25 Cal. 474.)"

The rule of the above cases has been often restated in the later reports. In Fredericks v. Judah [10a] it was held that the verdict of a jury could not be impeached by the affidavits of individual jurors to the effect that facts not in evidence were considered in determining the same. In People v. Pratt [10b] affidavits tending to impeach the verdict were refused consideration on the ground that they were "affidavits of the jurors which were procured to be taken by the defendant for use on motion to obtain a new trial" by "impeachment of the verdict." In People v. Deegan [10c] the verdict was sought to be impeached by a showing of misconduct upon the part of a juror in drinking liquor, and the court held upon the authority of the case in People v. Gray, *supra*, that "the affidavit of the juror himself, seeking to impeach his verdict, is not admissible." In People v. Kloss [10d] where it was sought by means of the affidavit of one of the jurors to show that the foreman of the jury had made use of false statements to manipulate the ignorance of the deponent with intent to procure his assent to a verdict which he was unwilling to agree to, the court refused to allow such affidavit to be filed "upon the ground that a juror could not thus impeach his own verdict," and the supreme court sustained this action.

[10] 50 Cal. 438; see, also, People v. Hughes, 29 Cal. 257; People v. Doyell, 48 Cal. 90; People v. Sprague, 53 Cal. 491; Clark v. His Creditors, 57 Cal. 639.

[10a] 73 Cal. 604, 15 Pac. 305.
[10b] 78 Cal. 345, 20 Pac. 731.
[10c] 88 Cal. 602. 26 Pac. 500.
[10d] 115 Cal. 567, 47 Pac. 459.

In People v. Azoff[10e] affidavits of jurors were held not admissible to prove misconduct in the matter of reading newspapers during the trial, because of the rule that jurors would not be permitted to impeach their own verdict. The same ruling was made in Saltzman v. Sunset Tel. Co.,[10f] where the alleged misconduct was the corruption of one or more members of the jury. In People v. Holmes[10g] the supreme court held that the trial court had very properly declined to consider the affidavit of a number of the members of the jury to the effect that their verdict of "guilty of involuntary manslaughter, not a felony," was intended as a verdict of guilty of a misdemeanor only, and that they would not have agreed to a verdict of conviction of any manslaughter that was a felony, such affidavit clearly tending to impeach their own verdict. And in many other cases, either directly or indirectly.[10h]

And the rule renders inadmissible the testimony of third persons as to what they heard the jurors say in derogation of their

[10e] 105 Cal. 632, 39 Pac. 59.

[10f] 125 Cal. 501, 58 Pac. 169.

[10g] 118 Cal. 444, 50 Pac. 675.

[10h] *Arizona:* Torque v. Carrillo, 1 Ariz. 336, 25 Pac. 526.

California: Hunt v. Elliott, 77 Cal. 588, 20 Pac. 132; Dixon v. Pluns, 98 Cal. 384, 35 Am. St. Rep. 180, 33 Pac. 268, 20 L. R. A. 698; S. C., 101 Cal. 512, 35 Pac. 1030; People v. Stokes, 103 Cal. 193, 42 Am. St. Rep. 102, 37 Pac. 207; People v. Leary, 105 Cal. 486, 39 Pac. 24; McDonnell v. Pescadero Co., 120 Cal. 476, 52 Pac. 725; People v. Soap, 127 Cal. 408, 59 Pac. 771; People v. Findley, 132 Cal. 301, 64 Pac. 472; Siemsen v. Oakland etc. Co., 134 Cal. 494, 66 Pac. 672; People v. Dobbins, 138 Cal. 694, 72 Pac. 339; People v. Chin Non, 146 Cal. 561, 80 Pac. 681; People v. Feld, 149 Cal. 464, 86 Pac. 1100; King v. Elton, 2 Cal. App. 145, 83 Pac. 261.

Colorado: Wray v. Carpenter, 16 Colo. 271, 25 Am. St. Rep. 265, 27 Pac. 248; Richards v. Richards, 20 Colo. 303, 38 Pac. 323.

Idaho: Griffin v. Montandon, 4 Idaho, 377, 39 Pac. 548; Giffin v. Lewiston, 6 Idaho, 231, 55 Pac. 545.

Montana: Sutton v. Lowry, 39 Mont. 462, 104 Pac. 545.

Nevada: State v. Stewart, 9 Nev. 120.

Oregon: State v. Smith, 43 Or. 109, 71 Pac. 973.

South Dakota: Murphy v. Murphy, 1 S. D. 316, 47 N. W. 142, 9 L. R. A. 820; Ulrick v. Dakota etc. Co., 2 S. D. 285, 49 N. W. 1054; Edward Thompson Co. v. Gunderson, 10 S. D. 42, 71 N. W. 764; Long v. Collins, 12 S. D. 621, 82 N. W. 95.

Utah: Homer v. Inter-Mountain Abst. Co., 9 Utah, 193, 33 Pac. 700; People v. Ritchie, 12 Utah, 180, 42 Pac. 209.

Washington: Marvin v. Yates, 26 Wash. 50, 66 Pac. 131.

Wyoming: Bunce v. McMahen, 6 Wyo. 24, 42 Pac. 23.

The supreme court of Oregon, in the case of Oregon Cascade Rd. Co. v. Oregon R. & N. Co., 3 Or. 178, thus gave expression to the rule:

"It would be a dangerous tendency to permit jurors to reconsider their verdict after they have been discharged, upon the ground that they now have a different conception, either of the facts or the law, from that under which the verdict was rendered."

In Ralton v. Sherwood Logging Co., 54 Wash. 254, 103 Pac. 28, it was held that a new trial would not be granted upon affidavits of jurors that they disregarded the instructions of the court.

verdict; for evidence as to what jurors said they did cannot stand in any better position than the direct testimony of the jurors as to what they did.[11] And a party cannot get around the rule by making an affidavit as to what occurred in the jury-room without stating how he knows it; for "it cannot be assumed, in the absence of any proof to the contrary, that the defendant was present in the jury-room, or had any personal knowledge of what took place there while the jurymen were considering their verdict."[12]

In other states it has been held that the affidavit of a juror is admissible to show his incompetency by reason of his not understanding the English language,[13] or to show what occurred to a juror when separated from his fellows,[14] or to show the misconduct of a party,[15] or of the officer in charge.[16] Such proceedings are allowed as exceptions to the general rule. In Wright v. Illinois Tel. Co.,[17] in which an elaborate examination of the authorities was made, the court classified the cases falling within the rule and those constituting exceptions to it, as follows: "The affidavits of jurors may be received for the purpose of avoiding a verdict, to show any matter occurring during the trial, or in the jury-room, which does not essentially inhere in the verdict itself, as that a juror was improperly approached by a party, his agent or attorney; that witnesses or others conversed as to the facts or merits of the cause out of court, and in presence of jurors; that the verdict was determined by aggregation and average or by lot, or game of chance, or other artifice or improper manner; but that such affidavit to avoid the verdict must not be received to show any matter which does inhere in the verdict itself, as that the juror did not assent to the verdict; that he misunderstood the instructions of the court, the statements of the witnesses, or

11 See Drummond v. Leslie, 5 Blackf. 453; Tucker v. South Kingston, 5 R. I. 558. See notes, 30, 31 and 32, below.

12 Hoare v. Hindley, 49 Cal. 274. The following more recent cases support the rule here stated: Saltzman v. Sunset Tel. Co., 125 Cal. 501, 58 Pac. 169; People v. Findley, 132 Cal. 301, 64 Pac. 472; Siemsen v. Oakland etc. Co., 134 Cal. 494, 66 Pac. 672; People v. Dobbins, 138 Cal. 694, 72 Pac. 339; and see People v. Murphy, 146 Cal. 502, 80 Pac. 709. See below for further discussion of the point. Notes 30, 31 and 32, below.

13 Lafayette Plank Road Co. v. New Albany R. R. Co., 13 Ind. 90, 74 Am. Dec. 246; Shaw v. Fisk, 21 Wis. 368, 94 Am. Dec. 547.

14 Heffron v. Gallupe, 55 Me. 563.

15 Ritchie v. Holbrooke, 7 Serg. & R. 458.

16 Thomas v. Chapman, 45 Barb. 98.

17 20 Iowa, 195.

the pleadings in the case; that he was unduly influenced by statements, or otherwise, of his fellow-jurors, or mistaken in his calculations or judgment, or other matter resting alone in the juror's breast." The principle upon which this classification rests is stated to be that certain things are in their nature incapable of disproof, and that therefore there would be danger in allowing them to be shown by the testimony of the jurors; while there is no danger in admitting such testimony to show facts which are easily susceptible of disproof if untrue.

The rule laid down in Boyce v. California Stage Co. and Polhemus v. Heiman [18] is that the only exception to the rule is the one specified in the statute, viz., where the verdict was arrived at by a resort to the determination of chance. The affidavit of the officer in charge is admissible.[19] But the affidavits of jurors are not admissible to show that the officer in charge made improper communications to the jury.[20]

Counter-affidavits, in support of their verdict, by members of the jury are not within the rule.[21] They are always competent, particularly for the purpose of contradicting charges of misconduct of the kind under consideration.[22] Consideration of affidavits of this description will not be refused, although the facts upon which the alleged misconduct rests are admitted therein, and the showing is merely in excuse or by way of extenuation thereof.[23] In this sense or to this extent, such affidavits constitute an exception to the rule; for the evidence of the misconduct cannot be rejected and that offered in excuse accepted. But this applies only to affidavits which contain express admissions of the misconduct.[24] If the counter-affidavit be silent with respect thereto, there is no such thing as presumptive waiver on the part of the district attorney as to the proof required to sustain the misconduct itself. An offer of facts by way of excuse or extenuation of a fault does not, in this case at least, operate as an admission of the fault itself.[25]

[18] Note 10, *ante*, and corresponding text.

[19] Wilson v. Berryman, 5 Cal. 44, 63 Am. Dec. 78.

[20] People v. Sprague, 53 Cal. 492.

[21] See section 74, *post*.

[22] Hunt v. Elliott, 77 Cal. 588, 20 Pac. 132; McDonnell v. Pescadero Stage Co., 120 Cal. 476, 52 Pac. 725.

[23] People v. Chin Non, 146 Cal. 561, 80 Pac. .681.

[24] People v. Chih Non, 146 Cal. 561, 80 Pac. 681; People v. Feld, 149 Cal. 464, 80 Pac. 1100.

[25] People v. Feld, 149 Cal. 464, 80 Pac. 1100.

The general rule that verdicts are not subject to impeachment by the affidavits of members of the jury which rendered them is said to be founded in public policy, and not upon the ground of estoppel of the consenting jurors.[26] The fact that the proposed affidavit is made by a dissenting, as distinguished from an assenting, juror is therefore of no consequence. The affidavit is inadmissible even though the affiant did not consent to the verdict.[27]

As above stated, the rule cannot be abrogated by the introduction of proof of admissions of a juror as to misconduct.[28] The reason is equally because it is hearsay,[29] and because that cannot be done indirectly which cannot properly be done directly.[30]

There is no distinction as to time, and the rule extends to alleged misconduct during the trial, before retirement and after retirement.[31]

The question as to whether the verdict is a chance verdict or not rests with the trial judge, and his determination is reviewable as other conclusions, when properly presented to the appellate court on appeal from a new trial order, and will not be disturbed if the evidence thereon is conflicting.[32]

§ 74. The Affidavits of Jurors are Admissible to Sustain Their Verdict.—In the case of People v. Backus,[1] the consequences of the separation of a juror from his fellows were sought to be avoided by the juror's affidavit to the effect that no improper communication took place with anyone. But the court, per Murray, C. J., said: "Neither can the affidavit of the juror be admitted to purge his conduct from the imputation of corruption or impropriety, for, say the court in the case just cited, if a party had been guilty of any corruption he would not hesitate to conceal the same by direct perjury." Although this language is ambiguous, it is apparent from the opinion that what the learned chief justice

[26] Saltzman v. Sunset etc. Co., 125 Cal. 501, 58 Pac. 169.

[27] Saltzman v. Sunset etc. Co., 125 Cal. 501, 58 Pac. 169.

[28] Siemsen v. Oakland etc. Co., 134 Cal. 494, 66 Pac. 672. See note 12, above. Also, Richards v. Richards, 20 Colo. 303, 38 Pac. 323; Sutton v. Lowry, 39 Mont. 462, 104 Pac. 545.

[29] People v. Dobbins, 138 Cal. 694, 72 Pac. 339. Also, Richards v. Richards, 20 Colo. 303, 38 Pac. 323; Sutton v. Lowry, 39 Mont. 462, 104 Pac. 545.

[30] People v. Murphy, 146 Cal. 502, 80 Pac. 709.

[31] Siemsen v. Oakland etc. Co., 134 Cal. 494, 66 Pac. 672.

[32] Dixon v. Pluns, 98 Cal. 384, 35 Am. St. Rep. 180, 33 Pac. 268, 20 L. R. A. 698, where the case was remanded for a determination of this question in the court below; and same case, 101 Cal. 512, 35 Pac. 1030, where the conclusion of the trial court was sustained on the ground of conflict.

[1] 5 Cal. 275.

meant to say was that the affidavit in question could not be admitted to be *sufficient* to purge the juror from the imputation of misconduct. In Wilson v. Berryman,[2] in the same volume, Chief Justice Murray said: "Although jurors will not be allowed to impeach their own verdict, still they will be admitted to substantiate it, and this will always be found a sufficient check against collusion or corruption on the part of the officer having them in charge." This was only a *dictum*, for in that case there was no affidavit in support of the verdict; but it serves to show that Chief Justice Murray did not intend, by what he said in People v. Backus, to lay down the rule that the affidavits of jurors could not be received to sustain their verdict. In the subsequent case of Turner v. Tuolumne Co. W. Co.,[3] there is a *dictum* to the same effect as in Wilson v. Berryman. Chief Justice Sanderson said: "Although there is some conflict of authority on this question, the better opinion seems to be that by the common law the affidavits of jurors cannot be received for the purpose of impeaching their verdict, but may be admitted in support thereof."

As above stated, the remarks above quoted are mere *dicta*. The point was, however, decided in People v. Hunt,[4] in which case Morrison, C. J., delivering the opinion of department one, said:

"It is claimed that the court below erred in admitting the affidavit of the juror to disprove the charges contained in the affidavit of Walker. We do not think so. If such were the rule, it would be a very easy matter to set aside the verdict of a jury in every criminal case. The affidavit of some irresponsible person is presented, in which he charges the juror with misconduct. No one was present at the time, and if the juror cannot be heard, there is no possible way in which the charge can be met and disproved by the prosecution. But such is not the rule. 'An affidavit of a juror is received in support of the verdict when attacked for misconduct on the part of the jurors.' (Proffatt on Jury Trial, sec. 410; State v. Ayer, 23 N. H. 301; Cannon v. State, 3 Tex. 31; Barlow v. State, 2 Blackf. (Ind.) 114.) The affidavit of the juror is admissible."

This accords with the decisions of most other states upon the question.[5] And it is plain that if the jurymen were not permitted

[2] 5 Cal. 44, 63 Am. Dec. 78.
[3] 25 Cal. 397, 1 Morr. Min. Rep. 107.
[4] 59 Cal. 430.
[5] See Dana v. Tucker, 4 Johns. 487; Leighton v. Sargent, 31 N. H. 119, 64 Am. Dec. 323; Tenney v. Evans, 13 N. H. 462, 40 Am. Dec. 166; Downer v. Baxter, 30 Vt. 467; Anderson v. State, 14 Ga. 709; Wilson v. Seaman, 15 S. D. 103, 87 N. W. 577. See, also, People v. Dye, 62 Cal. 523; People v.

to explain doubtful occurrences, and to contradict false statements, there would be but small chance of sustaining verdicts.

Jurors will not be permitted to say that they were not influenced in their determination by the misconduct charged, or to say to what extent they were influenced. This question is not one for the jurors to determine, but for the court. In People v. Stokes[6] the court said, quoting from Woodward v. Leavitt:[7]

"But, where evidence has been introduced tending to show that without authority of law, but without any fault of either party or his agent, a paper was communicated to the jury which might have influenced their minds, the testimony of the jurors is admissible to disprove that the paper was communicated to them, though not to show whether it did or did not influence their deliberations and decision. A juryman may testify to any facts bearing upon the question of the existence of the disturbing influence, but he cannot be permitted to testify how far the influence operated on his mind. There are intimations in the cases of People v. Goldenson, 76 Cal. 328, 19 Pac. 161, and People v. Murray, 85 Cal. 350, 24 Pac. 666, tending to oppose the foregoing views, but they do not express the law."

§ 74a. Miscellaneous.—The investigation of alleged misconduct of the jury in connection with a motion for a new trial on that ground rests in the discretion of the trial court, and while the court should offer every facility in its power for such investigation, and should grant continuances, issue subpoenas for witnesses, and hear their testimony, the refusal to do so in any given case is governed by the same rules which obtain with respect to any other exercise of the recognized discretion of the court, and will not be disturbed on appeal except for a manifest abuse of such discretion.[1] As a matter of course, if there is no showing of mis-

Goldenson, 76 Cal. 352; People v. Murray, 94 Cal. 216; People v. Azoff, 105 Cal. 328, 19 Pac. 161; Saltzman v. Sunset Tel. Co., 125 Cal. 501, 58 Pac. 169; and see People v. Murray, 85 Cal. 350, 24 Pac. 666; People v. Stokes, 103 Cal. 193, 42 Am. St. Rep. 102, 37 Pac. 207; People v. Leary, 105 Cal. 486, 39 Pac. 24.

[6] 103 Cal. 193, 42 Am. St. Rep. 102, 37 Pac. 207. See, in support, People v. Leary, 105 Cal. 486, 39 Pac. 24.

[7] 107 Mass. 453, 9 Am. Rep. 49.

[1] People v. Phelan, 123 Cal. 551, 56 Pac. 424; Tucker v. Salem Flouring Mill Co., 13 Or. 28, 7 Pac. 53; State v. Magers, 36 Or. 38, 58 Pac. 892; State v. McDaniel, 39 Or. 161, 65 Pac. 520; State v. Smith, 43 Or. 109, 71 Pac. 973. The rule of conflict of evidence applies to the determination of the trial court upon the question of fact involved in any alleged misconduct, as for example, intoxication (see section 70, *ante*, note 101), or prejudicial inattention: Shannon v. Ta-

conduct, by affidavit or otherwise, beyond the bare asseveration of the motion, it will be disregarded. If there is nothing from which prejudicial misconduct can be inferred, none will be assumed to exist, and the motion will be denied.[2]

Willful inattention to the testimony or argument of counsel has been presented as the basis of misconduct of this description, but without success.[3] But the willful refusal of a jury to return a specific answer to a particular question, as a special finding in connection with a general verdict, has been held to be such misconduct as would entitle the losing party to a new trial.[3a] Such refusal must be willful, however, for if it is inadvertent it will not be available as ground for a new trial, unless the moving party accompanies the showing of the fact with an additional showing of injury resulting therefrom.[3b]

The employment by a juror accused of a grave crime of the attorney of one of the parties does not constitute prejudicial misconduct.[4]

coma, 41 Wash. 220, 83 Pac. 186; Becker v. Duncan, 8 N. D. 600, 80 N. W. 762. But the conflict should be substantial, not illusory. Fuller v. Elevator Co., 2 N. D. 220, 50 N. W. 359.

[2] Outcault v. Johnston, 9 Colo. App. 519, 49 Pac. 1058.

[3] Lee v. McLeod, 15 Nev. 158; Shannon v. Tacoma, 41 Wash. 220, 83 Pac. 186. But in neither case was the question fairly presented, and it is manifest that a juror could hardly display his incapacity to return an unprejudiced verdict more completely in any other way.

[3a] Chicago etc. Co. v. McGraw, 22 Colo. 363, 45 Pac. 383. The question was one relating to the contributory negligence of the plaintiff. The jury brought in a general verdict for the plaintiff, and answered one of the two questions. The verdict was rendered in the form of a sealed verdict. On the following morning the court called the attention of the jury to the fact that they had not answered the second question, and declined to accept it, and required them to return to their room and complete their verdict. Afterward they returned an evasive answer. The court was of the opinion that the circumstances showed willful misconduct, and following the authority of the decisions of other states, held that a new trial should be granted.

[3b] May v. People, 8 Colo. 219, 6 Pac. 816.

[4] Hill v. Corcoran, 15 Colo. 270, 25 Pac. 171.

CHAPTER XI.

GROUNDS OF THE MOTION—ACCIDENT, SURPRISE, ETC.

§ 75. The statute—Scope of subject.
§ 76. Party not represented at the trial.
§ 77. Want of preparation—Absence of witnesses.
§ 78. Surprise at testimony of own witness.
§ 79. Surprise at evidence of adverse party.
§ 80. Negligence and unskillfulness of attorney.
§ 81. Inadvertence, and other unforeseen occurrences during the trial.
§ 82. Reliance upon oral stipulations.
§ 83. Surprise occasioned by an act of the court.
§ 84. The party surprised should apply for a continuance at the earliest opportunity.
§ 85. Probability of a different result must be shown upon the motion.
§ 86. Power to grant new trials on this ground should be exercised with care.

§ 75. The Statute—Scope of the Subject.—The third subdivision of section 657, Code of Civil Procedure, specifying the grounds upon which a motion for new trial may be made, is as follows: "Accident or surprise, which ordinary prudence could not have guarded against." This provision has been in the statute since 1851.[1] In strictness the term "surprise" denotes a feeling or state of mind, and the term "accident" an occurrence causing or likely to cause surprise. No such distinction is taken by the decisions, however; the words appear to be used as supplementing each other, to cover a somewhat indefinite line of cases.

The following definition occurs in McGuire v. Drew:[2]

"The terms 'accident' and 'surprise,' though not strictly synonymous, as used in legal practice, have substantially the same meaning, as each is used to denote some condition or situation in which a party to a cause is unexpectedly placed, to his injury, without any default or negligence of his own (see Bouvier's Law Dictionary; Anderson's Law Dictionary), which ordinary prudence could not have guarded against."

§ 76. Party not Represented at the Trial.—If the party does not intend to manage his case in person, he should employ an at-

[1] See Laws of 1851, p. 81, sec. 193, subd. 3 (California). See section 23, *ante*, as to provisions of the statutes of the states.

[2] 83 Cal. 225, 23 Pac. 312. See, also, Brandt v. Krogh, 14 Cal. App. 39, 111 Pac. 275.

torney, and both the party and his attorney must take notice of the time and place of holding court, and of the position of the cause on the calendar, and be present when it is called for trial.

1. *If the Party Does not Intend to Manage His Case in Person, He must Employ an Attorney.* Merely requesting an attorney to appear, without ascertaining whether or not he can or will, is not sufficient.[1] And if the attorney demands a retainer before consenting to appear, it must be paid before the party is entitled to rely on the attorney to appear for him.[2] But a mutual and honest mistake between the attorney and the party as to the employment may sometimes be ground for relief.[3] And the subject is one peculiarly within the discretion of the court.[3a]

2. *The Party and His Attorney must Take Notice of the Time and Place of Holding Court, and of the Position of the Cause on the Calendar, and be Present When It is Called for Trial.*—As has been stated, the court must be held at the time and place appointed by law.[4] The party and his attorney must take notice of such time and place, and of the position of the cause on the calendar, and be present when the case is called for trial.[4a] The mere fact that a party is ignorant of the hour of holding court, and comes in a short time after judgment is rendered against him, is not ground for a new trial.[5] So where the motion was made upon the ground that the cause had come on sooner than the party expected, and that he supposed it was set for a subsequent day, it was held that a new trial could not be granted because the party could easily have ascertained from the clerk when the case was

[1] Mussin v. Collins, 1 A. K. Marsh. (Ky.) 350.

[2] Goldstone v. Sperling, 39 Cal. 447. In Stewart Min. Co. v. Coulter, 3 Utah, 183, 5 Pac. 557–563, it was held that the applicant for a new trial on the ground of surprise was at fault in that he did not provide the means he knew would be necessary for the expenses of the litigation and for the retainer fee of his counsel, and his attorneys withdrew, as they had warned him they would, at the last moment, leaving him without representation by counsel.

[3] McKinlay v. Tuttle, 34 Cal. 235.

[3a] See Gaines v. White, 1 S. D. 434, 47 N. W. 524; Adams v. Rathburn, 14 S. D. 552, 86 N. W. 629.

[4] See sections 30, 31, *ante*.

[4a] In Clifford v. Mason, 6 Colo. 603, it was held that parties and their attorneys must be in court and look after their cases, and cannot be relieved from the result of their negligence in this respect. Following this rule, it was subsequently held, in Reynolds v. Manville, 5 Colo. App. 486, 39 Pac. 350, that it was no ground for a new trial that through his own neglect a party to the action was absent when the case was tried, and was unable to give material evidence. But if the absence is due to no fault of his own, and he is prevented from being present, the rule is otherwise. Sluman v. Dolan, 24 S. D. 32, 123 N. W. 72.

[5] Brevard v. Graham, 2 Bibb (Ky.), 177.

set.[6] So where the cause was not on the printed calendar as originally called, but was put on subsequently by the clerk, and the attorney of the losing party was repeatedly informed by the opposite attorney that the cause was on the calendar, and that it would be tried when reached, it was held that the attorney for the losing party was put upon inquiry, and that a new trial could not be granted on the ground of surprise.[7] So where a party supposed from looking at the docket that his cause would not be reached on that day, and went away from the court, and in the meantime the cause was called and judgment taken against him, it was held that a new trial could not be granted.[8] So where a cause was set for trial on a day certain, and the party came to court, and was ready for trial, but another case was on trial, and his attorney told him that the case on trial would take all the week, and thereupon he went to his home some fifty miles distant, and returned at the end of the week to find that judgment had been taken against him, it was held a new trial could not be granted.[9] So where a party left the place where the court was held, and went to a distant point, intending to return in time for the trial, but knowing that he could not do so unless every railroad connection should be made on time, and he was delayed by a railroad accident, it was held that a new trial could not be granted.[10] So where a case was set for trial, and the attorney for the losing party, knowing this, went off to try a case in another court, and in the meantime judgment was taken against him, it was held that a new trial could not be granted.[11] Where case is called in its regular order, absence of counsel is not ground for a new trial.[11a] So where the parties and their attorneys were in attendance, waiting the termination of the case on trial; and the defendant's attorney being informed by the attorney in the case on trial that that case would take until recess, left the court-room (although warned by the opposing attorney that the case would be tried when reached), telling his son where to find him in case he was wanted; and the son mistook the place and could not find him, and the court, after waiting some time and send-

[6] Stout v. Calver, 6 Mo. 254, 35 Am. Dec. 438. See Hawthorne v. Bowman, 3 Sneed, 524.

[7] Nooney v. Mahoney, 30 Cal. 226.

[8] McAuly v. Lockhart, 4 Humph. (Tenn.) 229.

[9] Desnoyer v. McDonald, 4 Minn. 515.

[10] Yater v. Mullen, 23 Ind. 562.

[11] Haight v. Green, 19 Cal. 113. For instance of party not represented at trial under special circumstances, see Preston v. Eureka Stone Co., 54 Cal. 198.

[11a] Crompton v. Crow, 2 Utah, 245.

ing an officer to look for him, proceeded with the trial in his absence, it was held that the order of the court below refusing a new trial would not be disturbed.[12] So where the defendant left the court because he had formed the opinion that it was impossible for his case to be reached, "which opinion was formed after conversing with, and partly from the same opinion expressed by, the presiding judge, the solicitor, and others with whom your petitioner conversed," it was held that a new trial could not be granted.[13] The fact that an attorney is engaged in another court is not excuse for his nonappearance.[14] And still less is his unexplained absence ground for a new trial.[15]

So where the defendant knew the date the case was set for trial, and that it would not be continued with the consent of the opposite party, and yet voluntarily neglected to appear, although aware that his presence was necessary at the trial, if he would make a defense, it was held not to be sufficient ground for a new trial.[15a] So an attorney is presumed to know the rules of the court where he practices, and a new trial will not be granted on this ground because of a failure to give a notice not required by the rules of the court, in consequence of which failure the moving party was not represented at the trial. It was said that a party cannot acquire any greater right by his absence than he would have if he were present, and the appellant here did not acquire a right to a notice of the date set for the trial as a result merely of his neglect to be present on the date noticed for the setting of the cause.[15b]

So where by reason of the refusal of the attorney, who originally defended the suit and prepared it for trial, to continue in such defense, the party was compelled to employ other counsel, and still

[12] Mulholland v. Heyneman, 19 Cal. 605.

[13] White v. Ryan, 31 Ala. 400; but look at Edsall v. Ayers, 15 Ind. 286.

[14] Haight v. Green, 19 Cal. 113; Jacob v. McLean, 24 Mo. 40.

[15] Allen v. Donelly, 1 McCord, 113; Freeman v. Neyland, 23 Tex. 529; Power v. Gillespie, 27 Tex. 370.

[15a] McGuire v. Drew, 83 Cal. 225, 23 Pac. 312. Generally speaking, an attorney should not rely upon his opponent for information as to the time set for the trial of the case; assuredly not to the exclusion of an exercise of diligence on his own part, to the extent of disregarding information from another source. He cannot wait information from his adversary, and rely upon the violation of an agreement to give it for a new trial. Josephson v. Sigfusson, 10 N. D. 312, 100 N. W. 703. Nor can an attorney rely upon a promise made by a bailiff of the courts to inform him when the jury reaches an agreement. Fitzgerald v. Clark, 17 Mont. 100, 52 Am. St. Rep. 665, 42 Pac. 273, 30 L. R. A. 803.

[15b] Brooks v. Johnson, 122 Cal. 569, 55 Pac. 423.

other counsel, and finally a fourth counsel, and the cause came on for a hearing before the last counsel employed was able to complete the work of preparing the case for trial, upon a showing that the litigant was at fault and responsible for the withdrawal of the original counsel, and that there had been time sufficient to fully prepare the cause for trial, the supreme court held that there was not adequate excuse, and that a new trial could not be granted.[15c]

But there may be sufficient excuse for the nonappearance of the party or his attorney. Thus where the defendant's counsel was not present at the call of the general calendar, and at such call the plaintiff's counsel stated to the court that a jury had been waived, and thereupon the case was placed on the equity calendar, and the defendant's counsel supposing that the cause was on the jury calendar (there having been no waiver) paid no attention to the equity calendar, and was not present when the case came up, it was held that the verdict should have been set aside.[15d] So the sudden illness of the attorney, or the dangerous illness of members of his family may be sufficient excuse for his nonappearance;[16] and although a party and his attorney must take notice of the time of holding court, changes in such time may be made under such circumstances, that if they are actually misled a new trial will be granted. Thus where the general term failed by reason of the death of the clerk, and the judge in vacation ordered a special term, of which the defendant who lived fifty miles off, had no actual notice, a new trial was granted;[17] but a change in the hour of holding court, of which three days' notice was given by proclamation, is something of which notice must be taken.[18] And a party is entitled to rely upon the assurance of the judge given in court as to when the case will be taken up. Thus where the judge announced from the bench that cases which had been passed at the call of the docket would not be taken up at that term, and that the court would sit a few days only to finish unfinished business; and a party to a cause which had been passed, as above stated, dismissed his witnesses and went home, it was held that a judgment taken

[15c] Chalmers v. Sheehy, 132 Cal. 459, 84 Am. St. Rep. 62, 64 Pac. 709. See, also, Gaines v. White, 1 S. D. 434, 47 N. W. 524.

[15d] Sweeny v. Stanford, 60 Cal. 362, 9 Pac. C. L. J. 356.

[16] See cases cited in section 62, *ante*. But not if the illness was one of long standing. Ekel v. Swift, 47 Cal. 619.

[17] Joslin v. Coffin, 5 How. (Miss.) 539; and see Ross v. Austill, 2 Cal. 183.

[18] Steigers v. Darby, 8 Mo. 679.

against him on a subsequent day of the same term in his absence, and without his knowledge, must be set aside.[19]

Where the attorneys for the defendants were misled by a conversation with the opposing counsel, and were induced thereby to believe that the case would not be tried on the date set, but would be postponed by consent, and so did not prepare for trial but asked for a continuance, which was refused, the supreme court reversed the order refusing a new trial, along with the judgment, saying:

"The judgment in this case was procured against the defendants under circumstances which entitle them to be relieved from it. The evidence shows that the neglect of defendants, on account of which the judgment lien went against them was excusable. The court below should, therefore, have granted them the new trial, and it erred in refusing it."[19a]

So where it appeared that on the day set for the trial of a divorce case other cases preceded it in the department where it was set for trial, and it would probably be prevented from being heard on that day in that department, and the case was, at the instigation of the plaintiff, without notice to the defendant, transferred to another department, and a judgment obtained on an *ex parte* hearing, the supreme court held that the trial court properly exercised its discretion in vacating the judgment, and granting a new trial, upon defendant's motion.[19b]

Where a party has any excuse for not going on with the trial, he should appear and make it, if there be opportunity to do so, and ask for a continuance.[19c] A party is not justified in not attending, because he knew that the judge had been counsel in the

[19] Edsall v. Ayres, 15 Ind. 286; but look at White v. Ryan, 31 Ala. 400.

[19a] Symons v. Bunnell, 80 Cal. 330, 22 Pac. 193. The court in this case placed the ground for its relief as "neglect" which was "excusable." And cited section 473, Code of Civil Procedure, as the authority for its action. At the same time the judgment was reversed along with the order refusing a new trial, and restitution ordered. On the face of the opinion it is in doubt whether the court intended to act under section 473, alone, and that the reversing of the new trial order was merely an incident to this particular relief, or whether the new trial order was reversed because the showing of surprise was sufficient. The ground given, "excusable neglect," is not a ground for a new trial, but it is ground for relief under section 473.

See, also, Robertson v. Williams, 81 Cal. 268, 22 Pac. 665, where it was held that reliance upon the word of a reputable attorney may be "excusable neglect" for which relief may be granted on the ground of surprise, and a new trial was granted.

[19b] Cottrell v. Cottrell, 83 Cal. 457, 23 Pac. 531.

[19c] If he fails to do so, he can hardly claim relief from his neglect in this respect, no matter how meritorious may have been his showing of excuse for absence. See Reynolds v. Manville, 5 Colo. App. 486, 39 Pac. 350.

case, and supposed he would not sit,[20] or in paying no attention to the suit because his attorney had told him that it could be settled for a small amount, and he had authorized it to be settled.[21] The rule requiring parties and their attorneys to be present when the case is called for trial was relaxed in Sturgeon v. Hitchens.[22] In that case the attorney went as a soldier in the late Civil War, and in his absence, and without his client's knowledge, judgment was taken; a new trial was granted. Possibly the decision may be sustained on the ground that the duty of the attorney to his country was paramount to that which he owed his client. The decision, however, seems to be founded rather on patriotism than law; for it was certainly negligence in the attorney not to make provision for the case before he left, or at least inform his client of his departure.

Applications for relief on this ground are addressed to the discretion of the court.[23] But if a party is unable, without fault or negligence, to be present, it will probably be deemed an abuse of discretion to deny a motion for a new trial.[24]

§ 77. Want of Preparation for the Trial—Absence of Witnesses.—It is the duty of the party to inform his attorney as to the facts of the case, and to secure the attendance of witnesses. If he neglects this duty he cannot be surprised at the result. Where a party employed a firm of attorneys to manage his case, and the one who had special charge of the case and knew about the facts became sick, and unable to attend to it, and the other had to go to trial uninformed as to the facts, the client not being in attendance to inform him, it was held that a new trial could not be granted. The court saying: "Certainly a party is not diligent who neither attends court himself, nor procures witnesses by the modes known to the law, nor ascertains that his attorney is informed as to the grounds of his defense."[1] So where the client instructed his attorney as to the facts of his defense to the case

[20] Owings v. Gibson, 2 A. K. Marsh. (Ky.) 515.

[21] Patchin v. Wegman, 19 Mo. 151,

[22] 22 Ind. 107.

[23] See section 86.

[24] Sluman v. Dolan, 24 S. D. 32, 123 N. W. 72.

[1] Washer v. White, 16 Ind. 136; and see Hawthorne v. Bowman, 3 Sneed (Tenn.), 524. In Friedman v. Manley, 21 Wash. 43, 56 Pac. 832, it was held that the failure of a party to furnish his attorney with the correspondence involving the alleged surprise was negligence, neutralizing any right he might otherwise have to a new trial on the ground of surprise. See, also, Clemans v. Western, 39 Wash. 290, 81 Pac. 824, and Mueller v. Washington etc. Co., 56 Wash. 556, 106 Pac. 476, as examples of a want of diligence in obtaining witnesses.

made by the complaint, and then left the state; but before he left the plaintiff amended his complaint so as to set up a different cause of action, concerning which the attorneys were not instructed, and judgment went against him, it was held that a new trial could not be granted, although merits were shown.[2] So in White v. Ryan,[3] in passing upon a similar application, the court said: "If there were no other fault on his part, there was this, that he left the court during the trial term of the original cause, after employing an attorney and filing a plea in bar, without putting that attorney in possession of the means for trying or continuing the suit, if the witnesses did not attend." It is not ground for a new trial, however, that the attorney tried the case in the absence of the client, and without notice to him.[4]

The party should make use of the process provided by law for the purpose of securing the attendance of his witnesses, and if, after due diligence on his part, they do not attend, he should move for a continuance in the manner pointed out in another portion of this treatise.[5] There may be cases, however, of excusable want of preparation for the trial. Thus where preparation was prevented by the detention of the party in another court as a juror, a new trial was ordered.[6] So where the party subpoenaed witnesses, who, however, did not attend, and he was himself prevented from attending and taking measures to compel their attendance by reason of the illness of his daughter in an adjoining county, a new trial was granted.[7] So where a defendant was prevented from subpoenaing witnesses by severe illness, a new trial was granted.[8] So where the notice for trial was short, and did not reach the defendants through miscarriage of the mails, and one of the defendants lay sick in Philadelphia, and the other, who was in Princeton, was unable to attend the trial, and neither defendant knew the situation of the other, and a material witness had left the county, a new trial was granted.[9] So where, in order to obtain the deposition of an absent witness, a party went out of the state, but was prevented from reaching him in time by an unusual quantity of ice in a river, it was held that he had exercised reasonable diligence,

[2] Davis v. Presler, 5 Smedes & M. 459; look at Hancock v. Pico, 40 Cal. 153.

[3] 31 Ala. 400.

[4] Endress v. Nelp, 1 Disn. (Ohio) 411.

[5] See section 61, *ante*.

[6] Grimes v. Com., 4 Litt. (Ky.) 1.

[7] Peebles v. Ralls, 1 Litt. (Ky.) 25. Compare Thompson v. Thornton, 41 Cal. 626; Ekel v. Swift, 47 Cal. 619.

[8] Stewart v. Durrett, 3 T. B. Mon. (Ky.) 113.

[9] Sherrard v. Olden, 1 Halst. (6 N. J. L.) 344.

and a new trial was granted.[10] So where a complaint showed that a note sued on was barred by the statute of limitations, and was amended to allege certain payments, without specifying where, it was held that where evidence of payment at a particular place could not be controverted then, but could be afterward, it was such surprise as warranted a new trial.[10a]

It is not ground for new trial because of surprise where a plaintiff neglected to procure the attendance of witnesses to a fact which he supposed, though mistakenly, he would be able to substantiate by his own testimony. It was a mistake of law on his part or that of his counsel, in that his testimony would be held incompetent under section 1880 of the Code of Civil Procedure, and not accident or surprise within the meaning of this section.[11]

It is not surprise warranting a new trial where a witness, though summoned and present, refuses to testify on the ground that his testimony would incriminate himself, where the moving party made no effort and took no steps to compel an answer.[12]

It was said by the supreme court to be disappointment rather than surprise where the plaintiff testified that an agent of defendant visited him, acknowledged a balance due and promised to pay, and defendants, although possessing full knowledge of these facts, and anticipating in reason that such testimony would be given, neglected to procure the attendance of such agent as a witness, and did not, at the trial, when the evidence was given, express surprise or ask for a continuance, or otherwise raise the point until after the decision.[13]

Nor is it surprise warranting a new trial where a party relied upon a visit to the mine by the trial judge, and so did not offer proof as to the doing of the annual work. It could not be said that a personal inspection by the judge would be equivalent to the testimony of witnesses.[14]

Where a continuance has been denied because of an insufficient showing, as a matter of course, the party cannot have a new trial on the ground of surprise because of other testimony the same witness would have given. Want of diligence would be apparent on the face of such a showing.[14a] But if a continuance is denied upon

10 McLane v. Harris, 1 Mo. 700.

10a O'Neil v. Lindsey, 41 Wash. 649, 84 Pac. 603. See, also, McCormick etc. Co. v. Marchant, 11 Utah, 68, 39 Pac. 483.

11 Bagnall v. Roach, 76 Cal. 106, 18 Pac. 137.

12 Nicholson v. Randall Banking Co., 130 Cal. 533, 62 Pac. 930.

13 Dewey v. Frank, 62 Cal. 343.

14 Miller v. Scoble, 8 Cal. App. 344, 97 Pac. 93.

14a Hartford Ins. Co. v. Hammond, 41 Colo. 323, 92 Pac. 686.

terms, as it may be, as by confining the adverse party to the introduction of evidence as to certain specified facts, or upon condition that the facts to be proved by the testimony of the absent witness shall be taken as true, or testimony in contravention thereof shall be omitted, the terms or conditions must be complied with. An illustration of this rule is to be found in Colorado etc. Co. v. Bowles,[14b] a case which is often cited as presenting an instance of genuine surprise. The railroad company brought condemnation proceedings, and filed an amended petition attacking B.'s original entry. When the cause was reached for trial, a continuance was asked on the ground that the defendant's entry had been suspended. The motion was denied, but B. was limited to proof of damages to actual possession alone. At the trial, the defendant was permitted to introduce evidence as to the validity of his pre-emption entry, and the jury were allowed to bring in a verdict which included damages to the ownership title. The principle involved was thus expressed in the language of the supreme court:

"The trial was entered upon immediately after overruling the motion for a continuance. As petitioner's counsel understood the terms upon which the motion was overruled, they were not advised that the facts respecting the validity of defendant's entry and title were to be litigated until the trial was actually entered upon. It is an elementary principle of our jurisprudence that parties are entitled to be advised concerning the matters to be litigated a sufficient length of time in advance of the trial to be prepared to meet them. When the issues are formed, as is usual in courts of record, by the pleadings of the parties, they must ordinarily advise themselves, at their peril. So, too, where amendments to pleadings are properly allowed during the trial, a continuance for a new trial may not be a matter of right, without showing special injury resulting therefrom. But when, as in this case, the court restricts the issues to be tried, or limits the evidence to be received in a material matter, as a condition for refusing a motion for a continuance otherwise well grounded, the terms of the condition should be substantially free from ambiguity, and should not be materially changed, to the prejudice of either party, during the progress of the trial.

"This case presents an instance, somewhat rare in actual practice, of genuine surprise. Petitioner's counsel were not only taken

[14b] 14 Colo. 85, 23 Pac. 467.

unawares by the unexpected admission of evidence to sustain defendant's entry, and to show the value of the land itself, whereby the damages were greatly augmented, but they were placed in a situation, without any fault of their own, greatly injurious to their interests, in which they were not prepared, and could not expect to be prepared, to meet such an issue. A surprise of this nature, if not otherwise remedied, may be made the ground of a motion for a new trial."

The materiality of the evidence in question and the probability of being able to overcome its effect by other evidence which the party proposes to introduce upon a second trial, must be made to appear,[14c] and by the best possible evidence,[14d] which would seem to be the affidavit of the witness himself, whom it is proposed to offer upon such trial.[14e]

Reasonable diligence is required in the preparation of a case for trial. This is the general and universal rule, recognized by all courts in dealing with motions for new trial on this ground, and where this degree of diligence is wanting, the motion will be denied. Where ordinary prudence would have guarded against the surprise, the party cannot complain.[15] The question of diligence is addressed to the discretion of the trial court, and its determination will not be disturbed except for manifest abuse.[16]

§ 78. Surprise at the Testimony of the Party's Own Witness.— Where a party has used reasonable diligence to ascertain what his witness will testify to, and has reasonable grounds to believe that

[14c] Denver etc. Co. v. Simpson, 21 Colo. 371, 41 Pac. 499, 31 L. R. A. 566.

[14d] Lillienthal v. Anderson, 1 Idaho, 673. See notes 5 and 6, section 85, *post*.

[14e] Lillienthal v. Anderson, 1 Idaho, 673.

[15] Solomon v. Norton, 2 Ariz. 100, 11 Pac. 108; Clifford v. Mason, 6 Colo. 603; Reynolds v. Manville, 5 Colo. App. 486, 39 Pac. 350; Fitch v. Ellison, 15 Colo. 418, 24 Pac. 872; Temple v. Teller Co., 46 Colo. 497, 106 Pac. 8; Fitzgerald v. Clark, 17 Mont. 100, 52 Am. St. Rep. 665, 42 Pac. 273, 30 L. R. A. 803; Rand v. Kipp, 27 Mont. 138, 69 Pac. 714; Hill v. McKay, 36 Mont. 440, 93 Pac. 345; Josephson v. Sigfusson, 13 N. D. 312, 100 N. W. 703; Gaines v. White, 1 S. D. 434, 47 N. W. 524; Adams v. Rathbun, 14 S. D. 552, 86 N. W. 629; Crompton v. Crow, 2 Utah, 245; Stewart Mining Co. v. Coulter, 3 Utah, 174, 5 Pac. 557; Burlock v. Shupe, 5 Utah, 428, 17 Pac. 19; Wilson v. Waldron, 12 Wash. 149, 40 Pac. 740; Pincus v. Brewing Co., 18 Wash. 108, 50 Pac. 930; Friedman v. Manley, 21 Wash. 43, 56 Pac. 832; Reeder v. Trader's National Bank, 28 Wash. 139, 68 Pac. 461; Collins v. Bacon, 38 Wash. 80, 80 Pac. 268; Dumontier v. Stetson etc. Co., 39 Wash. 264, 81 Pac. 693; Jensen v. Railroad Co., 51 Wash. 448, 98 Pac. 1124; Mortimer v. Dirks, 57 Wash. 402, 107 Pac. 184.

[16] Burlock v. Shupe, 5 Utah, 428, 17 Pac. 19.

the witness will testify to a certain state of facts, and relies upon his doing so, and he does not do so, and the case is lost in consequence, a new trial will be granted. In Taylor v. California Stage Co.,[1] the application for new trial was upon the ground of surprise at the testimony of a witness of the adverse party. In passing upon the application, however, the court, per Murray, C. J., said: "If Rossiter had been called by the defendants, and it had appeared on the trial that he had misled them by statements of what his evidence would be, and the defendants; relying on such representations, had not prepared themselves with other testimony, it might have been ground for the interference of the court." The foregoing, however, is merely a *dictum*. But in Rodriguez v. Comstock,[2] the point was directly decided. The facts were that the defendants applied to the witness seasonably in advance, to know whether he could prove a delivery of juridical possession under the Spanish law to two brothers (that being a material point in the case); the witness assured them that the delivery was to the two, and that the fact was within his personal knowledge and recollection; and the defendants, relying upon his statement, secured his attendance at the trial, together with an interpreter. Before going on the stand the witness told the interpreter that "his head was greatly disordered," and that "he was not fit to testify"; but it seems that the interpreter did not communicate these statements to the parties. When the witness got on the stand he testified that the delivery was to one brother only, and that the name of the other was not mentioned, and the plaintiff had judgment. The supreme court held, reversing the decision of the court below, that a new trial ought to have been granted, and Shafter, J., delivering the opinion, said: "There are cases to the effect that the mere fact that the witness of a party swears contrary to the party's expectation does not furnish adequate ground for granting a new trial; but all the cases agree that if the witness suddenly changes front, by collusion with the party against whom he is called, or fails to testify in accordance with his previous assurances by reason of any fact or occurrence for which neither the witness nor the party is in any measure responsible, a new trial will be granted *ex debito justitiae.*"

So where a witness told the plaintiff's attorney before the trial that the defendant had acknowledged in his presence that the full

[1] 6 Cal. 228; look at Guy v. Hanly, 21 Cal. 397.

[2] 24 Cal. 85.

amount claimed was due, but declined to testify; and the plaintiff compelled his attendance by the process of the court, and relying on his telling the truth did not subpoena other witnesses, and when on the stand the witness testified that what the defendant said was that he owed the plaintiff something without specifying how much, a verdict for the defendant was set aside, and a new trial granted.[3] So where the question was whether or not the defendant signed a note as surety, and he was assured by a witness that he could and would prove that the signing was only as surety; and relying upon such assurance, the defendant did not subpoena any other witness, and on the trial the witness failed to identify the note and judgment passed for the plaintiff, a new trial was granted.[4] So where a person, on being shown a receipt purporting to be signed by her, did not deny, but virtually admitted, the signature, and reliance being placed upon her admitting the signature no witness was called to prove it, and on the stand she denied the signature, a new trial was granted.[5] So where a witness testified in the appellate court to the contrary of what he had testified in the justice's court, a new trial was granted.[6] So where a witness was so disconcerted that he was not able to testify to the facts, a new trial was granted.[7] So where the sureties on a note set up in defense to an action against them by the holder, that the time for payment had been extended without their consent, and their counsel was informed by a witness upon whom they were entitled to rely, that the extension was contained in a certain writing in the custody of the other side, and relying on this information the counsel took no steps to procure other evidence of the extension; and when the writing was produced from the custody of the other side, at the trial, it was found that it did not contain an extension, and judgment went for the plaintiff, a new trial was granted.[8]

But a party cannot have a new trial on the ground of surprise at the testimony of his witness, unless he used diligence to ascertain what the witness would swear to.[9] And if he can remedy the effect produced by the adverse testimony, he should do so. Thus if a witness testifies differently from what he testified to on a previous trial, the party should call his attention to his former testi-

[3] Delmas v. Margo, 25 Tex. 1, 78 Am. Dec. 516.
[4] Wilson v. Brandon, 8 Ga. 136.
[5] McFarland v. Clark, 9 Dana, 134.
[6] Levy v. Brown, 11 Ark. 16.
[7] Ainsworth v. Sessions, 1 Root, 175.
[8] Dorr v. Watson, 28 Miss. 393.
[9] Ruger v. Bungan, 10 Ind. 451; Nelson v. Waters, 18 Ark. 570; O'Conner v. Duff, 30 Mo. 595; O'Donnell v. Bennett, 12 Mont. 242, 29 Pac. 1044.

mony.[10] So if there are other witnesses to the same facts, he should procure their attendance, or apply for a continuance in order to enable their attendance to be secured.[11] So if a party perceives that his witness is intoxicated, he should call the attention of the court to the fact.[12] So, where a witness was not subpoenaed, but promised to be present anyway, and was prevented by sickness from attending the trial, it is not ground for a new trial, if it appears that such sickness was known in ample time to have enabled the party to have guarded against the want of his testimony, and that he took no steps to do so, and did not ask for a continuance.[13]

§ 79. Surprise at Evidence Introduced by the Adverse Party. The general rule is that each party must understand his case, and come prepared to meet the case made by his adversary. Therefore a party cannot be surprised that his adversary introduces testimony in support of the issues made by the pleadings, even though such testimony be false,[1] nor can he be surprised at the introduction of a document mentioned in the pleadings.[2] So a party must know the character of his witness, and cannot in general be surprised if it be impeached.[3] So where a party had prepared evidence to impeach the character of a witness whom he expected his adversary to produce, and his adversary hearing of this did not produce the witness, but proved the fact by another witness, it was held that this did not constitute ground for a new trial.[4] So in other cases.[4a]

[10] Howell v. Howell, 37 Mo. 124.

[11] See section 61, *ante*. But a party need not place his attorney on the stand in order to avoid the consequence of surprise at the testimony of a witness. Alger v. Merritt, 16 Iowa, 121.

[12] Iseley v. Lovejoy, 8 Blackf. 462.

[13] Josephson v. Sigfusson, 13 N. D. 312, 100 N. W. 703. See, also, Jensen v. Railroad Co., 51 Wash. 448, 98 Pac. 1124, where it was held, under a similar state of facts, that an applicant for a new trial on the ground of surprise must show actual surprise, and it must appear that he used ordinary care, at least, to remedy the result of the surprise. See, also, to same effect, Hill v. McKay, 36 Mont. 440, 93 Pac. 345.

[1] Armstrong v. Davis, 41 Cal. 494; and look at Anderson v. Duffield, 8 Tex. 237; Cox v. Hutchings, 21 Ind. 219; Peck v. Hensley, 21 Ind. 344. See, also, to same effect, Marshall v. Marshall, 7 Okl. 240, 54 Pac. 461.

[2] McNeally v. Stroud, 22 Tex. 229.

[3] Bell v. Howard, 4 Litt. (Ky.) 117.

[4] Beach v. Tooker, 10 How. Pr. 297. And for instance of new trial refused where it was claimed that the party was surprised at the evidence of his adversary, see Taylor v. California Stage Co., 6 Cal. 228; Klockenbaum v. Pierson, 22 Cal. 160.

[4a] In Salida etc. Co. v. Davis, 16 Colo. App. 294, 64 Pac. 1046, it was held that if the evidence which is the

So when depositions have been taken, the party upon whose application they were taken is not bound to introduce them, and if his adversary relies upon such depositions, without preparing himself to meet the situation in the event they should not be introduced, he cannot be said to have been surprised if the opposite party elects to prove the facts by other means.[4b] So where a party is present by attorney when depositions are taken, he cannot successfully complain of surprise involved in the identity of the witness whose testimony is taken.[4c]

But there may be cases of surprise produced by the evidence of the adverse party. Thus where the plaintiff set out a particular title in his complaint, and claimed to be entitled to recover on that, and the defendants came prepared with evidence to defeat that title only, and at the trial the plaintiffs were permitted

basis of the alleged surprise might have been reasonably anticipated from the pleadings it cannot be available. The defendant alleged that plaintiff's stock had been pledged as collateral security for the payment of a note, and that he had appropriated their value for the payment thereof. Plaintiff denied the allegation and testified that she had paid the note, and the court held that such testimony should have occasioned no surprise, since it must have been anticipated that the note would be the subject of the testimony.

In Francisco v. Benepe, 6 Mont. 243, 11 Pac. 637, it was held that where the plaintiff had simply proved the allegations of his pleadings the defendant could not complain of surprise.

In Marshall v. Marshall, 7 Okl. 240, 54 Pac. 461, it was held that the testimony given by the plaintiff was not ground for a new trial where it was strictly in support of the allegations of the petition.

In Snell v. Cisler, 1 Utah, 298, it was held that a new trial on this ground would not be granted when the testimony was pertinent and within the issue, unless some trick or fraud was perpetrated.

In Hendelman v. Kahan, 50 Wash. 247, 97 Pac. 109, where the controversy arose out of dealings involving the payment of various sums of money on one side, and the performance of divers services on the other, it was held that testimony as to the payment of money to a brother, per request, was not to be regarded as the basis for a new trial on the ground of surprise.

In Harden v. Card, 15 Wyo. 217, 88 Pac. 217, which was an action upon a lease, it was held that defendant had full and complete notice from the pleadings that his adversary would attempt to prove that the lease was annulled upon a certain date. The defense was that it occurred upon a different date. The issue was clear, and there could be no ground for surprise when plaintiff attempted to establish his case by testimony in support thereof.

See, also, Clifford v. Denver etc. Co., 12 Colo. 125, 20 Pac. 333; Jefferson Min. Co. v. Anchoria etc. Co., 32 Colo. 176, 75 Pac. 1070, 64 L. R. A. 925; Sun etc. Co. v. Heiderer, 44 Colo. 293, 99 Pac. 39; Hill v. McKay, 36 Mont. 440, 93 Pac. 345; Ernster v. Christianson, 24 S. D. 103, 123 N. W. 711; Stewart Min. Co. v. Coulter, 3 Utah, 174, 5 Pac. 557; Wilson v. Waldron, 12 Wash. 149, 40 Pac. 740; Pincus v. Puget Sound etc. Co., 18 Wash. 108, 50 Pac. 930; Friedman v. Manley, 24 Wash. 43, 56 Pac. 832; Hardman's Estate v. McNair (Wash.), 111 Pac. 1059.

[4b] Heath v. Scott, 65 Cal. 548, 4 Pac. 557.

[4c] Reeder v. Traders' National Bank, 28 Wash. 139, 68 Pac. 461.

to prove a different title from the one set forth in the complaint, and judgment passed for them, the supreme court directed a new trial on the ground of surprise, holding that while it was not incumbent upon the plaintiff to set out in his complaint the title on which he expected to recover, yet that when a particular title was set out, and the defendants had come prepared to meet that title only, it would operate as a surprise to permit plaintiff to recover on a different title.[5] So where the defendant filed an evasive answer, admitting plaintiff's demand, and on motion the answer was stricken out and judgment ordered for plaintiff, and subsequently this order was set aside, and a junior attaching creditor was allowed to intervene, and on the trial of the issue raised by the intervention the defendant, without changing his answer and without intimating what he was going to do, went on the stand and testified that the debt to plaintiff was not yet due, and judgment passed for the intervener, the supreme court affirmed the order granting a new trial, on the ground (among others) that the plaintiff was entitled to a new trial on the ground of surprise.[6]

So where the case was as follows: The plaintiff in ejectment made a *prima facie* case showing title in himself and rested; the defendants proved title outstanding in a third person and rested; the plaintiff then introduced a deed from such third person to himself and recovered judgment. It was shown on the motion for a new trial that the deed from the third person to plaintiff was subsequent to a deed made by that person to the defendant; that defendant had not produced this deed because he was advised by his attorney that it was sufficient to show title outstanding in a third person; that defendant had been in possession under his deed for a long time, and did not know of the plaintiff's deed; that plaintiff procured his deed from the third person shortly before the trial, and without consideration; and that such person informed plaintiff's agent at the time application for a deed was made that he had already conveyed the title to defendant's grantor, and had no title to convey—the supreme court held, reversing the decision of the court below, that a new trial should be granted, on the ground of surprise.[7]

So where the defendant's witness, contrary to the expectation of plaintiff, testified to a certain location of a line bounding the claim of the plaintiff, and on that testimony judgment passed for

[5] Eagan v. Delaney, 16 Cal. 85, 5 Morr. Min. Rep. 223.

[6] Coghill v. Marks, 29 Cal. 673.

[7] Delmas v. Martin, 39 Cal. 555.

the defendant, and on motion for new trial the witness himself made affidavit that he was mistaken in his testimony as to the line, and plaintiff made affidavit that he was surprised at the testimony and had no time to procure other evidence on the point, a new trial was granted.[8]

So where, in an action upon a promissory note, the answer denied the allegations of the complaint, and set up a counterclaim for goods, wares and merchandise, sold and delivered etc., and the defendant, in support of his answer and counterclaim, testified that he had paid the note in full by the sale to the plaintiff of a saloon and contents, it was held that the plaintiff could not anticipate such evidence from the answer, and that a new trial on the ground of surprise should be granted to enable the plaintiff to present newly discovered evidence to the effect that plaintiff had never been in possession of the saloon, and that the defendant had sold the same to other parties.[9]

So, where the complaint alleged, in effect, that the policy of insurance sued on was issued upon an application made and signed by the plaintiff and containing certain material representations, and plaintiff was permitted against the objections of the defendant to testify at the trial that the application was in fact made by an agent of the defendant, and that plaintiff did not know what representations it contained, it was held, in effect, that defendant could not anticipate that plaintiff would testify in contravention of the averments of the complaint, and that he should have an opportunity to offer evidence in support of the fact that the representations were actually made by the plaintiff, and that they were untrue.[10]

[8] Moore v. L. A. Infirmary, 49 Cal. 669; look at Guy v. Hanly, 21 Colo. 397; and see generally Hendy v. Desmond, 62 Cal. 260.

[9] Kenezleber v. Wahl, 92 Cal. 202, 28 Pac. 225. It was contended here that the order of the court granting a new trial was based upon the ground of newly discovered evidence, and that the other of the two grounds—surprise—was not covered by the order. The supreme court, however, held specifically that it was evident from the language of the trial court that the ground of surprise was considered. The basis of this decision was that the pleadings—answer and cross-complaint—did not disclose the nature of defendant's case, and for that reason it was held that the plaintiff could not anticipate the character of the defense. But see Harden v. Card, 15 Wyo. 217, 88 Pac. 217, where the pleadings did disclose plaintiff's case.

[10] Menk v. Commercial Ins. Co., 70 Cal. 585, 11 Pac. 654. In this case the motion was made upon newly discovered evidence, but it is obvious that a clear case of surprise was made out. The court say: "Defendant did not have an opportunity of producing the proof at the trial, because it could not have anticipated that plaintiff would be permitted to testify that he did not make the representations contained in his application." It is to

So, where, without plaintiff's fault, the parties proceeded to trial upon the theory that the title to the property in controversy was in a vendee of the original trustee, whereas the title was in the trustee by an unrecorded reconveyance, it was held that plaintiff was at a distinct disadvantage, and was entitled to a new trial.[11]

The remarks at the end of the preceding section as to what is to be done when a party is surprised at testimony apply here.

§ 80. Negligence or Unskillfulness of the Attorney.—The negligence of the party is no ground for a new trial. The provision of the code is: "Accident or surprise *which ordinary prudence could not have guarded against.*"[1] And the negligence of the attorney is the negligence of the party within the meaning of the subdivision. The attorney is the agent of the party for the purposes of the trial, and the party cannot make his attorney's negligence a ground for relief.[2] So the unskillfulness of the attorney is not ground for a new trial. Thus where the motion was on the ground of surprise at a ruling of the court admitting certain evidence, which ruling was correct, the supreme court, per Field, J., said: "The surprise alleged is only that the law was different from what the attorney supposed it to be—a state of feeling which in numerous instances, under like circumstances, has been experienced by other counsel, but has never availed to obtain a new trial."[3] So in Morgan v. Houston,[4] in deciding a similar application, the supreme court of Vermont, per Redfield, C. J., said: "One ground of surprise on the part of the petitioners is that the county court ruled the law different from what they expected, and that ruling

be observed that it was not said that defendant did not have the evidence, but that it did not have an opportunity to present it. The court committed error in admitting the testimony of the plaintiff in contravention of the averments of his complaint, but having admitted such evidence, the defendant was surprised by the raising of the new issue, and should have been accorded an opportunity to meet it.

[11] Van Wagenen v. Carpenter, 27 Colo. 444, 61 Pac. 698. See, also, Porter v. Industrial etc. Co., 26 Mont. 170, 66 Pac. 839, 67 Pac. 67.

[1] Section 657, subdivision 3, California Code of Civil Procedure; see, also, Brook v. Lyon, 3 Cal. 113; May v. Hanson, 5 Cal. 360, 63 Am. Dec. 135; Patterson v. Ely, 19 Cal. 28; Cook v. De la Guerra, 24 Cal. 237; Mendelsohn v. Anaheim Lighter Co., 40 Cal. 657.

[2] Smith v. Tunstead, 56 Cal. 175; Patterson v. Mathews, 3 Bibb, 80; Field v. Matson, 8 Mo. 686; Shields v. Burns, 31 Ala. 535; Yates v. Munro, 13 Ill. 212; Henck v. Todhunter, 7 Har. & J. 275, 16 Am. Dec. 300; Kent v. Ricards, 3 Md. Ch. 392; Barrow v. Jones, 1 J. J. Marsh. 470.

[3] Fuller v. Hutchings, 10 Cal. 523, 70 Am. Dec. 746; and see Packer v. Heaton, 9 Cal. 568, 4 Morr. Min. Rep. 447; Lawrence v. Fulton, 19 Cal. 683; Klockenbaum v. Pierson, 22 Cal. 160.

[4] 25 Vt. 570.

was affirmed in this court. This could never form the basis of a petition for new trial. This is a surprise that overtakes everybody concerned in the administration of civil justice. Human opinion is infinitely various and always will be." So mistakes as to the competency of a witness is no ground.[5] So it is not surprise that a party mistakes the character of evidence necessary to be produced by his opponent to prove a fact, and therefore was not prepared with evidence to countervail the showing made.[6] So the rejection of a document from another state because not properly certified under the act of Congress does not constitute surprise.[7] So it is not surprise that plaintiff, having recently come to the state, was unacquainted with the statute law, and erroneously supposed that copies of certain instruments were admissible instead of the originals.[8] So counsel cannot be surprised if the court construes certain admissions to be less extensive than he had supposed them to be.[9] So the fact that a deposition was read in evidence on a former trial of the case does not justify counsel in neglecting to look among the papers to see whether the preliminary affidavit is on file.[10] So where depositions were excluded, the witness residing within forty miles from the court-house, it was held that the distance was a fact which ought to have been ascertained by the party, and that a new trial could not be granted.[11] So it is mere negligence in the attorney if he does not look to see whether a patent, material to his case, is among the files of the court.[12] So where the plaintiff relied upon an account stated, which he failed to prove, and judgment passed for the defendant, it was held improper to grant a new trial to allow plaintiff an opportunity to prove the services and their value, the court saying: "To give the plaintiff an opportunity of proving the services rendered by him for the defendant, and their value, when the plaintiff has already had such opportunity at the trial, but had declined it, is not a sufficient ground for a new trial, especially when it is not even pretended that any surprise or misapprehension had occurred."[13] So where counsel misunderstood a conversation had with opposing counsel as to the line

[5] Packer v. Heaton, 9 Cal. 568, 4 Morr. Min. Rep. 447.

[6] Gorgerat v. McCarty, 1 Yeates, 253; Phillips v. Wheeler, 10 Tex. 536; Pleasants v. Clements, 2 Leigh, 474, 481, 482.

[7] Dorsey v. Maury, 10 Smedes & M. 298.

[8] Hite v. Lenhart, 7 Mo. 22.

[9] Sanford v. Wiggin, 14 N. H. 441, 40 Am. Dec. 198.

[10] Smith v. Natchez Steamboat Co., 1 How. (Miss.) 479; but see Helm v. Jones, 9 Dana, 26.

[11] Peers v. Davis, 29 Mo. 184.

[12] Linard v. Crossland, 10 Tex. 462, 60 Am. Dec. 213.

[13] Griffith v. Moss, 47 Cal. 567.

of action he intended to pursue, and relying upon what he supposed had been said neglected to make certain necessary defenses, it was held that the judgment must stand, the court saying: "The word 'accident,' as used in this connection, indicates that the kind of mistake or error intended is such as results from fortuitous circumstances, and not such as arises from an error of judgment, or from misapprehension on the part of the counsel in reference to the points of the case as they arise in the course of the trial. It would be a most unwise policy to grant new trials for such mistakes and errors."[14]

So where a new trial was sought to enable the defendant to introduce evidence which he was not prepared to introduce at the trial, because of *surprise* at the ruling of the court contrary to what his attorneys had previously advised him, the court said: "Erroneous views of the law, or advice of an attorney contrary to the ruling of the court, is not, however, the 'surprise' for which a new trial will be granted."[15] So where a new trial was sought on the ground of surprise, the plaintiff supposing his own testimony would be admitted in support of his claim, having been so advised, and not being prepared with other testimony when his own was excluded under the inhibition of section 1880, Code of Civil Procedure.[16] So where the validity of a lease for a year was in controversy, and plaintiff and his counsel failed to acquaint themselves with the fact that the lease was for a period of more than a year, the lease being the foundation of the action and being in their possession, it was held not to be surprise which ordinary prudence could not have guarded against, and hence a new trial could not be granted.[17]

So in an action on a promissory note, where defendant had introduced sufficient evidence to shift the burden of proof as to the *bona fides* of the consideration thereof to the plaintiff-assignee, and the latter's attorney neglected to introduce depositions which he had prepared to meet just such an emergency, tending to show the ignorance of his client of the illegal character of the consideration (lobbying), although given ample opportunity to do so, evidently refraining from doing so because of the view which he entertained and acted upon that the defendant must not only estab-

[14] Handy v. Davis, 38 N. H. 411; and look at Taylor v. Harlow, 11 How. Pr. 285. As to reliance upon oral stipulations, see sections 82, 349, *post*.

[15] Santa Cruz etc. Co. v. Bowie, 104 Cal. 286, 37 Pac. 934.

[16] Bagnall v. Roach, 76 Cal. 106, 18 Pac. 137.

[17] Borderre v. Den, 106 Cal. 594, 39 Pac. 946.

lish the illegality of the consideration, but must bring home to the plaintiff the knowledge thereof, a new trial upon this ground was refused. The failure of the attorney to introduce the depositions was due to a mistaken view of the law, which could not be relieved against on motion for new trial, as "surprise" within section 657, Code of Civil Procedure. As suggested by the learned justice of the court of appeals who wrote the opinion, relief would no doubt have been granted, if asked for within a reasonable time, under the provisions of section 473, Code of Civil Procedure,[18] but not by new trial, the court saying:

"If, after a case has been submitted and decided, the losing party could have the judgment set aside because he acted upon an erroneous view of the law, there would be no end to litigation. There have been times, no doubt, in the experience of every lawyer, when he would have liked to have been relieved of a situation brought about by his failure to do the proper thing at the proper time. But after judgment it is too late for relief on such a ground."[19]

And the rule is not altered by the fact that a party has dismissed his attorneys, and seeks by means of a charge that they were badly advised, to avoid responsibility, as for surprise. Thus, in Fincher v. Malcolmson[20] the defendant, on his motion for a new trial on this and other grounds, denied that he had consented to their action, and proceeded as though they were adverse; the court held that the showing was insufficient, that he could not avoid responsibility for their acts in this way.

The rule that negligence or unskillfulness of the party or attorney cannot operate as "surprise" within the meaning of the subdivision under consideration is a general one; but it is sometimes relaxed under special circumstances, of which examples are given in the next section.

Upon the question as to whether temporary incapacity, as for drunkenness, upon the part of an attorney, would be deemed ground for surprise sufficient to entitle one to a new trial, it is probable that a degree of drunkenness which would incapacitate would be sufficient to put both the client and the court upon notice. In such case, clearly it is the duty of the court to allow the party

[18] See section 351, *post*.

[19] Le Tourneaux v. Gilliss, 1 Cal. App. 546, 82 Pac. 627. See, also, Connell v. Harron, 7 Cal. App. 745, 95 Pac. 916, where the same rule was held to govern where the counsel misapprehended the effect of a ruling of the court upon the admission of certain evidence.

[20] 96 Cal. 38, 30 Pac. 835.

time and an opportunity to procure the services of another attorney.[21] If not apparent, a strong showing would perhaps be required to establish such incapacity as would be available as a basis for surprise.

§ 81. Inadvertence and Other Unforeseen Occurrences During the Trial.—As shown in the preceding section, negligence or unskillfulness of the attorney is not "surprise" within the meaning of the subdivision. But circumstances are so complex and various that it is often impossible to foresee and guard against all their possible combinations; and the rule above mentioned is sometimes relaxed, so as to afford relief from the consequences of inadvertence, and mistakes involving, perhaps, slight negligence. Thus where two causes of action were so blended together as not to distinctly apprise the defendant of the case he had to meet, and he omitted to offer certain evidence necessary under one aspect of the complaint, the order of the court below granting a new trial on the ground of surprise was affirmed.[1] So where the court and all the parties believed at the time certain depositions were taken they were inadmissible under the pleadings, and the defendant, acting on such belief, did not prepare evidence to countervail them, and the depositions were admitted on the trial, it was held that in view of all the circumstances a new trial should be granted.[2] So where a document had been read on two previous trials without objection, and on the third trial objection was made to it and sustained, and the party was unprepared with other evidence, having relied upon the document as proof of the fact, a new trial was granted.[3] So where the party relied upon the decision of the supreme court upon

[21] See Fitch v. Ellison, 15 Colo. 418, 24 Pac. 872, where the supreme court said:

"In cases of this kind much must be left to the discretion of the judge presiding at the trial, and we are not prepared to say that the court showed such a gross abuse of discretion in this instance as calls for interference by this court upon appeal. In order that our position may not be misunderstood, we will say that courts should not permit the rights of litigants to be jeopardized by an attorney who so far forgets the obligations which he owes to the bench, to his profession, and to his client, as to appear in the trial of a cause in a condition of intoxication. The trial ought not to be allowed to proceed under such circumstances without giving the unfortunate litigant an opportunity to employ other counsel who should have an opportunity of advising themselves in reference to the case before being required to proceed, and the summary power of the court to punish the offending attorney as for contempt of court ought also to be exercised."

[1] Smith v. Richmond, 15 Cal. 501.

[2] Morrow v. Hatfield, 6 Humph. 108.

[3] Helm v. Jones, 9 Dana, 26; compare Smith v. Natchez Steamboat Co., 1 How. (Miss.) 479.

the question of the admissibility of certain evidence, and the lower court rejected the evidence and the decision of the supreme court was afterward overruled, it was held that a new trial should be granted.[4] So where a material fact appearing in the chain of title, which changed the whole aspect of the case, escaped the attention of the counsel on both sides, and of the judge who presided at the trial, and was not discovered until after the trial, a new trial was granted.[5] So where the defendant's counsel was proceeding to call witnesses, but was stopped by the judge, who stated that the plaintiff had proved no case, and the matter was then submitted to the jury, who rendered a verdict for the plaintiff, it was held that a new trial must be granted, irrespective of the question whether the judge's statement as to plaintiff's case was correct.[6]

So where counsel for the defendant omitted, through inadvertence to put in evidence certain books which he had with him, and intended to introduce, and supposing he had done so, commented on them to the jury, when on the objection of his opponent he discovered for the first time that he had forgotten to put the books in evidence, and the court refused to allow him to do so, the appellate court directed a new trial.[7] So where, during a trial, the mind of one of the counsel became so disturbed by information of the dangerous illness of one of his children that he failed to make a claim for his client which ought to have been made, a new trial was granted.[8] So where the omission to affix a revenue stamp to a document was the result of an honest mistake as to the character of the document, and for the want of a stamp it was rejected, and judgment went against the party offering it, a new trial was granted to allow the party to pay the penalties and affix the stamp.[9] So where the jury founded their verdict on what they believed to be a suspicious alteration in a bond, which had escaped the attention of the counsel on both sides, and of the court, and which could easily have been explained had attention been called to it, the verdict was set aside.[10] So where priority of registry was the issue, and to maintain his side of it the plaintiff procured from the recorder a certified abstract, which showed his instrument to be prior

[4] Starkweather v. Loomis, 2 Vt. 573; Allen v. Chambers, 18 Wash. 341, 51 Pac. 478.

[5] Rose v. Daniel, 1 Nott & McC. 33.

[6] Dunham v. Baxter, 4 Mass. 79; see, also, Sanchez v. McMahon, 35 Cal. 218. But it is otherwise where the party chooses to rely upon a favorable intimation of the court. Beekman v. Bemus, 7 Cow. 29.

[7] Rolfe v. Rolfe, 10 Ga. 143; compare Schellhous v. Ball, 29 Cal. 605.

[8] Cutler v. Rice, 14 Pick. 494.

[9] Hoppock v. Stone, 49 Barb. 524.

[10] Libenintz v. Greenland, 2 McCord, 313.

to his adversary's, and rested, the abstract being *prima facie* evidence by statute; and the defendant showed an error by parol testimony, and the plaintiff was unprepared with evidence to contradict the showing made, but afterward found such, a new trial was granted.[11] So where an alteration in the bond sued on was discovered on the trial too late, under the rules of the court, to move for a continuance, a new trial was granted.[12] So where, before the trial, the party examined the records of the county, and found that the record of a power showed it to be without a seal, and on the trial a certified copy of the record was produced with a seal affixed, and the party had no witnesses on hand to prove that the seal had been subsequently affixed, a new trial was granted.[13] So where, after the commencement of the suit, the plaintiff's attorney admitted to the defendant's attorney that he had a certain deed in his possession, and afterward, on the matter being alluded to between them, did not mention the fact that the deed was no longer in his possession; and the defendant's attorney, supposing that the plaintiff's attorney still had the deed, subpoenaed him to produce it; and on the trial the plaintiff's attorney stated that before being subpoenaed he had sent the deed to a distant part of the country, and therefore he could not produce it, it was held that a new trial must be granted.[14] So in other cases.[15]

§ 82. Reliance upon Oral Stipulations.—Section 283 of the Code of Civil Procedure provides that:[1]

"Sec. 283. An attorney and counselor shall have authority, 1. To bind his client in any of the steps of an action or proceeding by his agreement filed with the clerk, or entered upon the minutes of the court, *and not otherwise.*"

[11] Shaw v. Henderson, 7 Minn. 480.

[12] Kirtley v. Kirtley, 1 J. J. Marsh. 96.

[13] Holbrook v. Nichol, 36 Ill. 161.

[14] Jackson v. Warford, 7 Wend. 62.

[15] See Jones v. Gammans, 11 Nev. 249, where objection was made to books of account offered in evidence only on the ground that defendant could not testify to the entries therein after the death of the party charged, and the court, in deciding the case, held that said books were improperly kept, excluding the entries for that reason, it was held that inasmuch as the objection was untenable, and the defendant never had any notice until after his motion for a new trial had been overruled that the evidence had been rejected for any other reason than because it was deemed incompetent, a new trial should be granted.

So, where there was an error in the computation of interest, not in the judgment, but in the evidence, which escaped the attention of both party and court until too late to receive correction, it was held that the surprise was complete. Sultan v. Sherwood, 18 Nev. 454, 5 Pac. 71.

[1] Corresponding provisions of other codes are as follows: Section 3998,

A substantially similar provision has been in the statute since 1851.[1a] This provision was considered in Borkheim v. N. B. & M. Ins. Co.[2] In that case it was verbally stipulated in open court that the case should abide the event of another case of the same character then pending, and judgment was afterward entered in pursuance of the stipulation, which had neither been reduced to writing nor entered in the minutes. This judgment was reversed on the ground that the stipulation was not binding, and Sanderson, J., delivering the opinion, said:

"It would be no misnomer to call the statute a statute of frauds. It declares such agreements null and void, unless they are in writing and filed with the clerk, or have been entered in the minutes of the court. Of such agreements, therefore, there can be no specific performance. To allow the court to enforce them as was done in this case, against the will or without the consent of the parties, is to allow the court to work the precise mischief which the statute was designed to prevent. Instead of being nullified in that way, the statute ought to be strictly adhered to, for it is the dictation of wisdom. Without it the court would be frequently annoyed by disputes between counsel concerning their agreements, and thus forced to try innumerable side issues more perplexing than the case itself, attended also with delay to its business, and with detriment to the public service."

The rule laid down in the foregoing case was approved and followed in Merritt v. Wilcox.[3] That was an action to recover a certain sum in gold coin. The allegation as to gold coin was denied, and the verdict was for a certain sum without specifying that it was to be paid in gold coin. The plaintiff claimed, however, it had been stipulated that whatever was recovered should be made payable in gold coin, and upon his motion supported by affidavits as to the stipulation (which, however, were contradicted by opposing affidavits), the court made an order that judgment be entered for gold coin. Upon appeal it was contended that "the statute is intended to apply only to agreements of counsel made *in pais*,

Revised Codes of Idaho; section 6389, Revised Codes of Montana (section 398, Code of Civil Procedure); section 2621, Cutting's Compiled Laws of Nevada; section 502, Revised Codes of North Dakota; section 1083, Lord's Oregon Laws; section 699, Political Code of South Dakota; section 115, Compiled Laws of Utah; section 130, Rem. & Bal. Code of Washington (section 4766, Bal. Code).

[1a] Laws of 1851, p. 48. In this connection, see section 349.

[2] 38 Cal. 623; and see Reese v. Mahoney, 21 Cal. 305.

[3] 52 Cal. 238.

and not to an agreement made as the one now under consideration is alleged to have been made, *in facie curiae.*" But the court held otherwise, and reversed the order of the court below, saying, however: "It is not necessary, however, for us to hold now that every waiver or consent of counsel made in the presence of the court at the trial of the cause, such, for instance, as waiving the required order of proof, of the production of evidence the best in degree, or the like, must be characterized as an agreement in the sense of the statute referred to, and must in order to its validity be reduced to writing and filed with the clerk or entered on the minutes." But it may be doubted whether even such agreements can be enforced if the party does not choose to keep them, though after they were *executed* it would undoubtedly be too late to repudiate them.

The cases above cited seem conclusively to establish that a stipulation of counsel cannot be enforced unless put in writing or entered in the minutes. And such being the case it would seem to follow that, as a general rule, a party cannot make his reliance upon an oral agreement a ground for new trial; for it was want of diligence to rely on a stipulation which he knew was not binding. This was the view taken in Patterson v. Ely.[4] In that case the defendants claimed to be surprised at the violation of an alleged oral agreement that no objection would be taken to the sufficiency of the answer. But the supreme court held this was not a sufficient ground for a new trial, and Field, C. J., delivering the opinion, said: "The surprise alleged did not of itself entitle the defendants to a new trial or to any reduction of damages. They may have been under the impression, from the verbal stipulation, that no objection would be taken to the sufficiency of the answer, and been surprised when the objection was urged. Yet it is very evident that had the stipulation been at the time reduced to writing, there would have been no misapprehension as to its effect, and no surprise at the construction given. The surprise was not such that ordinary prudence could not have guarded against; and it is only when the surprise arises under circumstances of this kind, and when the proceeding which produces it prevents the presentation of the case upon its merits, that it constitutes a ground for a new trial. Verbal stipulations as to the pleadings or evidence cannot be regarded, except as they are admitted by the parties against whom they are invoked. Any other rules would lead to endless disputes."

[4] 19 Cal. 28; and see Handy v. Davis, 38 N. H. 411.

In the foregoing case and in Reese v. Mahoney,[5] above cited the idea is conveyed that the rule applies only in cases where the oral agreement is disputed, and that where it is admitted it will be respected, and enforced. The case of Borkheim v. N. B. & M. Ins. Co.[6] seems to be the other way, but later cases support this view,[7] and it is now well settled, at least with respect to applications for relief under section 473, California Code of Civil Procedure, in the matter of default judgments, that parties who seek to take advantage of the fact that stipulations into which they have entered with their adversaries have not been put into writing or entered in the minutes, as prescribed by section 283, Code of Civil Procedure, shall not be permitted to make of the court an instrument of injustice. If this is the correct doctrine as applied to a proceeding under section 473 for relief from a default judgment, there would seem to be no good reason why a different doctrine should be upheld in an application for relief from the result of a similar state of affairs by way of new trial. The point has not been directly determined, but in Robertson v. Williams[8] it was held that while oral stipulations were not binding, yet "reliance upon the word of a reputable attorney is *excusable neglect*, for which relief may be given so far as to set aside the advantage taken in violation of the promise." It was further said:

"If the promise had been denied, then we think that in view of the practical difficulty of investigations of that character it would have been proper to refuse relief. But the fact being virtually admitted, we think that the motion (for new trial) should have been granted."

If it be conceded, as undoubtedly it must be, that the phrase "excusable neglect" is intended to represent the "accident" and the "surprise" which, taken together, are a ground for a new trial, "excusable neglect" not being so,[9] then the case here cited must be regarded as a direct acceptance of the doctrine as applied to new trial proceedings.

The doctrine itself has logic and good reason to sustain it. The section of the code (283, Code of Civil Procedure) was intended as a statute of frauds, and has no other office or function than to

[5] 21 Cal. 305.

[6] 38 Cal. 623.

[7] See section 349, *post*, and cases there cited.

[8] 81 Cal. 268, 22 Pac. 665.

[9] McGuire v. Drew, 83 Cal. 225, 23 Pac. 312. But see Heine v. Treadwell, 72 Cal. 217, 13 Pac. 503. Nor is "mistake" or "inadvertence" such a ground. Fincher v. Malcolmson, 96 Cal. 38, 30 Pac. 835.

prescribe a method of proving stipulations entered into by attorneys for their clients. Its purpose was to afford to clients a means of protecting themselves against the intrigues of dishonest attorneys, not to put into their hands a weapon of injustice, or to offer a premium for *mala fides*. As a ground for relief under either section 473, Code of Civil Procedure, or section 657, Code of Civil Procedure, no question of proof can arise. If it could, there would be no need to ask for the relief provided by either section. The stipulation itself would stand in the way of the injustice which would intervene. The question is solely one as to whether there has been a degree of negligence on the part of the moving party sufficient to nullify the surprise resulting from the failure of his adversary to keep his promise—the promise upon which he has relied—and this again depends upon the circumstances of each case, and no general rule can be framed to cover every case that may arise. Intentional misleading would perhaps always be within the rule. So, as in the case of Robertson v. Williams, above cited, doubtless would reliance upon the promise of a reputable attorney. It is also probable that both cases would be within the definition of irregularity of the adverse party.

The principle was clearly recognized in the Colorado case of Morse v. Budlong,[10] which was based upon a rule of court of

[10] 5 Colo. App. 147, 38 Pac. 59. The language of the court is as follows: "The refusal of the court to vacate the judgment and grant a new trial is assigned for error. It was purely a matter of discretion with the court, and the only question for determination is whether there was an arbitrary abuse of discretion. Admitting the oral agreement claimed by plaintiff in error to its fullest extent, it only amounts to a mutual agreement that both should watch the trial docket, and each inform the other. The case was on the calendar for trial, and had been for four days awaiting its turn. Counsel must have expected a trial when it was reached. The situation was such as to require vigilance from both, and it appears it was as much the duty of one as the other to obtain and give the information. The most that could be said was that the attorney acted in bad faith and did not inform the other party of a fact that he should equally have informed himself in regard to. The arrangement, if made, was but an oral agreement, liable to be misunderstood by either, in no way obligatory upon the court, and it is not shown to have been communicated to the court. Rule No. 23 of the district court is as follows: 'No verbal agreement of counsel with each other, with a party, or with an officer of the court, concerning the progress or management of any matter pending in court will be enforced unless made in open court.' Stipulations and agreement require three parties, the court being the third; otherwise it would be impossible to do the business. It was plainly the duty of the court to dispose of the case when reached, either by trial or a continuance for proper cause shown. The case for a new trial made by the affidavits, and they were conflicting, was not one to appeal very strongly to the court, or to show that the negligence was not culpable. The court could not be held responsible for the bad faith of the counsel, if there was bad faith."

similar import, but the determination of the court was treated as an exercise of discretion, and the case, in other ways, possessed features which prevent it from being regarded as a fair test of the views of the court upon the subject.[11]

§ 83. Surprise Occasioned by the Act of the Court.—As has been shown under the head of irregularity of the court, the judge should rule upon questions of law as they arise,[1] and should not

[11] For a more detailed discussion of the subject with reference to the decisions of other states, see section 349, *post*.

[1] See section 36, *ante*. The rule has been frequently stated, and is well established, that a party is not entitled to a new trial on the ground of surprise, whatever its nature or basis, where he did not give expression to his surprise at the first seasonable opportunity. Thus, in Walker v. Gray, 6 Ariz. 359, 57 Pac. 614, where Walker asked for a new trial because of alleged surprise occasioned by certain testimony introduced by his adversary, it was said that he made no "application to the court for a continuance, ... in order that he might meet the testimony of appellee which he claims occasioned his surprise"; nor did he make "an application for a postponement of the hearing, ... nor did he call the court's attention to the fact that the testimony of Gray made it necessary," etc., and the court, in sustaining the denial of his motion for a new trial, said: "His silence upon the point of surprise during the trial, ... and his willingness to enter upon the hearing of this cause indicated that he was content to submit the question upon the evidence of the books of the company, and upon the other evidence in the cause. And, having lost, he should not thereafter be heard to complain because of the insufficient preparation to meet the issues. For that reason we do not think the trial court erred." So, in Fitch v. Ellison, 15 Colo. 418, 24 Pac. 872, where a new trial was asked on the ground of surprise, in that the attorney for the moving party was incapacitated by drink for intelligently managing the trial of the case for him, the court said: "It does not appear, however, that appellant made any objection to the attorney acting for him until after the trial was concluded, and a verdict returned against him. Then, for the first time, upon a motion for a new trial, the complaint was made that the verdict resulted from the drunken condition of his attorney." In Lee-Clark-Andreesen Co. v. Yankee, 9 Colo. App. 443, 48 Pac. 1050, Outcault v. Johnston, 9 Colo. App. 519, 49 Pac. 1058, and Temple v. Teller Lumber Co., 46 Colo. 497, 106 Pac. 8, the rule was similarly stated. See, also, Lilliendthal v. Anderson, 1 Idaho, 673.

In Rand v. Kipp, 27 Mont. 138, 69 Pac. 714, where the basis for the motion was surprise because of the testimony of a witness, the court said: "The record does not reveal a suggestion of surprise, or that the defendant sought a continuance in order to enable him to meet the testimony so given." See, also, Hill v. McKay, 36 Mont. 440, 93 Pac. 345; Vasquez v. Spiegelberg, 1 N. M. 464; Romero v. Desmarais, 4 N. M. (Johns.) 367, 20 Pac. 787; Romero v. Lopez (N. M.), 21 Pac. 679; Huster v. Wynn, 8 Okl. 569, 58 Pac. 736; State v. Gardner, 33 Or. 149, 54 Pac. 809. In this last-cited case, the court said: "The rule is well settled that to entitle a party to have a judgment set aside on account of surprise, it must appear he immediately applied for a postponement of the trial when the surprise occurred, and that he cannot speculate upon the chances of obtaining a favorable verdict, and, after having failed in this respect, urge as a ground for a new trial any matter that occurred at the trial, and was known to, but waived by, him." Citing a large number of cases

change his rulings to the prejudice of a party.[2] Occurrences of such a nature may in all probability be reviewed either under the first subdivision, as for an irregularity of the court, or under the third, upon the ground of surprise.[3]

§ 84. The Party Surprised Should Apply for a Continuance at the Earliest Opportunity.—It is manifest that it would be contrary to fair dealing to permit a party to take his chance of a verdict, with the knowledge that if it should be adverse to him he could obtain a new trial on the ground of surprise. If, therefore, a party be surprised by any occurrence, and by reason thereof he is unable to present his case to the jury upon its merits, he should make his misfortune known to the court and appeal to it for a postponement in order to be enabled to remedy the mishap. This has been laid down in several cases. In Turner v. Morrison,[1] the surprise was claimed to be at the nonattendance of a witness who had been subpoenaed. No motion for a continuance was made, but the court below granted a new trial. The supreme court reversed the order, and Terry, C. J., delivering the opinion, adopted the following language from Graham and Waterman on New Trials: "That a party came to the trial unprepared to make out his case or establish his defense has not even the appearance of a valid excuse. It is true that sometimes no amount of diligence or effort will suffice to arrange all the details and procure everything needful in time for the trial; but injury need not for that reason be sustained. Courts are extremely indulgent and liberal in granting adjournments, and they are seldom or never appealed to in vain in a proper case. Even where it is simply expedient that a continuance should be had, and much more where any necessity for it exists, they will not deny a postponement. It is therefore incumbent upon a party, if for any good reason he finds himself unprepared to go on, to state the circumstances to the court and move for an adjournment. If he fails to do this, he waives his want of

in the older jurisdictions, including a number by federal courts.

See, also, Gaines v. White, 1 S. D. 434, 47 N. W. 524; Adams v. Rathbun, 14 S. D. 552, 86 N. W. 629; Fox v. Territory, 2 Wash. Ter. 297, 5 Pac. 603; Pincus v. Puget Sound etc. Co., 18 Wash. 108, 50 Pac. 930; Reeder v. Traders' National Bank, 28 Wash. 139, 68 Pac. 461; Clemans v. Western, 39 Wash. 290, 81 Pac. 824; Woods v. Globe Navigation Co., 40 Wash. 376, 82 Pac. 401; Mortimer v. Dirks, 57 Wash. 402, 107 Pac. 184.

[2] See section 37, *ante*.

[3] See section 29, *ante*.

[1] 11 Cal. 21. A similar ruling was made in People v. Holden, 28 Cal. 123.

preparation and all right after to object. Any other rule would work great injustice and be attended with innumerable evils."

So in Schellhaus v. Ball,[2] where the surprise claimed was that the party did not know a certain note had been introduced in evidence, and only found it out by the comments of the opposite counsel upon it during the argument, but no motion for a continuance was made, it was held that a new trial was properly refused, and Sanderson, J., delivering the opinion, said:

"A party claiming to have been injured must show that the surprise has not resulted in any degree from his own fault or negligence, and must in addition claim his relief at the earliest opportunity. If he can relieve himself from his embarrassment in any mode, either by a nonsuit, or a continuance, or the introduction of other testimony, or otherwise, he must not take the chances of a verdict, but must at once fortify his position by resorting to all available modes of present relief."

This case was approved and followed in Doyle v. Sturla.[3]

It was also cited as authority in Bailey v. Richardson,[3a] where the moving party claimed surprise as ground for a new trial, as resulting from the introduction of evidence which would not have been competent but for a prayer for general relief, which was overlooked. The court there said:

"If counsel was misled by the prayer (and this can be said to be surprise) he could, so far as appears, have relieved himself of the consequences by an application for such a postponement as would have enabled him to secure the attendance of witnesses to the matter of value. Defendants were not, therefore, entitled to a new trial on the ground of surprise. (Schellhaus v. Ball, 29 Cal. 605.)"

It will be observed that in the foregoing extract from Schellhaus v. Ball, it is suggested that a party may relieve himself from embarrassment by submitting to a nonsuit. The same thing was said in Live Yankee Co. v. Oregon Co.[4] In neither of these cases, however, did the party resort to that course, and therefore what is said concerning it must be regarded as mere *dictum*. It is obvious that if a nonsuit be granted on plaintiff's motion (as may in certain cases be done) the party cannot afterward attack the judgment of nonsuit, because it was made upon his consent.[5] But it

[2] 29 Cal. 605.
[3] 38 Cal. 456.
[3a] 66 Cal. 416, 5 Pac. 910.
[4] 7 Cal. 40, 15 Morr. Min. Rep. 94.
[5] As to consent orders, see section 282, *post*.

has been held that if at the time he moves for a nonsuit he obtains leave to move to set it aside, the rule as to consent proceedings does not apply.[6] Under this decision it would seem that such a course is open to the party who claims to be surprised. The decision does not seem to have had much effect upon the practice, probably because a motion for a continuance is a much simpler remedy.

But whatever may be the particular mode of relief to be applied for, it is certain that if there be sufficient opportunity to do so, the party must seek to relieve himself from his embarrassment before taking the chance of a verdict. This rule was relaxed in Delmas v. Martin.[7] That was an action of ejectment. The plaintiff proved a *prima facie* case showing title in himself and rested; the defendant proved outstanding title in a third person and rested; he could have connected himself with such outstanding title, but was advised by his counsel that it was not necessary to do so, and therefore had not brought his deed with him. The plaintiff in rebuttal introduced a deed conveying the outstanding title to himself, and (no motion for a continuance being made) obtained judgment. It was shown upon motion for new trial that this deed was subsequent to the deed of the defendants, who had been in possession for a long time; that it was obtained shortly before the trial and without consideration, and that when it was applied for the plaintiff's agent was informed that the grantor had already conveyed the property and had no title to convey. The supreme court reversed the order denying a new trial, and Crockett, J., delivering the opinion, said:

"The general rule undoubtedly is that a party surprised must apply for relief at the earliest practicable moment, and in such method as to produce the least vexation, expense, and delay. He will not be allowed to speculate on the chances of a favorable decision on other points, and if he fails in these, fall back on his motion for a new trial on the ground of surprise. But while this is the general rule, cases may, and frequently do, arise in which it ought not to be enforced. But in relaxing the rule it should be done only where the surprise is clearly established and the consequences can be avoided in another trial; and it must also be apparent that the party has not been guilty of laches, and has acted in good faith in omitting to apply for relief at an earlier stage

[6] Natoma Water Co. v. Clarkin, 14 Cal. 544.

[7] 39 Cal. 555.

of the proceeding. It may well be that in the last stage of a jury trial, at the conclusion of the evidence, sufficient opportunity may not have occurred to enable the defendants and their counsel to decide, deliberately, discreetly, and wisely what course it was proper to pursue."

The general rule was applied in the subsequent case of Ferrer v. Home Mut. Ins. Co.,[8] in which it was said of Delmas v. Martin, that it was a peculiar case, and that the rule would not be extended beyond the facts of that case.

In the case of Roderiguez v. Comstock[9] it was held that the failure to apply for the continuance was excused by the fact that at the time "they did not know, and therefore could have given no assurances to the court, that a continuance would enable them to retrieve the disaster that had befallen them." It may be doubted, however, whether, as a general rule, the party should forestall the action of the court by passing upon his own application for continuance. Courts are extremely liberal in granting postponements, and very frequently grant them, in the exercise of a wise discretion, although no legal showing has been made. When the party moves for a continuance, he should support the application by affidavits in the regular way;[10] for if he does not his failure to do so may be turned against him.

This doctrine was reiterated in the case of McLear v. Hapgood,[11] where the surprise consisted in an alleged interlineation in a document introduced in evidence, the position being that if it could have been shown that the interlineation had been made after the execution of the document, the plaintiff would be estopped by the recitals of the instrument, and that defendants' motion for a continuance should have been granted to enable them to obtain the evidence of experts, and of others, in relation to the matter. The court said:

"It is the rule, however (subject to but few exceptions), that a party claiming to be surprised must move for a continuance at the earliest practical moment. He is not ordinarily allowed to wait until he sees how the case is going before he makes his motion. In the present case it appears that the document in question

[8] 47 Cal. 416.

[9] 24 Cal. 85; compare Turner v. Morrison, 11 Cal. 21.

[10] See chapter 9, herein. And see Cohen v. City of Alameda, 124 Cal. 504, 57 Pac. 377.

[11] 85 Cal. 557, 24 Pac. 788. This extract is quoted *in extenso* for the purpose of illustrating what is regarded as a prompt request for a continuance, as much as an instance of the application of principle.

was introduced as part of the plaintiff's case; that the defendant, who appeared *in propria persona*, and for his codefendants, saw the duplicate agreement coming from the hands of the plaintiff, and saw the interlined word 'surplus,' on the day before he moved for a continuance; that being so informed of the facts he did not move for a continuance at the time the document was introduced in evidence, or at the close of the plaintiff's case, but proceeded to open the case for the defendants and himself, took the stand, and 'testified as to the circumstances attending the signing of the contract,' and 'placed upon the witness-stand defendant Joseph Hapgood, and his son Nathan Hapgood, and interrogated them fully as to the circumstances attending the signing of the agreement.' Such being the case we cannot say that there was an abuse of discretion in refusing the continuance.''

§ 85. The Party must Show upon the Motion for New Trial That the Result may be Different upon Another Trial.—It would be perfectly idle to have another trial of the cause, if there be no reasonable prospect that the result would be different. Therefore it is incumbent upon the party to show upon his motion for new trial that he will probably be able to avoid the difficulty upon a retrial. This is well settled. Thus in Cook v. De la Guerra,[1] where the party was not represented at the trial and moved for a new trial on the ground of surprise, the supreme court, per Rhodes, J., said: ''The court will not set aside a decree and grant a new trial on behalf of a defendant merely for the purpose of going through the idle form of a trial in the presence of the defendant or his attorney; but it must be made to appear that on the new trial the result may be different from that on the first trial; in other words, the defendant must disclose a valid defense to some material part of the plaintiff's cause of action.''

Upon this principle, if the surprise be at the testimony of a witness, it must be shown that the testimony is not true, and that the party can countervail it.[2] And in order to show that the result may be different, it is not sufficient merely to so state, but the facts showing it must be set forth. Thus in Patterson v. Ely,[3] where the surprise was at the taking of objection (contrary to a verbal stipulation) to the failure to deny an averment as to the

[1] 24 Cal. 237; and see Reese v. Mahoney, 21 Cal. 305.

[2] Estate of Cartery, 56 Cal. 470; People v. Jocelyn, 29 Cal. 562; Brooks v. Douglass, 32 Cal. 208.

[3] 19 Cal. 28.

damages sustained, whereby plaintiff obtained judgment fo large amount of damages, it was held insufficient merely to s that the attorney "was informed, and believes that the dam assessed are excessive and more than could be recovered on a trial of the action"; and Field, C. J., delivering the opinion, s

"No facts are stated from which the court can perceive the damages are excessive, or that on another trial there w be any probability of a verdict for a less amount or that t is any defense to the claim. In Blake v. Howe, 1 Aiken (Vt.), 15 Am. Dec. 681, the supreme court of Vermont, in decidin motion for a new trial in an action of ejectment, on the gro of surprise, said: 'The defendant ought not only to show a prise but to show that he is injured by it.'"[4]

The necessity of a showing of injury as well as probabilit different result was referred to in the case of McGuire v. Drew,[4a] court saying:

" He also fails to show another necessary quality to title him to relief upon the ground of surprise, namely, inj (Patterson v. Ely, 19 Cal. 28; Cook v. De la Guerra, 24 Cal. Brooks v. Douglass, 32 Cal. 208.) There is nothing presente show that a different result would be reached."

So in Brooks v. Johnson,[4b] with reference to the same point court say:

" It was, moreover, essential to show that the defend had sustained injury by the action of the court. Unless it is m to appear that a different result might have been reached, a c is not authorized to set aside its decision on the ground merel surprise or failure of the attorney to be present at the t (Haight v. Green, 19 Cal. 113; Ekel v. Swift, 47 Cal. 619; McG v. Drew, 83 Cal. 225, 23 Pac. 294.)"

The rule as to the probability of a different result has been lowed in many other states, having a similar system or practice.

[4] See, also, Rogers v. Huie, 1 Cal. 429, 54 Am. Dec. 300.

[4a] 83 Cal. 225, 23 Pac. 294.

[4b] 122 Cal. 569, 55 Pac. 423. And see Cohen v. Alameda, 124 Cal. 504, 57 Pac. 377, where the court said that "appellants did not produce at the hearing of their motion for a new trial any affidavit of the evidence that they would have introduced or make it appear that a different finding would have been made"; but this was merely a *dictum*, since the appeal went off on another point. See, Rauer's etc. Co. v. Bradbury, 3 App. 256, 84 Pac. 1007.

[4c] Denver etc. Co. v. Simpson Colo. 371, 41 Pac. 499, 31 L. R 566; Hill v. McKay, 36 Mont. 93 Pac. 345; McClusky v. Gerha 2 Nev. 47, 90 Am. Dec. 512; M v. Hill, 3 Utah, 157, 2 Pac. 62; son v. Bank, 37 Wash. 443, 79 1003; Pierson v. Pierce, 42 W 164, 84 Pac. 731.

The affidavits should be made by the party within whose knowledge the facts lie.[5] And if it be practicable (where the surprise is at the testimony of a witness), the affidavits of the countervailing witness must be obtained.[6]

§ 86. The Power to Grant New Trials on the Ground of Surprise Should be Carefully Exercised.—The granting or refusing of new trials on the ground of surprise rests in the sound discretion of the court below, which the supreme court will not disturb except for abuse of discretion.[1] But inasmuch as such applications are frequently made as a sort of forlorn hope, and not in good faith, the court should exercise the utmost caution with respect to them. In this regard Sanderson, J., delivering the opinion in Schellhaus v. Ball,[2] said: "Upon this ground new trials should be granted with great caution, for in many cases it is used as a pretext and a cover for carelessness and inattention rather than as a meritorious ground for relief. It is the duty of courts to look upon applications for new trials upon the ground of surprise with suspicion, for the reason that from the nature of the case surprise may be often feigned and pretended, and the opposite party be unable to show that such is the case. Hence the party alleging surprise should be required to show it conclusively, and by the most satisfactory evidence within his reach."

The same rule applies to applications for new trial on the ground of newly discovered evidence.[3]

[5] Schellhaus v. Ball, 29 Cal. 605. Thus in Martin v. Hill, 3 Utah, 157, 2 Pac. 62, where the basis of the alleged surprise was in the instructions of the court, it was held that the affidavit should have been made by the attorney, presumably upon the theory that only the attorney could be fully cognizant of the legal effect of such instructions.

In Brown v. Warren, 17 Nev. 417, 30 Pac. 1078, an affidavit was held insufficient as being pointed at probative rather than ultimate facts.

[6] See People v. Jocelyn, 29 Cal. 562.

[1] Nooney v. Mahoney, 30 Cal. 226; Schellhaus v. Ball, 29 Cal. 605; Moore v. Los Angeles Infirmary, 49 Cal. 669; Smith v. Richmond, 15 Cal. 501; Brooks v. Johnson, 122 Cal. 569, 55 Pac. 423.

[2] 29 Cal. 605.

[3] See section 87, *post*.

CHAPTER XII.

GROUNDS OF THE MOTION—NEWLY DISCOVERED E DENCE.

§ 87. The statute—Application addressed to discretion of court.
§ 88. What must be shown on the application.
§ 89. The evidence in question must be "newly discovered."
§ 90. The evidence must not be merely cumulative.
§ 91. The evidence must be such as to render probable a different r on a retrial.
§ 92. Reasonable diligence in preparing for trial must be shown to been exercised.
§ 93. The facts upon which the motion is based must be shown by the evidence possible.
§ 93a. Counter-affidavits.
§ 93b. Miscellaneous—Affidavits.

§ 87. The Statute—Application Addressed to the Discretio the Court Below—How Regarded.—By the act of 1851 one the grounds on which a motion for a new trial could be made "newly discovered evidence, material for the party making application, which he could not with reasonable diligence have covered and produced at the trial."[1] The subdivision of the tion has never been amended, and the corresponding provision the Code of Civil Procedure is in the same language.[2]

Applications on this ground are addressed to the discretion the court below,[3] and the action of the court below will not

[1] Laws of 1851, p. 81, sec. 193 (California).

[2] Section 657, subdivision 4, California Code of Civil Procedure. Newly discovered evidence is also a ground for a new trial in criminal actions. The corresponding provision in the California Penal Code is to be found in the seventh subdivision of section 1181, which is as follows:

"7. When new evidence is discovered material to the defendant, and which he could not, with reasonable diligence, have discovered and produced at the trial."

The next sentence prescribes the procedure:

" When a motion for a new trial is made upon the ground of newly discovered evidence, the defendant must produce at the hearing support thereof, the affidavits the witnesses by whom such evid is expected to be given, and if is required by the defendant to cure such affidavits, the court postpone the hearing of the mo for such length of time as, under the circumstances of the case, may seem reasonable."

See section 23, *ante*, as to cedure of other states.

[3] *California:* Baker v. Joseph, Cal. 173; O'Brien v. Brady, 23 243; Jones v. Singleton, 45 Cal. Bartlett v. Hodgen, 3 Cal. 55; H ler v. Cole, 49 Cal. 250; Crystal L Ice Co. v. McAulay, 75 Cal. 631, Pac. 924; Spottiswood v. Weir, Cal. 448, 22 Pac. 289; People

disturbed, except for an abuse of discretion,[2a] the presumption being that the discretion was properly exercised.[4]

It is therefore not a matter of law that the court is required to pass upon, but of discretion, and it has been said that even though

Loui Tung, 90 Cal. 377, 27 Pac. 295; People v. Cesena, 90 Cal. 381, 27 Pac. 300; Kenezleber v. Wahl, 92 Cal. 202, 28 Pac. 225; People v. Urquidas, 96 Cal. 239, 31 Pac. 52; Harralson v. Barrett, 99 Cal. 607, 34 Pac. 342; O'Rourke v. Vennekohl, 104 Cal. 254, 37 Pac. 930; Heintz v. Cooper, 104 Cal. 668, 38 Pac. 511; People v. Demasters, 109 Cal. 607, 42 Pac. 236; People v. Tallmadge, 114 Cal. 427, 46 Pac. 282; People v. Woon Tuck Wo, 120 Cal. 294, 52 Pac. 833; People v. Griner, 124 Cal. 19, 56 Pac. 625; Tibbet v. Sue, 125 Cal. 544, 58 Pac. 160; Oberlander v. Fixen, 129 Cal. 690, 62 Pac. 254; People v. Mitchell, 129 Cal. 584, 62 Pac. 187; People v. Rushing, 130 Cal. 449, 80 Am. St. Rep. 141, 62 Pac. 742; Hausmann v. Sutter Street Ry. Co., 139 Cal. 174, 72 Pac. 905; People v. Buckley, 143 Cal. 375, 77 Pac. 169; People v. Sing Yow, 145 Cal. 1, 78 Pac. 235; People v. Jailles, 146 Cal. 301, 79 Pac. 965; People v. Feld, 149 Cal. 464, 86 Pac. 1100; Estate of Dolbeer, 153 Cal. 652, 96 Pac. 266; Baule v. Drobatz, 6 Cal. App. 594, 92 Pac. 666; Lynch v. McGhan, 7 Cal. App. 132, 93 Pac. 1044; Hubbell Oil Co. v. Morrison, 7 Cal. App. 457, 94 Pac. 589; Miller v. Scoble, 8 Cal. App. 344, 97 Pac. 93; James v. Oakland Traction Co., 10 Cal. App. 785, 103 Pac. 1082; Rockwell v. Italian Swiss Colony Co., 10 Cal. App. 633, 103 Pac. 162.

Montana: Case v. Kramer, 34 Mont. 142, 85 Pac. 878.

North Dakota: Pengilly v. J. I. Case Co., 11 N. D. 249, 91 N. W. 63.

Oregon: Stern v. Volz, 52 Or. 597, 98 Pac. 148.

South Dakota: Longley v. Daly, 1 S. D. 257, 46 N. W. 247; Daley v. Forsythe, 10 S. D. 464, 74 N. W. 201; Wilson v. Seaman, 15 S. D. 103, 87 N. W. 577; Anderson v. Medbery, 16 S. D. 329, 92 N. W. 1087; Grigsby v. Wolven, 20 S. D. 623, 108 N. W. 250; Palmer v. Schurz, 22 S. D. 283, 117 N. W. 150.

Washington: State v. Stowe, 3 Wash. 206, 28 Pac. 337, 14 L. R. A. 609; State v. Webb, 20 Wash. 500, 55 Pac. 935; Brennan v. Seattle, 39 Wash. 640, 81 Pac. 1092; Cummings v. Sunich, 44 Wash. 665, 87 Pac. 949; Crowley v. Taylor, 49 Wash. 511, 95 Pac. 1016; Goodrich v. Kimble, 49 Wash. 516, 95 Pac. 1084.

[2a] *California:* Harralson v. Barrett, 99 Cal. 607, 34 Pac. 342; O'Rourke v. Vennekohl, 104 Cal. 254, 37 Pac. 930; People v. Demasters, 109 Cal. 607, 42 Pac. 236; People v. Tallmadge, 114 Cal. 427, 46 Pac. 282; People v. Griner, 124 Cal. 19, 56 Pac. 625; Tibbet v. Sue, 125 Cal. 544, 58 Pac. 160; Oberlander v. Fixen, 129 Cal. 690, 62 Pac. 254; Hausmann v. Sutter Street Ry. Co., 139 Cal. 174, 72 Pac. 905; People v. Buckley, 143 Cal. 375, 77 Pac. 169; People v. Jailles, 146 Cal. 301, 79 Pac. 965; People v. Feld, 149 Cal. 464, 86 Pac. 1100; Estate of Dolbeer, 153 Cal. 652, 96 Pac. 266. Also, People v. Clarke, 130 Cal. 642, 63 Pac. 138.

South Dakota: Longley v. Daly, 1 S. D. 257, 46 N. W. 247; Daley v. Forsythe, 10 S. D. 464, 74 N. W. 201; Wilson v. Seaman, 15 S. D. 103, 87 N. W. 577; Anderson v. Medbery, 16 S. D. 329, 92 N. W. 1087; Grigsby v. Wolven, 20 S. D. 623, 108 N. W. 250; Palmer v. Schurz, 22 S. D. 283, 117 N. W. 150.

Washington: State v. Stowe, 3 Wash. 206, 28 Pac. 337, 14 L. R. A. 609; State v. Webb, 20 Wash. 500, 55 Pac. 935; Brennan v. Seattle, 39 Wash. 640, 81 Pac. 1092; Cummings v. Sunich, 44 Wash. 665, 87 Pac. 949; Crowley v. Taylor, 49 Wash. 511, 95 Pac. 1016; Goodrich v. Kimble, 49 Wash. 516, 95 Pac. 1084.

[4] Hobler v. Cole, 49 Cal. 250; Byrne v. Reed, 75 Cal. 277, 17 Pac. 201; People v. Tallmadge, 114 Cal. 427, 46 Pac. 282; People v. Rushing, 130 Cal. 449, 80 Am. St. Rep. 141, 62 Pac. 742; and see People v. Sutton, 73 Cal. 243, 15 Pac. 86; People v. Howard, 74 Cal. 547, 16 Pac. 394; People v. Urquidas, 96 Cal. 239, 31 Pac. 52; Heintz v. Cooper, 104 Cal. 668, 38 Pac. 511.

an important witness should come forward, after the trial, v an affidavit to the effect that he had committed perjury in a m rial particular, the question raised will not, even in that event, come a matter of law, but will remain one for the exercise of discretion of the court.[4a]

The court below, it has also been said, should regard the plication with disfavor and closely scrutinize it. Thus in Ba v. Joseph,[5] Baldwin, J., delivering the opinion, used the follow language with reference to applications on this ground:

"Applications for this cause are regarded with distrust and favor. The temptations are so strong to make a favorable sh ing after a defeat in an angry and bitter controversy, involv considerable interests, and the circumstance that the testimony just been discovered when it is too late to introduce it so suspicio that courts require the very strictest showing of diligence and other facts necessary to give effect to the claim."

So in Arnold v. Skaggs,[6] Sanderson, J., delivering the opini said:

"Applications for new trial upon the ground of newly discove evidence must be looked upon with suspicion and disfavor, beca the temptation to make a favorable showing after having sustai a defeat is great. A party who relies upon that ground must m a strong case, both in respect to diligence on his part, in prepar for the trial, and as to the truth and materiality of the newly covered evidence, and that, too, by the best evidence which can obtained. If he fails in either respect, his motion must be denie

Again, in the more recent case of People v. Weber,[6a] referri to this point, Henshaw, J., for the court, said:

"It is to be remembered that a wise discretion is vested in trial court in determining the weight to be given to the stateme contained in affidavits upon motion for new trial. This discret is to be exercised in determining the diligence shown, the tr of the matters stated, and the materiality and probability of effect of them, if believed to be true. Moreover, it is to be reme bered that a trial court is justified in regarding with distrust davits of newly discovered evidence in motions for new trial."

This doctrine has been so often stated in identical or in simi language that it has come to be regarded as little less than ax

[4a] People v. Tallmadge, 114 Cal. 427, 46 Pac. 282.
[5] 16 Cal. 173.
[6] 35 Cal. 684.
[6a] 149 Cal. 325, 86 Pac. 671.

matic.[6b] So, if the affidavits expose the application to the suspicion of bad faith.[7]

The same rule applies to applications for new trial on the ground of surprise.[8]

§ 88. What must be Shown on the Application.—In Bartlett v. Hogden,[1] Wells, J., delivering the opinion of the court in reference to the requirements of the subdivision, said:

"An application for a new trial on the ground of newly discovered evidence should show affirmatively that the evidence is new material and not cumulative; that the applicant has been diligent in preparing his case for trial; that the new evidence was discovered after the trial, and will be important and tend to prove facts which were not directly at issue on the trial, or were not then known or investigated by proof."

This summary is somewhat crude, and is inaccurate, because it need not be shown *affirmatively* that the evidence is not cumulative.[2] In Stoakes v. Monroe,[3] Crockett, J., delivering the opinion, stated the requirements as follows:

"It is well settled that to entitle a party to a new trial on the ground of newly discovered evidence it must appear, first, that he used reasonable diligence to discover and produce the evidence at the former trial, and that his failure to do so was in no degree the result of his own *laches;* second, that the newly discovered evidence is not simply cumulative; third, that it is not sufficient if its only office is to impeach an adverse witness; fourth, that it must be material to the issue, and of such a character that it may reasonably be inferred that the verdict would have been different if the newly discovered evidence had been in on the former trial."

Perhaps a better statement of the requirements of the subdivision would be the following, viz.:

First, that the evidence, and not merely its materiality, be newly discovered;[4]

[6b] See People v. Sutton, 73 Cal. 243, 15 Pac. 86; People v. Howard, 74 Cal. 547, 16 Pac. 394; Spottiswood v. Weir, 80 Cal. 448, 22 Pac. 289; People v. Freeman, 92 Cal. 359, 28 Pac. 261; Harralson v. Barrett, 99 Cal. 607, 34 Pac. 342; People v. Tallmadge, 114 Cal. 427, 46 Pac. 282; Tibbet v. Sue, 125 Cal. 544, 58 Pac. 160; People v. Warren, 130 Cal. 683, 63 Pac. 86; People v. Gonzales, 143 Cal. 605, 77 Pac. 448; Estate of Dolbeer, 153 Cal. 652, 96 Pac. 266; United States v. Smith, 1 Saw. 277, Fed. Cas. No. 16,341; Lander v. Miles, 3 Or. 40; Anderson v. Medbery, 16 S. D. 329, 92 N. W. 1087.

[7] Merk v. Gelzhaeuser, 50 Cal. 631.

[8] See section 86, *ante.*

[1] 3 Cal. 55.

[2] Hobler v. Cole, 49 Cal. 250.

[3] 36 Cal. 383, 2 Morr. Min. Rep. 246.

[4] See section 89, *post.*

Second, that the evidence be not cumulative merely, unless strong enough to render a different result probable;[5]

Third, that it be such as to render a different result prob on a retrial of the cause;[6]

Fourth, that the party could not, with reasonable diligence, discovered and produced it at the trial;[7] and

Fifth, that these facts be shown by the best evidence of w the case admits.[8]

This analysis of the requirements to be met has received unqualified sanction of the supreme court in a number of cases,[9] is believed to be sufficiently comprehensive for practical purp The propositions stated will be separately considered in the lowing sections.

§ 89. The Evidence must be "Newly Discovered."— words of the statute are, "which he could not, with reasor diligence, have discovered *and produced* at the trial." This guage seems to imply that a new trial may be granted, where party had discovered the evidence before the trial, but not enough before to have enabled him to produce it. But in case the party would certainly be required to show the fac the court, and move for a continuance. And if he should that course, it is difficult to see that a motion for a new tria the ground of the newly discovered evidence would prese different question from that which would arise on a motion f new trial on the ground of abuse of discretion in refusing continuance, which motion should be made under the first division of section 657, Code of Civil Procedure. If there be such implication as is above stated, then the remedies are prob

[5] See section 90, *post.*
[6] See section 91, *post.*
[7] See section 92, *post.*
[8] See section 93, *post.*
[9] See People v. Sutton, 73 Cal. 243, 15 Pac. 86; People v. Howard, 74 Cal. 547, 16 Pac. 394; Byrne v. Reed, 75 Cal. 277, 17 Pac. 201; People v. Urquidas, 96 Cal. 239, 31 Pac. 52; and see People v Leong Yune Gun, 77 Cal. 636, 20 Pac. 27; also People v. Demasters, 109 Cal. 607, 42 Pac. 236; United States v. Smith, 1 Saw. 277, Fed. Cas. No. 16,341; Howard v. Winters, 3 Nev. 539; Cutler v. S. S. Columbia, 1 Or. 101; Lander v. I 3 Or. 40; Stern v. Volz, 52 Or. 98 Pac. 148; Klopenstine v. Hay Utah, 45, 57 Pac. 712.

In Gaines v. White, 1 S. D. 43 N. W. 524, it was said that the cation must show:

1. That the applicant has vigilant in the preparation of hi for trial;

2. That new and material facts been discovered since the trial, could not by reasonable diligence been produced at the trial.

concurrent. If there be none such, then the evidence must, in all cases, be discovered after the trial.

However this may be, it must be the evidence which is "newly discovered," and not merely its materiality. If the evidence itself was known ignorance of its materiality does not excuse.[1] A party is bound to know the materiality of his evidence. This was laid down in Berry v. Metzler,[2] in which case Burnett, J., delivering the opinion, said:

"The affidavit, upon which the motion for a new trial was alone based, does not state that the evidence itself was not discovered until after the trial, but only that the defendants 'were not aware of the materiality of the testimony until too late to produce it in time to use on the trial.' It was not stated that the materiality of this testimony was discovered too late to apply for a continuance. No ground for surprise is stated, nor is it stated that the testimony was not cumulative. The materiality of the testimony is so evident that due diligence could not have mistaken it. A party is bound to know the materiality of testimony known to him, except in cases of surprise at the trial. And when the party discovers new testimony before the trial, but too late to procure it, he should apply for a continuance."

The principle was upheld in the later case of Scanlan v. San Francisco etc. Co.,[3] the court saying:

"Additionally, appellant insists that the court erred in refusing it a new trial upon its affidavits of newly discovered evidence. Donalson, who made the survey and field-notes in question, had left defendant's employ, and his whereabouts had been discovered too late to produce him at the hearing of the case. A new trial was sought, and Donalson's testimony was urged as the newly discovered evidence, but it appears from the affidavits that this evidence was in no sense newly discovered. Defendant's engineers had knowledge through their attorney of the materiality of Donaldson's testimony before the trial, and took certain steps to find him and procure his attendance. At the time of the trial they had not discovered him. Knowing of the importance of his testimony, defendant should have moved for a continuance, and, failing to do so, it must be held that it entered upon the trial at its peril."

In the first cited case ignorance of the materiality was urged as an excuse; in the second, inability to avail thereof. The same

[1] See People v. Freeman, 92 Cal. 359, 28 Pac. 261.

[2] 7 Cal. 418.

[3] 128 Cal. 586, 61 Pac. 271.

principle was applied in both. So in another case,[4] there
similar ruling where there was merely inadvertence, or n
It is essential that the evidence relied upon should be ac
newly discovered, otherwise it will not be available as a g
for a new trial.[4a]

It is to be noted that there is in the language of the o
first above cited a reference to an exception in the case of *su*
This exception is founded in the doctrine that where the ca
tried upon a theory that could not have been reasonably antici
there is surprise authorizing a new trial; and, if the moving
is thereby placed in such a situation that he cannot fully
himself of evidence that would otherwise have been at his com
he will be entitled to a new trial upon the additional grou
newly discovered evidence, even though the materiality alon
be truly said to be newly discovered.[5]

To this extent there is an exception to the rule that a
is bound or presumed to know the materiality of the evide
support of his cause. To the same class belong also cases
testimony is introduced in direct contravention of the aver
of the complaint, constituting surprise in so far that such evi
could not be anticipated; and hence, the materiality of evi
could not be known even though in possession of the moving
or within his knowledge before trial.[6]

There must be a showing, or it must affirmatively appear
the alleged newly discovered evidence is material to the
This is well understood, and has been frequently stated. In
v. Freeman[7] it was said that a party who relies upon newl

[4] See Sonoma Co. v. Stofen, 125 Cal. 32, 57 Pac. 681.

[4a] See Harralson v. Barrett, 99 Cal. 607, 34 Pac. 342; Smith v. Smith, 119 Cal. 183, 48 Pac. 730, 51 Pac. 183; Butler v. Estrella etc. Co., 124 Cal. 239, 56 Pac. 1040; Mazor v. Springer (Cal.), 78 Pac. 474; People v. Kelleher (Cal.), 16 Pac. 705.

[5] See Kenezleber v. Wahl, 92 Cal. 202, 28 Pac. 225. In this case it was held that the plaintiff could not, under the circumstances, anticipate a defense upon the theory actually advanced by the defendant, and that he could not have foreseen or prepared for such a defense. Hence, the materiality of the evidence in question could not have been known prior to the trial, and prior to the pr
tion of defendant's testimony.
therefore ground for a new t
surprise; and also, there was
ground because of the newly
ered evidence. But see Butler
trella Raisin Vineyard Co., 1
239, 56 Pac. 1040, where the e
was held not available, the m
ity being such as might hav
anticipated. See Blewett v.
131 Cal. 149, 63 Pac. 157, w
was held that defendant cou
have anticipated the necessity
evidence in question. See, al
tion 79, *ante*.

[6] See Menk v. Commercial I
70 Cal. 585, 11 Pac. 654.

[7] 92 Cal. 359, 28 Pac. 261.

covered evidence as a ground for a new trial "must make a strong case, ... as to the truth and *materiality* of the newly discovered evidence." In Tibbet v. Sue,[8] the court said: "The moving party must make a clear case, showing due diligence on his part, and the truth and *materiality* of such evidence."

Similar language has been used in other cases.[8a]

The reason for this very essential requirement is not far to seek. If the evidence be not material the motion will have no ground to stand upon. It cannot affect the issues of fact involved, and the purpose of a new trial is thus nullified at the outset. Thus evidence bearing solely upon the degree of negligence of two defendant street-car companies, and having no bearing upon or tendency to rebut plaintiff's right of recovery from both, cannot be said to be material to the issue, and hence cannot be available as ground for a new trial on defendants' motion, even though, in point of fact, it be newly discovered.[9]

If it does not directly tend to establish or dispose of any issue, the motion should be denied.[9a]

Not only must its materiality be shown, but its materiality must be consistent with the theory upon which the cause was first tried. This was clearly pointed out in People v. Freeman, above cited, where the supreme court, quoting from the written opinion of the learned trial judge, said:

" While the defendant may make as many and as different defenses to a charge as he may see fit, although they may be inconsistent, nevertheless, if he proceeds to trial upon a certain line of defense without making due inquiry and preparation as to any other defense that he may have to the charge, he cannot be per-

[8] 125 Cal. 544, 58 Pac. 160.

[8a] See People v. Rushing, 130 Cal. 449, 80 Am. St. Rep. 141, 62 Pac. 742; People v. Warren, 130 Cal. 683, 63 Pac. 86; and cases cited in note 9, section 88. And see Thompson v. Thompson, 88 Cal. 110, 25 Pac. 962, where the evidence was held to be irrelevant. Galvin v. Palmer, 113 Cal. 46, 45 Pac. 172, where the necessity for a showing of materiality was announced. Barton v. Laws, 4 Colo. App. 212, 35 Pac. 284; Gaffney v. Hoyt, 2 Idaho, 199 (184), 10 Pac. 34; Territory v. Latshaw, 1 Or. 146; Wilson v. Waldron, 12 Wash. 149, 40 Pac. 740. The converse of the rule is, of course, also true. Wall v. Trainor, 16 Nev. 131; Waite v. Fish, 17 S. D. 215, 95 N. W. 928; Brennan v. Seattle, 39 Wash. 640, 81 Pac. 1092.

[9] See Howland v. Oakland City etc. Ry. Co., 110 Cal. 513, 42 Pac. 983.

[9a] Smith v. Mutual etc. Co., 21 S. D. 433, 113 N. W. 94. "If the evidence does not meet the issues raised by the evidence of the successful party, the motion is properly refused." Kincaid v. Walla Walla etc. Co., 57 Wash. 334, 135 Am. St. Rep. 982, 106 Pac. 918. In Territory v. Latshaw, 1 Or. 146, it was held that the evidence must be material to the issue joined, and to the point decided by the verdict, and not collateral thereto.

mitted, when the issue has gone against him, to thereafter
in, and, upon a motion for a new trial, suggest for the first
that there is other evidence material to his defense upon a
and different theory. He cannot divide up his defense piece
If he were permitted to pursue one line of defense withou
quiring as to any other until the issue had gone against him
that, and then for the first time inquire as to any other, an
granted a new trial upon the ground that it was newly discov
there would be no end of litigation."

And the rule is not differently applied with respect to c
of action. A plaintiff cannot abandon the theory or the
upon which his action has been prosecuted to judgment, and
judgment, by motion for new trial, advance an entirely diff
theory, inconsistent with those upon which the action was
prosecuted, and offer evidence as newly discovered in su
thereof, as ground for such motion. The supreme court, in
v. Bates,[10] held that a plaintiff, in whose favor a judgment
rendered in exact accordance with the allegations and the p
of her complaint, could not, after judgment, by motion for
trial, upon newly discovered evidence, advance a new theory i
sistent with that upon which trial had been had, which w
entitle her to entirely different relief,—the newly discovered
dence being in direct contradiction of the allegations upon v
she had secured judgment, and hence not material to the issue
the former theory.

So the newly discovered evidence must bear all the earm
of truth.[10a] As above stated, if the affidavits contain anyt
to indicate bad faith, or to throw suspicion upon the applica
the latter will be denied. Therefore, the courts have assoc
along with the requirement of a showing of materiality a si
requirement as to a showing of truth. Truth, in the natu

[10] 71 Cal. 307, 12 Pac. 223.

[10a] See cases cited in note 8a, above, and in note 9, section 88, *ante*. See, also, People v. Clarke, 130 Cal. 642, 63 Pac. 138.

". . . . Mere relevance alone is not sufficient to admit the evidence, if it is incredible, cumulative, unconvincing, or otherwise unsatisfactory." State v. Mims, 36 Or. 315, 61 Pac. 888. In Simonson v. Aney (S. D.), 128 N. W. 319, it was held that a motion for a new trial, based on newly discovered evidence, was properl nied where it appeared that a of the evidence was manifestly

But it must be borne in mind in some jurisdictions the newly covered evidence will be treat true, for the purposes of the m even though discredited by th fidavits of the adverse party. McClellan's Estate, 21 S. D. 209 N. W. 540. And see section *post*.

things, cannot be as readily made to appear as materiality, and it is perhaps sufficient, in general, if there is nothing on the face of the affidavits themselves to indicate their falsity; or, if the averments contained therein do not contradict the usual rules of reason and good sense. But if there appears in the affidavits any apparent want of truth, or any indication of falsity, the application must be denied. Thus, where it appeared from the character of the evidence itself that it must have been within the knowledge of the moving party prior to the trial, an affidavit of ignorance was held unworthy of credence, and the showing was held insufficient.[11] So where the truth of the alleged newly discovered evidence is utterly inconsistent with want of knowledge thereof prior to the trial, the showing was held insufficient.[12]

Failure to draw out evidence by proper examination cannot be so far excused as to enable the moving party to present such evidence as newly discovered, and ground for a new trial.[13]

There must, in general, be an affirmative showing as to the reason why the evidence could not be procured before the trial, if it appears to have been known.[14] This, however, is doubtless a question of diligence.[15]

§ 90. The Evidence must not be Merely Cumulative.—This is not a rule expressed in the statute. But it is well settled, and has been asserted by the court from an early period. Thus in Bartlett v. Hogden,[1] an order denying a motion for new trial on the ground of newly discovered evidence was affirmed on the ground that the evidence was cumulative merely. So in Gaven v. Dopman,[2] Murray, C. J., delivering the opinion, said, with reference to the affidavit on the motion:

"It sets out facts entirely cumulative, and it would be a dangerous practice to permit a witness, whose deposition has already been used on the trial, to come in after a verdict and patch up his

[11] People v. Freeman, 92 Cal. 359, 28 Pac. 261.

[12] People v. Cesena, 90 Cal. 381, 27 Pac. 300.

[13] Moran v. Abbey, 63 Cal. 56. To same effect, see Smith v. Smith, 119 Cal. 183, 48 Pac. 730, 51 Pac. 183. See notes 6 and 6a, section 92, *post*.

[14] See People v. McCurdy, 68 Cal. 576, 10 Pac. 207.

[15] See section 92, *post*. If there is any want of diligence, an amendment of the pleadings so as to make evidence, not otherwise so, relevant, will not be permitted. Crater v. McCormick, 4 Colo. 196.

[1] 3 Cal. 55.

[2] 5 Cal. 342.

mitted, when the issue has gone against him, to th
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[4] 6 Cal. 228.
[5] 7 Cal. 40, 12 Morr. Min. Rep. 94.
[6] 22 Cal. 595.
[7] 23 Cal. 418.
[8] 24 Cal. 513.
[9] 34 Cal. 514.
[10] 35 Cal. 41.

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Clark,[11] Niles, J., de-
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, and is not good cause for a new trial."

Drais[11a] the court said:

y discovered evidence was, according to the affidavits,
, and in such cases, it is well settled, a new trial should
such cause, be granted."

in Crystal Lake Ice Co. v. McAulay,[11b] the court said:

"In regard to the evidence alleged to be newly discovered, it is enough to say that it presents nothing new. It contradicts the plaintiff's testimony in some respects, and is merely cumulative."

So in Von Glahn v. Brennan,[11c] the court said:

"One of the grounds of the motion for new trial was newly discovered evidence. Concerning this, it is sufficient to say that the affidavits are not incorporated in a bill of exceptions, but are merely marked by the clerk as having been used on the hearing. But if they could be considered, they are cumulative merely, and are not such as to render a different result probable if a new trial were had," etc.

So in Williamson v. Tobey,[11d] the court said:

"The affidavit of Gates was in relation to the action of the committee of the board of supervisors above mentioned. If this was

[10] 41 Cal. 494.
[11] 47 Cal. 194.
[11a] 67 Cal. 491, 8 Pac. 20.
[11b] 75 Cal. 631, 17 Pac. 924.
[11c] 81 Cal. 261, 22 Pac. 596.
[11d] 86 Cal. 497, 25 Pac. 65.

relevant at all, it was thoroughly gone over at the trial, a
stated. The affidavit of the attorney relates to the same
and to the question of diligence. The affidavit of ten oth
sons was merely to the general effect that the acts compla
did not constitute a nuisance. It is too clear for discussi
all this was merely cumulative, and not such as to rende
ferent result probable, if a retrial should be had."

So in Wood v. Moulton,[11e] the court said:

"The rule is that newly discovered evidence which is
cumulative, or designed to contradict witnesses is not of a ch
to warrant granting a new trial."

So in Kataoka v. Hanselman,[11f] the court said:

"Moreover, the alleged new evidence was merely cum
and for that reason also the reopening, rehearing and retri
properly refused. (Patterson v. San Francisco etc. Co., 1
178, 81 Pac. 531.)"

So in many other cases.[11g]

[11e] 146 Cal. 317, 80 Pac. 92.

[11f] 150 Cal. 673, 89 Pac. 1082.

[11g] *Arizona:* Ryder v. Leach, 3 Ariz. 129, 77 Pac. 490.

California: Jones v. Jones, 38 Cal. 584; Russell v. Dennison, 45 Cal. 337; McCormick v. C. R. R. Co., 75 Cal. 506, 17 Pac. 542; Mowry v. Raabe, 89 Cal. 606, 27 Pac. 157; Christensen v. McBride (Cal.), 36 Pac. 398; Wells v. Snow (Cal.), 41 Pac. 858; Galvin v. Palmer, 113 Cal. 46, 45 Pac. 172; Niosi v. Empire Steam Laundry, 117 Cal. 257, 49 Pac. 185; Kuhlman v. Burns, 117 Cal. 469, 49 Pac. 585; Chalmers v. Sheehy, 132 Cal. 459, 84 Am. St. Rep. 62, 64 Pac. 709; Patterson v. San Francisco etc. Co., 147 Cal. 178, 81 Pac. 531; Estate of Doolittle, 153 Cal. 29, 94 Pac. 240.

Colorado: Martin v. Hazzard etc. Co., 2 Colo. 596; Piela v. People, 6 Colo. 343; Liggett v. People, 26 Colo. 364, 58 Pac. 144; Cole v. Thornburg, 4 Colo. App. 95, 34 Pac. 1013; Barton v. Laws, 4 Colo. App. 212, 35 Pac. 284; Outcault v. Johnston, 9 Colo. App. 519, 49 Pac. 1058.

Idaho: Flannagan v. Newberg, 1 Idaho, 78; State v. Davis, 6 Idaho, 159, 53 Pac. 678; Twin Springs Placer Co. v. Upper Boise Hydraulic Min. Co., 6 Idaho, 687, 59 Pac. 535; Knollin v. Jones, 7 Idaho, 466 638; Heckman v. Espey, 1 755, 88 Pac. 80.

Montana: Caruthers v. Pe 1 Mont. 111, 4 Morr. Min. R Kleinschmidt v. Dunphy, 1 M Morse v. Swan, 2 Mont. 306; etc. Co. v. Hammer, 6 Mon Pac. 153; State v. Brooks, 146, 57 Pac. 1038.

Nevada: United States v. Saw. 277, Fed. Cas. No. Gray v. Harrison, 1 Nev. 50 ard v. Winters, 3 Nev. 539; Trainor, 16 Nev. 131.

New Mexico: Territory v. 2 N. M. 391.

Oklahoma: Huster v. Wynn 569, 58 Pac. 736.

Oregon: Cutler v. S. S. Col Or. 101; Lander v. Miles, 3 State v. Hill, 39 Or. 90, 65 P Stern v. Volz, 52 Or. 597, 98 P

South Dakota: Scheffer v. (S. D. 233, 58 N. W. 555; v. Mullen, 6 S. D. 554, 62 N. Axiom Min. Co. v. White, 1 198, 72 N. W. 462; Hahn v. son, 19 S. D. 373, 103 N. In re McClellan's Estate, 20 S 107 N. W. 681; Palmer v. Sc S. D. 283, 117 N. W. 150; St

The same rule is applied in criminal cases. Thus in People v. M'Donell,[12] the court said: "The ground chiefly relied upon on the motion for new trial was newly discovered evidence, and we would be strongly inclined to grant a new trial on this ground, if we could do so without violating established rules of law. The objection to the newly discovered evidence as a ground for new trial is that it was all cumulative in its character, and it is well settled that such evidence is not of itself sufficient to authorize a new trial."

So in People v. Fitzgerald,[13] it was held that where the alleged newly discovered evidence was merely cumulative, the action of the trial court in disregarding it would be sustained. And in many other criminal cases.[13a]

But the language of some of the decisions implies the existence of exceptions to the rule. Thus in Millard v. Hathaway,[14] Shafter, J., delivering the opinion, said: "The evidence alleged to be newly

Dolan, 24 S. D. 32, 123 N. W. 72; Ernster v. Christianson, 24 S. D. 103, 123 N. W. 711.

Utah: Foster v. Reich, 1 Utah, 192; Tiernan v. Trewick, 2 Utah, 393; United States v. Eldridge, 5 Utah, 161, 13 Pac. 673; People v. Peacock, 5 Utah, 237, 14 Pac. 332; Klopenstine v. Hays, 20 Utah, 45, 57 Pac. 712.

Washington: Leschi v. Territory, 1 Wash. Ter. 13; Tolmie v. Dean, 1 Wash. Ter. 46; McKilver v. Manchester, 1 Wash. Ter. 255; Wiseman v. Eastman, 21 Wash. 163, 57 Pac. 398; Benson v. Hamilton, 34 Wash. 201, 75 Pac. 805; O'Toole v. Faulkner, 34 Wash. 371, 75 Pac. 975; State v. Underwood, 35 Wash. 558, 77 Pac. 863; Thayer v. Spokane Co., 36 Wash. 63, 78 Pac. 200; Brennan v. Seattle, 39 Wash. 640, 81 Pac. 1092; Shannon v. Tacoma, 41 Wash. 220, 83 Pac. 186; Galena Nat. Bank v. Ripley, 55 Wash. 615, 104 Pac. 807; Kincaid v. Walla Walla Valley Tr. Co., 57 Wash. 334, 135 Am. St. Rep. 982, 106 Pac. 918; In re Wells (Wash.), 111 Pac. 778; The Hardman Estate v. McNair (Wash.), 111 Pac. 1059.

Wyoming: Link v. Union Pacific Ry. Co., 3 Wyo. 680, 29 Pac. 741; Tucker v. Wyoming Coal Co. (Wyo.), 104 Pac. 529.

[12] 47 Cal. 134. See, also, Wilson v. S. P. R. R. Co., 62 Cal. 164.

[13] 1 Cal. App. 507, 82 Pac. 555.

[13a] People v. Anthony, 56 Cal. 397; People v. Wong Ah Foo, 69 Cal. 180, 10 Pac. 375; People v. Fong Ah Sing, 70 Cal. 8, 11 Pac. 323; People v. Goldenson, 76 Cal. 328, 19 Pac. 161; People v. O'Brien, 78 Cal. 41, 20 Pac. 359; People v. Loui Tung, 90 Cal. 377, 27 Pac. 295; People v. Cesena, 90 Cal. 381, 27 Pac. 300; People v. Hong Quin Moon, 92 Cal. 41, 27 Pac. 1096; People v. Mesa, 93 Cal. 580, 29 Pac. 116; People v. Kloss, 115 Cal. 567, 47 Pac. 459; People v. Ah Noon, 116 Cal. 656, 48 Pac. 799; People v. Brittan, 118 Cal. 409, 50 Pac. 664; and see People v. Chrisman, 135 Cal. 282, 67 Pac. 136; People v. Lapique, 136 Cal. 503, 69 Pac. 226; People v. Davis, 1 Cal. App. 8, 81 Pac. 716, 88 Pac. 1101; People v. Burdick (Cal.), 29 Pac. 245; People v. McCurdy, 68 Cal. 576, 10 Pac. 207; People v. Urquidas, 96 Cal. 239, 31 Pac. 52; People v. Clarke, 130 Cal. 642, 63 Pac. 138; People v. O'Brien, 78 Cal. 41, 20 Pac. 359; People v. Demasters, 109 Cal. 607, 42 Pac. 236; People v. Benc, 130 Cal. 159, 62 Pac. 404.

An exception seems to exist in criminal cases, where the cumulative evidence is in support of the testimony of the defendant. People v. Ah Lee Doon, 97 Cal. 171, 31 Pac. 933.

[14] 27 Cal. 119. See, also, Baker v. Joseph, 16 Cal. 173.

discovered is merely cumulative, and does not fall *within* *the exceptions* to the general rule prohibiting the granting trials on the ground of newly discovered evidence of that acter." So in Levitsky v. Johnson,[15] above quoted, it wa that a new trial will not be granted where the newly disc evidence is merely cumulative, "unless it is clear that suc dence would change the result."

So in McCormick v. Central R. R. Co.,[15a] Hayne, C., for the said:

"The affidavits of Galbraith and O'Brien are upon a s which was much disputed at the trial, and are merely cumu *and not such as to render a different result probable,*" etc.

So in Von Glahn v. Brennan,[15b] it was said:

" But if they could be considered, they are cumu merely, *and are not such as to render a different result prob* etc.

So in O'Rourke v. Vennekohl,[15c] Van Fleet, J., deliveri opinion, said:

"The new evidence was largely, if not entirely, cumulativ conceding that appellant's view of the law be correct, that trial should not be refused merely because the evidence is cu tive in a case where the cumulation is sufficiently strong to a different result probable, we cannot say that the record pr such a case."

In Brennan v. City of Seattle,[15d] where a new trial was g on the ground of newly discovered evidence, which the ap contended was merely cumulative, in affirming the decision lower court, the supreme court said:

"Stress is laid upon the contention that the newly disc evidence would be merely cumulative. We do not regard But, even if it were to be deemed simply cumulativ fact would not conclusively determine the motion against re ents. It is, of course, a general rule that new trials are be granted upon the ground of newly discovered evidence is merely cumulative. But this rule is not without excep and, like other rules of law and procedure, it is not to be in

[15] 35 Cal. 41.
[15a] 75 Cal. 506, 17 Pac. 542.
[15b] 81 Cal. 261, 22 Pac. 596.
[15c] 104 Cal. 254, 37 Pac. 93
[15d] 39 Wash. 640, 81 Pac.

in a given case where its application would tend to defeat the ultimate purpose for which all such rules are ordained—the accomplishment of substantial justice."

Something to the same effect appears in the decision of the same court in an earlier case, that of State v. Townsend,[15e] although the reasons given were not the same. The prosecution was for an assault with a deadly weapon alleged to have been committed by the defendant upon one Skagit Jerry, presumably an Indian. The report of the case shows that the motion was made on the ground of surprise, as well as that of newly discovered evidence, and errors committed at the trial. The surprise and newly discovered evidence were based upon a statement made by the prosecuting attorney in open court, published in the newspapers, and brought to the knowledge of the defendant, who was confined in jail, of his intention not to prosecute the case against the defendant. This statement, it was alleged, induced the defendant and his friends to neglect preparations for the trial. In consequence of this fact, no effort was made to ascertain who were likely to have a knowledge of the facts. At the last moment an effort was made to establish a defense by means of the testimony of Indians, but no request for a continuance was made. For this reason the court sustained the order refusing a new trial on that ground. As to the newly discovered testimony, however, a different view was taken. That consisted of the testimony of a white man, as to the facts which had been testified to by the Indians. It was cumulative. The statement of the prosecuting attorney with reference to a *nolle prosequi* was sufficient to fix a showing of diligence, but it could hardly change the cumulative character of the testimony offered. The language of the court is as follows:

" The materiality of the testimony of House cannot be disputed; but it is urged that the testimony is cumulative, and that, therefore, a new trial should not be granted for the purpose of obtaining it. This, no doubt, is the general rule, but there are many exceptions. State v. Stowe, 3 Wash. 208, 28 Pac. 337. In that case this court said: 'No fixed standard can be established for the measurement of every case, no iron-bound rule prescribed, but each case must be governed by the circumstances surrounding it.' The circumstances surrounding this case appeal more

[15e] 7 Wash. 462, 35 Pac. 367.

strongly to this court, in favor of a new trial, than did th
cumstances in the Stowe case. In that case the defendan
not misled by anyone, but he had failed, without any fa
his part, of obtaining his testimony. Here the defendan
been actually misled by an officer of the court and of the
But the prominent feature which takes it out of the rule of
lative testimony is the fact that the witness required here
only white witness in the case. The testimony adduced
trial of the cause was exclusively the testimony of Indian
of them, evidently, partisans on one side or the other, an
very excited condition, from the combined influences of
and rum at the time that the difficulty occurred. Their
mony had to be given through the medium of interprete
was, at the best, disjointed, unintelligible, and unsatisfactor
whether the sentiment be founded in reason or prejudice
a fact well known to the citizens of this coast that jurors w
give the same credence to Indian testimony as they will
testimony of respectable white people. In fact, they ha
the same facilities for judging the credibility of the Indian
talks a foreign language; and it cannot be denied that,
witness House would testify to the state of things which th
davit states he will, the result of the trial would probably
ferent and, if that be true, then the testimony will not fall
the inhibition of cumulative testimony."

The implication from this language is that there may be
tions to the rule. The rule, as has been stated, is not exp
in the statute. It is manifestly a corollary of the requir
that the newly discovered evidence must be such as to re
different result probable on a retrial of the case. If the ev
be merely cumulative, it would not in most cases render a
ent result probable. But it is evident that the new eviden
though cumulative, might be of so overwhelming a charac
to render a different result certain; in which case it is sub
that a new trial would be granted.[16]

The supreme court, in the leading case of Oberlander v.
& Co.[16a] said:

[16] In this connection, look at People v. Stanford, 64 Cal. 27, 28 Pac. 106. See, also, People v. Ah Lee Doon, 97 Cal. 171, 31 Pac. 933. See, also, the latter part of the quotation in the text from State v. Townsend, 7 Wash. 462, 35 Pac. 367, which intimates th different result would be like objection to evidence as cumul removed.

[16a] 129 Cal. 690, 62 Pac.

"Under the provisions of section 657 of the Code of Civil Procedure the requisites for a new trial on the ground of newly discovered evidence are that the evidence could not, with reasonable diligence, have been discovered and produced at the trial, and that it shall be material for the party making the application" (subdivision 4)—or, as previously expressed, shall be of a character "materially affecting the substantial rights of such party." The last requisite would seem to imply that the newly discovered evidence should be of such a character as to render a different result probable on a new trial; and accordingly such is held by the court to be the established rule. Hayne on New Trial and Appeal, 91. Where these requisites occur they constitute sufficient grounds for new trial, and no others can be required.

"Hence the rule, so often iterated by the courts, that a new trial should not be granted where the evidence is merely cumulative, must be regarded (in this state) not as an independent rule, additional to those established by the provisions of section 657 of the code, but as a mere application of those rules, or, as it has been expressed, as 'a corollary of the requirement that the newly discovered evidence must be such as to render a different result probable on a retrial of the case.' Hayne on New Trial and Appeal, sec. 90, pp. 255, 256. For (continuing the quotation) 'it is evident that new evidence, although cumulative, might be of so overwhelming a character as to render a different result certain' (or probable); and in such case under the express provisions of the code a new trial should be granted. The rule should therefore be construed as simply holding that cumulative evidence is insufficient 'unless it is clear such evidence would change the result.' Levitzky v. Johnson, 35 Cal. 41. Hence, 'a new trial should not be refused merely because the evidence is cumulative in a case where the cumulation is sufficiently strong to render a different result probable.' That this is the true statement of the rule is established in the case last cited, and in Von Glahn v. Brennan, 81 Cal. 261, 22 Pac. 596, and in O'Rourke v. Vennekohl, 104 Cal. 254, 37 Pac. 930, from which the above language is quoted; and it is so in effect held in People v. Stanford, 64 Cal. 27, 28 Pac. 106."

Continuing, the court said: "Whether the evidence is of this character is not a question of law but for the judgment of the trial judge, whose discretion will not be interfered with by this

court except in cases of manifest abuse. Hence, where the motion is denied, the fact that the newly discovered evidence is merely cumulative will in general be a sufficient ground for affirmance; but where the motion is granted the contrary will hold. For, in either case, it is for the trial judge to determine whether the evidence is of character probably to affect the result on a new trial; and unless the evidence be of such a character as to make it manifest and certain to this court that in the one case it would, or in the other that it would not, result differently on a retrial, the order will not be disturbed."

There is not usually much difficulty in determining whether or not the evidence is merely cumulative. According to the Code of Civil Procedure,[17] "cumulative evidence is additional evidence

[17] Section 1838. The code defines corroborative evidence as follows: "Sec. 1839. Corroborative evidence is additional evidence of a different character to the same point." The decisions above cited make no reference to corroborative evidence, and it is probable that the rule would not be extended so as to apply to it. It is easy to state a case where a new trial would be granted for newly discovered evidence which is corroborative. For example, if the plaintiff sued on a lost note, the execution of which was denied, and upon the oral evidence of the parties the verdict was for the defendant, a new trial would undoubtedly be granted if the note in the handwriting of the defendant should be found. And look at People v. Stanford, 64 Cal. 27, 28 Pac. 106. As stated in note 16, the rule is not thought to be of much value even as applied to cumulative evidence.

The supreme court of Idaho took the view in an early decision that evidence could not be regarded as cumulative if pointed at some collateral or subordinate fact, even if the latter is directed to the establishment of the same general result to which other evidence adduced at the former trial was directed. Quoting from 14 Ency. of Pl. & Pr. 815–817, the court said: "Although evidence is additional to other evidence tending to prove the same position, yet it is not cumulative if it is of a different character, tending to establish the same general result by proof of a new and distinct fact." Twin Springs Placer Co. v. Upper Boise Hyd. Min. Co., 6 Idaho, 687, 59 Pac. 535.

The same point was made in the earlier case of Flannagan v. Newberg, 1 Idaho, 78, where the court thus clearly illustrated the principle involved:

"This admission of Maloney was a new and independent fact unknown to the defendant at the time of the trial. Had this admission been proven at the trial, the testimony of other witnesses to the same admissions would be merely cumulative. In the case of Aitken v. Bemis, 3 Wood. & M. 348, Fed. Cas. No. 109, Judge Woodbury said: 'The meaning of the rule cannot be to exclude as cumulative newly discovered evidence of subordinate points or facts bearing on the general question, for in such views no trial for new evidence could ever be obtained; all new evidence relating, as it must, if it be pertinent, to the general ground or general fact put in issue before. But it must mean that new evidence to a subordinate point or particular fact was before gone into; because it is then cumulative, or additional, to that fact.'

"In the case of Gray v. Harrison, 1 Nev. 502, Chief Justice Lewis says: 'To render evidence subject to this objection, it must be cumulative, not with respect to the main issue between the parties, but upon some collateral or subordinate fact bearing upon that issue. If the newly discovered evidence brings to light some

of the *same character* to the *same point.*" Concerning which it may be observed that "the same point" means the same ultimate fact. Thus in Reed v. Clark,[18] where the point in controversy at the trial was the chastity of the plaintiff, it was held that evidence of different acts of unchastity from those testified to at the trial was cumulative merely, and that the rule applied. It is not necessary, however, for the moving party to show that the evidence is not cumulative; that burden is cast upon the party opposing the motion. This was held in Hobler v. Cole,[19] in which case Wallace, C. J., delivering the opinion, said: "The general rule undoubtedly is that the newly discovered evidence must not be cumulative. If it be of that character it will not ordinarily aid the moving party. That it is cumulative, however, is an affirmative proposition, and unless sufficiently appearing in the moving papers, ought to be shown to be such by the party opposing the motion. There is no presumption that it is cumulative—the mere presumption is rather to the contrary. In practice it would be difficult for the moving party to establish the negative at the outset. His mere statement in terms, that the evidence is not cumulative, would, of course, go for nothing. If in point of fact the newly discovered evidence be cumulative, within the rule, it is easy for the opposing party to set forth in his counter-affidavit so much of the evidence given at the trial as will make it so appear."

Where the question as to whether the alleged newly discovered evidence is cumulative or not is involved in doubt, the conclusion of the trial court upon the point will not be disturbed; but otherwise if it is clear that the evidence is neither incompetent, impeaching or cumulative, but original evidence going directly to the

new fact bearing on the main question, and it would be likely to change the result, a new trial should be granted.'

"The facts claimed to have been newly discovered are certain admissions of Maloney, the payee mentioned in the note in dispute. There was no testimony introduced on the trial of such an admission, and the defendant swears it was not discovered until after the trial. "

Similar expressions are to be found in Wall v. Trainor, 16 Nev. 131.

In Tucker v. Wyoming Coal Co. (Wyo.), 104 Pac. 529, in this connection, the court said: "Cumulative evidence is evidence of the same kind to the same point. But it is not cumulative if it is of a different character, and of a separate and distinct fact."

The supreme court of Oregon in Lander v. Miles, 3 Or. 40, held that if the evidence was of material facts which the moving party did not prove or attempt to prove at the original trial, it is not cumulative.

[18] 47 Cal. 194.

[19] 49 Cal. 250. As to the other grounds of the motion, the burden is, of course, upon the moving party.

merits, in which case an order denying the motion will be reversed.[20]

The rule as to newly discovered evidence that is merely cumulative has sometimes been extended to include newly discovered evidence the sole purpose of which is to impeach or contradict the evidence which sustains the decision; and it has been said that "where the only office of newly discovered evidence is *to impeach an adverse witness*, it is insufficient for the purpose of a new trial."[21] And "the rule is, that newly discovered evidence which is merely cumulative, *or designed to contradict a witness*, is not of a character to warrant a new trial."[22]

This rule is doubtless subject to the limitation above applied to the rule as to cumulative evidence.[23] If it appears probable that a different result would follow a retrial by reason of the introduction of such evidence—if the evidence is of such a character as to wholly overthrow the evidence of the adversary upon some one or more vital issues—it would be clearly within the doctrine of the case as enunciated in Oberlander v. Fixen & Co., heretofore referred to.

[20] See Kenezleber v. Wahl, 92 Cal. 202, 28 Pac. 225.

[21] *California:* See People v. Goldenson, 76 Cal. 328, 19 Pac. 161; People v. Loui Tung, 90 Cal. 377, 27 Pac. 295, and also Stoakes v. Monroe, 36 Cal. 383, 2 Morr. Min. Rep. 246; People v. Anthony, 56 Cal. 397; People v. Sing Yow, 145 Cal. 1, 78 Pac. 235; People v. Fitzerald, 1 Cal. App. 507, 82 Pac. 555. Also. People v. Weber, 149 Cal. 325, 86 Pac. 671.

Colorado: Christ v. People, 3 Colo. 394; Mackey v. Mackey, 16 Colo. 134, 26 Pac. 554; Beals v. Cone, 27 Colo. 473, 83 Am. St. Rep. 92, 62 Pac. 948, 20 Morr. Minn. Rep. 591; Fist v. Fist, 3 Colo. App. 273, 32 Pac. 719.

Montana: Garfield etc. Co. v. Hammer, 6 Mont. 53, 8 Pac. 153; State v. Anderson, 14 Mont. 541, 37 Pac. 1; Leyson v. Davis, 17 Mont. 220, 42 Pac. 775, 31 L. R. A. 429; Baxter v. Hamilton, 20 Mont. 327, 51 Pac. 265.

New Mexico: United States v. Biena, 8 N. M. 99, 42 Pac. 70.

North Dakota: Libby v. Barry, 15 N. D. 286, 107 N. W. 972.

Oklahoma: Huster v. Wynn, 8 Okl. 569, 58 Pac. 736.

Oregon: Territory v. Latshaw, 1 Or. 146; State v. Gardner, 33 Or. 149, 54 Pac. 809.

South Dakota: Scheffer v. Corson, 5 S. D. 233, 58 N. W. 555; Axiom Min. Co. v. White, 10 S. D. 198, 72 N. W. 462; Smith v. Mut. etc. Co., 21 S. D. 433, 113 N. W. 94; Palmer v. Schurz, 22 S. D. 283, 117 N. W. 150.

Utah: Rydalch v. Anderson (Utah), 107 Pac. 25.

Washington: State v. Hunter, 18 Wash. 670, 52 Pac. 247; Harvey v. Ivory, 35 Wash. 397, 77 Pac. 725; Seattle v. Sweeney, 43 Wash. 1, 85 Pac. 677; Olsen v. Home Inv. Co., 58 Wash. 151, 108 Pac. 140.

[22] See Chalmers v. Sheehy, 132 Cal. 459, 84 Am. St. Rep. 62, 64 Pac. 709; and also cases cited in note 21, *supra*. Also People v. McCurdy, 68 Cal. 576, 10 Pac. 207; People v. Freeman, 92 Cal. 359, 28 Pac. 261; People v. Holmes, 126 Cal. 462, 58 Pac. 917; People v. Ah Noon, 116 Cal. 656, 48 Pac. 371.

[23] See People v. Sing Yow, 145 Cal. 1, 78 Pac. 235.

§ 91. The Evidence must be Such as to Render a Different Result Probable on a Retrial.—This is a consequence of the provision that the cause for which a new trial may be granted must be one "materially affecting the substantial rights" of the party.[1] If there be no probability that the new evidence would change the result, its absence cannot be said to have materially affected the substantial rights of the party. The proposition that the new evidence must be such as to render a different result probable on a retrial seems to follow from the statutory provision mentioned. It has been several times asserted. Thus in Stoakes v. Monroe,[2] Crockett, J., delivering the opinion, stated as one of the essentials of newly discovered evidence, "that it must be material to the issue, and of so important a character as to satisfy the court that it may reasonably be inferred the verdict would have been different if the newly discovered evidence had been in on the former trial." So in Armstrong v. Davis,[3] the court, after stating that the newly discovered evidence was open to the objection of being merely cumulative, said: "But if it were not, we do not think it so conclusive in its character as to raise a reasonable presumption that the result of a second trial would be different from the first." So in Reed v. Clark,[4] the court said: "The evidence is merely cumulative, and is not good cause for a new trial. Moreover, considering the character of the evidence proffered, we cannot say that the court might not have reasonably inferred that the verdict would have been the same if the evidence had been in." So in People v. McDonell,[5] the court, after stating that the evidence was merely cumulative, said: "Moreover, the court below which tried the case had a better opportunity than we to judge of the probable effect which the newly discovered evidence would produce upon another trial, and for these reasons we do not feel justified in disturbing the verdict, but are constrained by the settled rules of law to affirm the judgment." So in Merk v. Gelzhaeuzer,[6] the court said of the affidavit in support of the motion: "It was not sufficient to raise a reasonable presumption that the testimony of Johnson, if produced, would change the result."

[1] Section 657, California Code of Civil Procedure.
[2] 36 Cal. 383, 2 Morr. Min. Rep. 246.
[3] 41 Cal. 494.
[4] 47 Cal. 194.
[5] 47 Cal. 134.
[6] 50 Cal. 631.

So in People v. Sing Yow[6a] the court said: ". . . . A defendant is not entitled to a new trial as a matter of right simply because he has discovered new evidence which might have been admitted on the trial if discovered earlier. The question always exists in this connection as to whether, under all the circumstances of the case, the newly discovered evidence is produced in such a way, and is of such a nature, that its introduction upon another trial would render a different result probable, and as to whether, in the absence of such evidence, the defendant [or plaintiff, as the case may be] has had a fair trial on the merits. The law does not contemplate the granting of a new trial on this ground simply to enable the defendant [plaintiff] to go through the form of another trial, where there is no reasonable probability that the newly discovered evidence will change the result, and where it does not appear that by reason of such evidence the result ought to be different. The question as to the effect upon the case of the newly discovered evidence is, from its nature, peculiarly one that is addressed to the discretion of the trial court, and, of course, should be determined by that court with a full realization of the responsibility involved, and the motion should undoubtedly be granted where the showing is such as to make it apparent to the trial court that the defendant [or plaintiff] has, without

[6a] 145 Cal. 1, 78 Pac. 235.

Similar language is to be found in the decisions of other states. In Baumgarten v. Hoffman, 9 Utah, 338, 34 Pac. 294, it was said that the evidence must be "very clear and satisfactory, and likely to affect the result." In State v. Mims, 36 Or. 315, 61 Pac. 888, it was said: "It must appear to the satisfaction of the court that if a new trial is granted, it is really probable that on the introduction of the new evidence the accused will be acquitted." In Territory v. Bryson, 9 Mont. 32, 22 Pac. 147, it was said that if the evidence throws no additional light on the issue, the motion should be denied. In Strunz v. Hood, 44 Wash. 99, 87 Pac. 45, it was said that if the newly discovered evidence was too vague and indefinite as to render a different result improbable, the motion should be denied. The evidence must be clear and convincing. If the evidence merely casts a doubt on plaintiff's testimony and does not support the defense, it is not enough. Mackey v. Mackey, 16 Colo. 134, 26 Pac. 554.

The language of some of the courts is even stronger, for it has been held that if the newly discovered evidence is not conclusive, and fully capable of settling the dispute, it will not be accepted as sufficient to warrant the granting of a new trial: "We are disposed to believe that the newly discovered evidence would not be decisive upon another trial, and therefore we do not feel authorized to order a new trial on account of it." Turner v. Stevens, 8 Utah, 75, 30 Pac. 24.

In another line of decisions it has been held that if the court gives full effect to the inference to be drawn from the newly discovered evidence, without resulting in a different conclusion, it is not abuse of discretion to deny a new trial. Tyler v. North American Tr. & Tr. Co., 24 Wash. 252, 64 Pac. 162; Pierson v. Bank, 42 Wash. 164, 84 Pac. 731.

fault on his part, not had a fair trial on the merits, and that by reason of the newly discovered evidence the result would probably be, or should be, different on a retrial. But unless the appellate court can plainly see that this discretion has been abused, that the showing made was of such a character as to make it manifest that the case would or should result differently on a new trial, in view of the newly discovered evidence, the order of the trial court refusing a new trial will not be disturbed."

The principles stated in the above-cited cases have been iterated and reiterated in the cases, and none is more strongly supported, both in reason and by weight of authority. Not only must the newly discovered evidence be of such a character, and so presented, as to render it probable that a different result will or ought to follow a retrial,[91b] but the question itself as to whether the evidence is of such a character, and whether a different result is probable or ought to follow, is one addressed to the discretion of the trial

[91b] See generally:

California: People v. Woods, 65 Cal. 121, 3 Pac. 466; People v. O'Neal, 67 Cal. 378, 7 Pac. 790; People v. Sutton, 73 Cal. 243, 15 Pac. 86; People v. Howard, 74 Cal. 547, 16 Pac. 394; Byrne v. Reed, 75 Cal. 277, 17 Pac. 201; People v. Leong Yune Gun, 77 Cal. 636, 20 Pac. 27; Miller v. Luco, 80 Cal. 257, 22 Pac. 195; Spottiswood v. Weir, 80 Cal. 448, 22 Pac. 289; Von Glahn v. Brennan, 81 Cal. 261, 22 Pac. 596; Madden v. Occidental Co., 86 Cal. 445, 25 Pac. 5; Williamson v. Tobey, 86 Cal. 497, 25 Pac. 65; Childs v. Lanterman, 95 Cal. 369, 30 Pac. 553; O'Rourke v. Vennekohl, 104 Cal. 254, 37 Pac. 930; Kuhlman v. Burns, 117 Cal. 469, 49 Pac. 585; Shafer v. Willis, 124 Cal. 36, 56 Pac. 635; People v. Woodruff, 126 Cal. 17, 58 Pac. 854; Oberlander v. Fixen, 129 Cal. 690, 62 Pac. 254; People v. Gonzales, 143 Cal. 605, 77 Pac. 448; People v. Sing Yow, 145 Cal. 1, 78 Pac. 235; Mazor v. Springer, 145 Cal. 18, 78 Pac. 474; Estate of Walker, 148 Cal. 162, 82 Pac. 770; People v. Feld, 149 Cal. 464, 86 Pac. 1100.

Colorado: Smith v. People, 1 Colo. 121; Piela v. People, 6 Colo. 343; Mackey v. Mackey, 16 Colo. 134, 26 Pac. 554; Nesbit v. People, 19 Colo. 441, 36 Pac. 221.

Idaho: Flannagan v. Newberg, 1 Idaho, 78.

Montana: Garfield etc. Co. v. Hammer, 6 Mont. 53, 8 Pac. 153; Francisco v. Benepe, 6 Mont. 243, 11 Pac. 637; Territory v. Bryson, 9 Mont. 32, 22 Pac. 147; Butte & Boston Co. v. Sloan, 16 Mont. 97, 40 Pac. 217; Leyson v. Davis, 17 Mont. 220, 42 Pac. 775, 31 L. R. A. 429; In re Colbert's Estate, 31 Mont. 461, 107 Am. St. Rep. 439, 78 Pac. 971, 80 Pac. 248, 3 Ann. Cas. 952.

Nevada: Gray v. Harrison, 1 Nev. 502.

New Mexico: Ruhe v. Abren, 1 N. M. 247; United States v. Biena, 8 N. M. 99, 42 Pac. 70; United States v. Rio Grande etc. Co., 10 N. M. 617, 65 Pac. 276.

Oklahoma: Huster v. Wynn, 8 Okl. 569, 58 Pac. 736.

Oregon: State v. Mims, 36 Or. 315, 61 Pac. 888.

South Dakota: In re McClellan's Estate, 20 S. D. 498, 107 N. W. 681; Palmer v. Schurz, 22 S. D. 283, 117 N. W. 150.

Utah: Tiernan v. Trewick, 2 Utah, 393; Turner v. Stevens, 8 Utah, 75, 30 Pac. 24; Baumgarten v. Hoffman, 9 Utah, 338, 34 Pac. 294; Rydalch v. Anderson (Utah), 107 Pac. 25.

Washington: Leschi v. Territory, 1 Wash. Ter. 13; Tolmie v. Dean,

court,[6c] and the exercise of that discretion will not be disturbed except in case of a manifest abuse.[6d]

The same rule prevails in applications for new trial on the ground of surprise.[7]

In order to enable the court to determine the probable effect of the newly discovered evidence, it must be set out in the affidavits.[7a] It is hardly necessary to say that the evidence must be competent.[8]

There must be a reasonable certainty that the alleged newly discovered evidence will be produced on the new trial.[9] It has been held, therefore, that an affidavit that a witness swore falsely on the former trial, made by himself, is not ground for a new trial unless it appears reasonably certain that he will swear differently on a second trial.[10]

§ 92. **Reasonable Diligence must have been Used in Preparing for the Trial.**—As already stated, the provision of the statute has been since 1851 as follows: "Newly discovered evidence, material for the party making the application, *which he could not with reasonable diligence have discovered and produced at the trial.*" The exercise of reasonable diligence, therefore, is an express requirement of the statute. It has always been insisted on in the decisions.[1]

The diligence here referred to is a relative term, and cannot be readily defined. It has been said to depend upon the circum-

1 Wash. Ter. 46; McKilver v. Manchester, 1 Wash. Ter. 255; State v. Nordstrom, 7 Wash. 506, 35 Pac. 382; Lafond v. Smith, 8 Wash. 26, 35 Pac. 404; Binns v. Emery, 45 Wash. 215, 88 Pac. 133; Strunz v. Hood, 44 Wash. 99, 87 Pac. 45; In re Wells (Wash.), 111 Pac. 778.

[6c] See People v. Sing Yow, 145 Cal. 1, 78 Pac. 235; Oberlander v. Fixen, 129 Cal. 690, 62 Pac. 254; People v. Buckley, 143 Cal. 375, 77 Pac. 169; and also People v. Demasters, 109 Cal. 607, 42 Pac. 236; People v. Feld, 149 Cal. 464, 86 Pac. 1100; People v. Davis, 1 Cal. App. 8, 81 Pac. 716, 88 Pac. 1101.

[6d] See People v. Sing Yow, 145 Cal. 1, 78 Pac. 235; People v. Feld, 149 Cal. 464, 86 Pac. 1100.

[7] See section 89, *ante*.

[7a] Leschi v. Territory, 1 Wash. Ter. 13; Tolmie v. Dean, 1 Wash. Ter. 46; McKilver v. Manchester, 1 Wash. Ter. 255.

[8] People v. Voll, 43 Cal. 166. Evidence of self-serving declarations made by a person in his lifetime in an action upon a claim against his estate will not be accepted as sufficient to warrant the granting of a new trial: Braithwaite v. Aiken, 2 N. D. 57, 49 N. W. 419.

[9] Piela v. People, 6 Colo. 343; Andrist v. Union Pacific Ry. Co., 30 Fed. 349 (also Colorado case).

[10] Leyson v. Davis, 17 Mont. 220, 42 Pac. 775, 31 L. R. A. 429.

[1] Rogers v. Huie, 1 Cal. 429, 54 Am. Dec. 300; Brooks v. Lyon, 3 Cal. 113; Bartlett v. Hogden, 3 Cal. 55; Jacks v. Cooke, 6 Cal. 164; Weimer v. Lowery, 11 Cal. 104, 4 Morr. Min. Rep. 543; Baker v. Joseph, 16 Cal. 173; Klockenbaum v. Pierson, 22 Cal. 163; Levitsky v. Johnson, 35 Cal. 41;

stances of each particular case. What would amount to diligence, or due diligence, in one case, might fall short, perhaps far short, in another. The determination of this, as well as every other question relative to this ground for new trial, is addressed to the discretion of the trial court, whose duty it is to take into consideration the particular circumstances of each case, with all its distinct and varying phases and bearings, for the purpose of ascertaining what is and what is not diligence within the contemplation of the statute; and its conclusion upon the point is so peculiarly and exclusively an exercise of discretion, that the appellate court will never be justified in interfering therewith unless the record discloses a clear abuse of discretion.[1a]

As was said in the early case of Jones v. Singleton:[2]

"Diligence, or want of it, in a particular case, depends in so great a degree upon the various circumstances surrounding the parties, and the conduct of the cause, which are peculiarly within the knowledge of the trial court, that its determination made in view of them will rarely be interfered with."

So in Heintz v. Cooper,[2a] Van Fleet, J., delivering the opinion, the supreme court said:

Arnold v. Skaggs, 35 Cal. 684; Stoakes v. Monroe, 36 Cal. 383, 2 Morr. Min. Rep. 246; Case v. Codding, 38 Cal. 191; Jones v. Jones, 38 Cal. 584; Russell v. Dennison, 45 Cal. 337; People v. Ah Ton, 53 Cal. 741; Estate of Cartery, 56 Cal. 470; People v. Cummings, 57 Cal. 88; Ross v. Sedgwick, 69 Cal. 247, 10 Pac. 400; People v. Sutton, 73 Cal. 243, 15 Pac. 86; People v. Ching Hing Chang, 74 Cal. 389, 16 Pac. 201; People v. Howard, 74 Cal. 547, 16 Pac. 394; People v. Leong Yune Gun, 77 Cal. 636, 20 Pac. 27; Von Glahn v. Brennan, 81 Cal. 261, 22 Pac. 596; People v. Freeman, 92 Cal. 359, 28 Pac. 261; Kenezleber v. Wahl, 92 Cal. 202, 28 Pac. 225; People v. Cesena, 90 Cal. 381, 27 Pac. 300; Harralson v. Barrett, 99 Cal. 607, 34 Pac. 342; O'Rourke v. Vennekohl, 104 Cal. 254, 37 Pac. 930; Galvin v. Palmer, 113 Cal. 46, 45 Pac. 172; People v. Brittan, 118 Cal. 409, 50 Pac. 664; People v. Luchetti, 119 Cal. 508, 51 Pac. 707; Butler v. Estrella Raisin Co., 124 Cal. 239, 56 Pac. 1040; Tibbet v. Sue, 125 Cal. 544, 58 Pac. 160; People v. Soap, 127 Cal. 408, 59 Pac. 771; People v. Rushing, 130 Cal. 449, 80 Am. St. Rep. 141, 62 Pac. 742; People v. Warren, 130 Cal. 683, 63 Pac. 86; Lee-Kinsey Co. v. Jenks, 13 Colo. App. 265, 57 Pac. 191; People v. Lewis, 61 Cal. 367; People v. Urquidas, 96 Cal. 239, 31 Pac. 52. And see cases cited in note 3e, below.

[1a] The exercise of discretion here referred to is not to be confounded with that referred to in the commencement of this chapter in connection with applications for a new trial on this ground. The discretion here is merely as to the single point of "reasonable diligence." See note 10b, below.

[2] 45 Cal. 92.

[2a] 104 Cal. 668, 38 Pac. 511. And see to same effect, Kenezleber v. Wahl, 92 Cal. 202, 28 Pac. 225; Oberlander v. Fixen & Co., 129 Cal. 690, 62 Pac. 254; Blewett v. Miller, 131 Cal. 149, 63 Pac. 157; Hausmann v. Railway Co., 139 Cal. 174, 72 Pac. 905.

"Diligence is a relative term incapable of exact definition. What would amount to due diligence under one state of facts would fall absolutely short of it under another and different state of facts. It depends, therefore, so essentially upon the particular circumstances of each case, ... as they have appeared to the lower court at the trial and throughout the conduct of the cause, in determining whether diligence has been used in any particular instance, that this court should hesitate to disturb a ruling upon this ground where it has any substance whatever upon which to rest. The presumption is that the discretion has been properly exercised, and that presumption must be overcome by a clear want of facts before the order will be disturbed."

Nevertheless, the requirement that diligence affirmatively appear has always been regarded as vital to the showing which must be made if a party wishes to avail himself of this as a ground for a new trial.[3] In Baker v. Joseph,[3a] Baldwin, J., delivering the opinion, said:

"The circumstance that testimony has just been discovered, when it is too late to introduce it, is so suspicious that courts require the very strictest showing to be made of diligence, and all other facts necessary to give effect to the claim. Especially is the rule held in its strictness when the testimony is to impeach a witness on the trial, or is merely cumulative." And, quoting from a well-known text-book on New Trials,[3b] "The party applying on the ground of newly discovered evidence must make his diligence apparent; for if it is even doubtful that he knew of the evidence, he will not succeed in his application."

So in People v. Sutton,[3c] and in People v. Howard,[3d] in almost identical language the court held that there must be a clear, unequivocal showing that the evidence alleged to be newly discovered could not, with reasonable diligence, have been discovered and produced at the trial, and that if there is a failure in this respect the motion must be denied. So in other cases.[3e]

[3] See note 10, below.

[3a] 16 Cal. 173.

[3b] Graham & Waterman on New Trials, vol. 1, p. 473.

[3c] 73 Cal. 243, 15 Pac. 86.

[3d] 74 Cal. 547, 16 Pac. 394.

[3e] *California:* People v. Leong Yune Gun, 77 Cal. 636, 20 Pac. 27; People v. Freeman, 92 Cal. 359, 28 Pac. 261; Harralson v. Barrett, 99 Cal. 607, 34 Pac. 342; O'Rourke v. Vennekohl, 104 Cal. 254, 37 Pac. 930; People v. Demasters, 109 Cal. 607, 42 Pac. 236; Tibbet v. Sue, 125 Cal. 544, 58 Pac. 160; People v. Rushing, 130 Cal. 449, 80 Am. St. Rep. 141, 62 Pac. 742; People v. Warren, 130 Cal. 683, 68 Pac. 86.

Colorado: Walling v. Warren, 2 Colo. 434; Martin v. Hazzard etc. Co.,

The reports furnish many instances of want of diligence. Thus where the party made no attempt to subpoena witnesses until the morning of the trial, it was held that he had not exercised reasonable diligence.[4] So it was held that it was negligence not to have discovered a deed which had been on record for a year before the trial.[5] So where a witness was produced at the trial, it was held to have been negligence in the party not to have examined him fully.[6] So where a witness was summoned and not examined at all, the supreme court said:

"It would be an exceptional case that the character of showing here disclosed should be deemed sufficient to demand a new

2 Colo. 596; Nesbit v. People, 19 Colo. 441, 36 Pac. 221; Liggett v. People, 26 Colo. 364, 58 Pac. 144; Pacific Mutual Life Ins. Co. v. Van Fleet, 47 Colo. 401, 107 Pac. 1087; Barton v. Laws, 4 Colo. App. 212, 35 Pac. 284; Outcault v. Johnston, 9 Colo. App. 519, 49 Pac. 1058.

Idaho: State v. Davis, 6 Idaho, 159, 53 Pac. 678; Knollin v. Jones, 7 Idaho, 466, 63 Pac. 638; Heckman v. Espey, 12 Idaho, 755, 88 Pac. 80.

Montana: Caruthers v. Pemberton, 1 Mont. 111, 4 Morr. Min. Rep. 622; Morse v. Swan, 2 Mont. 306; Quigley v. Birdseye, 11 Mont. 439, 28 Pac. 741; In re Colbert's Estate, 31 Mont. 461, 107 Am. St. Rep. 439, 78 Pac. 971, 80 Pac. 248, 3 Ann. Cas. 952; Spencer v. Spencer, 31 Mont. 640, 79 Pac. 320; Martin v. Corscadden, 34 Mont. 308, 86 Pac. 33.

Nevada: Howard v. Winters, 3 Nev. 539.

New Mexico: Ruhe v. Abren, 1 N. M. 247; Armstrong v. Arragon, 13 N. M. 19, 79 Pac. 291.

Oklahoma: Flersheim v. Gillespie, 14 Okl. 143, 77 Pac. 183.

Oregon: State v. Magers, 36 Or. 38, 58 Pac. 892; Stern v. Volz, 52 Or. 597, 98 Pac. 148.

South Dakota: Gaines v. White, 2 S. D. 410, 50 N. W. 901; Dermon v. Mullen, 6 S. D. 554, 62 N. W. 380; Ochsenreiter v. Bagley, 11 S. D. 91, 75 N. W. 822; Wilson v. Seaman, 15 S. D. 103, 87 N. W. 577; Waite v. Fish, 17 S. D. 215, 95 Pac. 928; In re McClellan's Estate, 20 S. D. 498, 107 N. W. 681; Grigsby v. Wolven, 20 S. D. 623, 108 N. W. 250; Ernster v. Christensen, 24 S. D. 103, 123 N. W. 711; Simonson v. Aney (S. D.), 128 N. W. 319.

Utah: Snell v. Cisler, 1 Utah, 298; Tiernan v. Trewick, 2 Utah, 393; United States v. Eldridge, 5 Utah, 161, 13 Pac. 673; People v. Peacock, 5 Utah, 237, 14 Pac. 332.

Washington: Booth v. Columbia etc. Co., 6 Wash. 531, 33 Pac. 1075; Wilson v. Waldron, 12 Wash. 149, 40 Pac. 740; State v. Power, 24 Wash. 34, 63 Pac. 1112; Reeder v. Traders' Bank, 28 Wash. 139, 68 Pac. 461; State v. Vance, 29 Wash. 435, 70 Pac. 34; Bullock v. White Star etc. Co., 30 Wash. 448, 70 Pac. 1106; Jordan v. Seattle, 30 Wash. 298, 70 Pac. 743; Collins v. Bacon, 38 Wash. 80, 80 Pac. 268; Dumontier v. Stetson etc. Co., 39 Wash. 264, 81 Pac. 693; Goodrich v. Kimble, 49 Wash. 516, 95 Pac. 1084; Kennay v. Hoffman, 51 Wash. 105, 98 Pac. 98; Schoening v. Young, 55 Wash. 90, 104 Pac. 132; Kincaid v. Walla Walla etc. Co., 57 Wash. 334, 135 Am. St. Rep. 982, 106 Pac. 918.

Wyoming: Tucker v. Wyoming Coal Co. (Wyo.), 104 Pac. 529; George v. Emery (Wyo.), 107 Pac. 1.

[4] Rogers v. Huie, 1 Cal. 429, 54 Am. Dec. 300.

[5] Weimer v. Lowery, 11 Cal. 104, 4 Morr. Min. Rep. 543.

[6] Arnold v. Skaggs, 35 Cal. 684; and see People v. Miller, 33 Cal. 99; Moran v. Abbey, 63 Cal. 56; Smith v. Smith, 119 Cal. 183, 48 Pac. 730, 51 Pac. 183.

Where the alleged newly discovered evidence was so closely related to what the witness had testified to at the trial that it might have been

trial."[6a] So where a party is brought, by evidence at the trial, to recollect that a person not subpoenaed was present at a conversation, he should take steps to secure the attendance of such person, and apply for a continuance, if necessary for that purpose.[7] So where a party did not come prepared with sufficient proof as to a material fact, simply because he had never heard it doubted or disputed, and the alleged fact was disproved by his opponent, the court said: "This is not the sort of diligence required from suitors. It will not do for them simply to satisfy themselves as to an important fact in the case, and to assume it as a conceded fact, because they never heard it disputed. A party must be prepared to *prove* the material facts of his case, unless they are admitted in the pleadings, or by express stipulation. If such excuses as these, for a failure to produce at the trial proofs which were within the power of the party, be tolerated, there would be no reasonable limit to applications for new trials on similar grounds. We think no sufficient diligence was shown, and that the motion was properly denied for this reason."[8]

brought out on cross-examination, it is not available as ground for new trial. People v. Phelan, 123 Cal. 551, 56 Pac. 424. And see cases cited in note 9, below.

In Kenway v. Hoffman, 51 Wash. 105, 98 Pac. 98, it was held that where affiants were witnesses at the trial and the new matter was entirely open for investigation then, diligence was wanting, and the evidence cannot be said to be newly discovered. In Gregg v. Kommers, 22 Mont. 511, 57 Pac. 92, it was held that a new trial would not be granted for failure of a witness through forgetfulness to tell all he knew when on the stand at the former trial.

It has been held not to be an abuse of discretion to deny the motion where the alleged newly discovered evidence was known to one of the party's attorneys, although such attorney was not able, because of illness, to attend the trial. Chapin v. Bokee, 4 Wash. 1, 29 Pac. 936.

[6a] People v. Griner, 124 Cal. 19, 56 Pac. 625.

[7] Klockenbaum v. Pierson, 22 Cal. 163.

[8] Stoakes v. Monroe, 36 Cal. 383, 2 Morr. Min. Rep. 246. In Schoening v. Young, 55 Wash. 90, 104 Pac. 132, it was said that the mere failure to anticipate the turn the action would take, or the necessity for certain evidence alleged to be newly discovered, and the failure to produce it for that reason was not sufficient ground for a new trial. In Tiernan v. Trewick, 2 Utah, 393, it was said that where it appears that if the party had done before the trial and as necessary preparation for it what was afterward done to obtain the newly discovered evidence, such newly discovered evidence would have been discovered and presented at the trial, want of diligence appears. In the Oregon cases the general rule has been stated to be that the existence of the evidence must not have been known to the party at the time of the trial; and that the circumstances should not leave an inference that reasonable diligence would have discovered it. Cutler v. S. S. Columbia, 1 Or. 101; Lander v. Miles, 3 Or. 40. Where there was no showing that the alleged newly discovered evidence was not known to the defendant prior to and during the trial, a new trial is properly denied. State v. Magers, 36 Or. 38, 58 Pac. 892. If the newly

So where the plaintiff expected to give his individual testimony as to the material facts, in support of his claim against the estate of his debtor, and was not informed by his attorney that under the provisions of section 1880, Code of Civil Procedure, such proposed testimony would be rejected, and did not therefore make provision for the introduction of other evidence in place thereof, the showing was held by the supreme court to have been inadequate to entitle him to a new trial on the ground of newly discovered evidence.[8a]

So where the question was as to the notice given to the indorser of a promissory note, and the written protest of the notary was insufficient, and the notary, when placed on the stand, could not recollect any facts other than what were stated in the protest, and judgment went for the defendant for want of proof of notice, and after the decision the notary, on looking into the city directory, found that the statement of the business and place of business of the defendant recalled to his mind all the facts necessary, and upon his affidavit a new trial was granted, the supreme court reversed the order, saying: "The affidavit discloses a mere want of recollection. The city directory was open to the witness as well before as after the trial, and an examination of it before the trial would have disclosed the business of Sweeney as well as an examination of it afterward. Due attention in due season would have afforded the witness the data which he deposes refreshed his memory, and that being so, its subsequent discovery is not sufficient ground for new trial."[9]

Generally speaking, want of diligence is manifest where the evidence was known before or at the time of the trial.[9a] And the same may be said where a party goes to trial without asking for a continuance to enable him to procure the attendance of a wit-

discovered evidence is an opinion of a physician as to the party's mental condition, the motion is insufficient unless it be shown that proper efforts were made to obtain such opinion before the trial. Nesbit v. People, 19 Colo. 441, 36 Pac. 221. And see Deindorfer v. Bachmor, 12 S. D. 285, 81 N. W. 297; Lunschen v. Ullom (S. D.), 127 N. W. 463.

[8a] Bagnall v. Roach, 76 Cal. 106, 18 Pac. 137.

[9] Hendy v. Desmond, 62 Cal. 260; and see to the same effect, Moran v. Abbey, 63 Cal. 56. In the former case the affidavit disclosed "a mere want of recollection"; in the latter, "absolute forgetfulness."

See notes 6 and 6a, *supra*.

[9a] Sonoma v. Stofen, 125 Cal. 32, 57 Pac. 681; People v. Lyle (Cal.), 4 Pac. 977; Smith v. Smith, 119 Cal. 183, 48 Pac. 730, 51 Pac. 183; In re Walker's Estate, 148 Cal. 162, 82 Pac. 770.

ness whose testimony is needed to establish a material fact at issue, but whose whereabouts are unknown.[9b]

It is incumbent upon the movant to show that he has not been guilty of laches,[9c] but that he has been vigilant,[9d] and that failure to produce the evidence at the trial cannot be imputed to lack of diligence on his part. Strict proof of diligence is required, such diligence as must be deemed to exclude negligence.[9e] "It is the duty of litigants to be active and vigilant in procuring the testimony upon which they rely to maintain their cause. Trials are not to be encouraged as experiments. A party is not allowed to present his facts by piecemeal, to take a part of the facts first, and then, if he fails, apply for a new trial, and seek to strengthen his case by a statement of other facts which were reasonably within his power to present at the first trial. He must make diligent search and inquiry in advance of the trial, and be able to show to the satisfaction of the court that he used reasonable diligence."[9f] Where it is doubtful whether the evidence was known or not, or that the moving party might have known it but for his negligence, the motion will be denied.[9g]

Where the affidavit of the moving party averred that he had learned since the former trial that the proposed new witness would testify to certain facts, and later on the affidavit also states that he had tried to ascertain the same witness' whereabouts before the trial, there is such a contradiction that detracts from the showing so as to render it insufficient. The court said: "He certainly must have had reason to believe that P. could furnish him with some evidence if he inquired for him before the trial."[9h] So the case of Clifford v. Denver etc. Co.[9k] affords a fair illustration of a defective showing, because of the negligence of the moving

[9b] Scanlan v. San Francisco etc. Co., 128 Cal. 586, 61 Pac. 271. And see People v. Luchetti, 119 Cal. 501, 51 Pac. 707. Also Smith v. Shook, 30 Mont. 30, 75 Pac. 513; Lander v. Miles, 3 Or. 40; In re McClellan's Estate, 20 S. D. 498, 107 N. W. 681; S. C., 21 S. D. 209, 111 N. W. 540; Dumontier v. Stetson etc. Co., 39 Wash. 264, 81 Pac. 693.

[9c] Snyder v. Rinehart, 20 Colo. 448, 39 Pac. 408; Lander v. Miles, 3 Or. 40.

[9d] Crater v. McCormick, 4 Colo. 196; In re McClellan's Estate, 20 S. D. 498, 107 N. W. 681; Grigsby v. Wolven, 20 S. D. 623, 108 N. W. 250.

[9e] Howard v. Winters, 3 Nev. 539. The failure to procure the evidence at the former trial must be unmixed with any fault of the movant. Freeman v. Wood, 14 N. D. 95, 103 N. W. 392.

[9f] Pinschower v. Hanks, 18 Nev. 99, 1 Pac. 454.

[9g] Martin v. Hazzard etc. Co., 2 Colo. 596; Chapin v. Goodell, 2 Colo. 608.

[9h] Holland v. Huston, 20 Mont. 84, 49 Pac. 390.

[9k] 12 Colo. 125, 20 Pac. 333.

party. So in Dumontier v. Stetson etc. Co.,[9m] where the affidavit showed that the witness' presence at the time of the accident was known to the movant before and during the trial, and that he made no effort to secure his presence, it was held not an abuse of discretion to deny the motion.

That reasonable diligence was exercised must affirmatively appear from the affidavits;[10] and an affirmative showing of want of diligence will be required to overturn on appeal an order granting a new trial on this ground.[10a] The reason of this rule is said to rest in the peculiar scope of the discretion of the trial court as to the question of whether the reasonable diligence required by the statute was or was not exercised. This discretion once exercised, there must be a showing of diligence or a showing of a want of diligence, as the case may be, made upon the record, to warrant the interference of the appellate court with an order denying, or one granting, a new trial on this ground. The presumption in every case is that the discretion of the court was properly exercised, and there must be an affirmative showing to counterbalance, or to overturn, this presumption, whether the motion be granted or denied.[10b]

Counter-affidavits may be admitted to show want of diligence.[11]

Where the evidence is material and could not have been discovered by the exercise of reasonable diligence, it is abuse of discretion to refuse a new trial.[12]

There is authority for a more liberal application of the rule in criminal cases because of the more or less helpless condition of the defendant when not on bail.[13]

[9m] 39 Wash. 264, 81 Pac. 693.

[10] Jacks v. Cooke, 6 Cal. 164; Baker v. Joseph, 16 Cal. 173; Arnold v. Skaggs, 35 Cal. 684; Case v. Codding, 38 Cal. 191; People v. Ah Ton, 53 Cal. 741; and cases cited in note 3e, *supra*.

If diligence be not shown, an order granting the motion will be held an abuse of discretion. Mowry v. Raabe, 89 Cal. 606, 27 Pac. 157.

New trial will not be granted unless excuse for not producing evidence at trial is shown. People v. Nelson, 85 Cal. 421, 24 Pac. 1006; Hahn v. Dickinson, 19 S. D. 373, 103 N. W. 642. See section 93, note 2.

[10a] See Heintz v. Cooper, 104 Cal. 668, 38 Pac. 511, and cases cited in note 3, *supra;* also see cases cited in note 3e, *supra*.

[10b] See cases cited and referred to in notes 10 and 10a, and particularly Heintz v. Cooper, 104 Cal. 668, 38 Pac. 511; Blewett v. Miller, 131 Cal. 149, 63 Pac. 157.

[11] People v. Cesena, 90 Cal. 381, 27 Pac. 300.

[12] Waite v. Fish, 17 S. D. 215, 95 N. W. 928; In re McClellan's Estate, 20 S. D. 498, 107 N. W. 681; Kellogg v. Finn, 22 S. D. 578, 133 Am. St. Rep. 945, 119 N. W. 545; State v. Stowe, 3 Wash. 206, 28 Pac. 337, 14 L. R. A. 609; State v. Townsend, 7 Wash. 462, 35 Pac. 367; State v. Webb, 20 Wash. 500, 55 Pac. 935.

[13] State v. Stowe, 3 Wash. 206, 28 Pac. 337, 14 L. R. A. 609.

§ 93. The Facts upon Which the Motion is Based must be Shown by the Best Evidence of Which the Case Admits.—The decisions fully establish this proposition. In Rogers v. Huie,[1] Bennett, J., delivering the opinion, said: "There is another defect in the papers upon which the motion for a new trial was made. The affidavits do not state the facts which the defendant expected to be able to prove by his absent witnesses. In all cases in which a new trial is moved for on the ground of surprise, or on the ground of newly discovered evidence, the evidence which the party moving expects to be produced on the second trial should be fully and distinctly set forth in the affidavits on which the application is based, in order that the court may see whether the testimony, if given, could have any legal effect on the result of the controversy. And as a general rule, the party ought not to rely on his own single and unsupported statement, but should, if possible by the exercise of due diligence, procure the affidavits of the persons whose testimony he deems material, so that the court may be satisfied as to what facts they will testify." In Jenny Lind Co. v. Bower,[2] the defendant Marshall moved for a new trial on the ground of newly discovered evidence, and based his motion upon his own affidavit, "setting forth that since the trial of the cause one Hoffman had informed him that he would testify to certain facts, which facts are set out in the affidavit; but affiant being ignorant of the law did not know that Hoffman's affidavit as to what he would testify to was necessary, until it was too late to procure the same in time for the hearing of the motion." In relation to which Field, J., delivering the opinion, said: "The affidavit of Marshall, as to the testimony which Hoffman would give, should have been accompanied by Hoffman's affidavit. Hoffman's absence at his residence at Forest Hill, and the consequent inability of Marshall to obtain the affidavit in time, was not a sufficient excuse for its nonproduction. If necessary, application should have been made to the court for additional time to obtain and file it." So it is held that diligence must be shown by the affidavit of the party himself; the affidavit of a witness is not enough.[3] In Arnold v. Skaggs,[4] Sanderson, J., delivering the opinion, said:

[1] 1 Cal. 429, 54 Am. Dec. 300.

[2] 11 Cal. 194, 5 Morr. Min. Rep. 589.

[3] Baker v. Joseph, 16 Cal. 173; and see People v. Ah Ton, 53 Cal. 741; People v. Freeman, 92 Cal. 359, 28 Pac. 261.

[4] 35 Cal. 684. As to criminal cases, see People v. De Lacey, 28 Cal. 589. See note 5b, section 93b, below.

"The affidavit of the defendant fails to show that he was not cognizant of the alleged insanity of Arnold before or at the time of the trial. The affidavits of Frey and Thomas both show, it is true, that they informed the defendant of Arnold's supposed insanity after the trial, and that they verily believe that he (the defendant) was ignorant of it until so informed by them; but their belief is insufficient. The defendant himself should have spoken upon the question. The fact that he is silent justifies the inference that Frey and Thomas are mistaken in their belief, and that he knew all about the alleged insanity of Arnold at or before the trial. In applications of this kind, as well as in other legal proceedings, the best evidence within reach must be produced. The defendant must have known whether the alleged insanity of Arnold was first made known to him after the trial, and his sworn statement that it was would be much more satisfactory than the mere belief of any number of other persons. Baker v. Joseph, 16 Cal. 173. What has been said about the defendant's affidavit, so far as it relates to the witness Covey, is also true of it generally. It wholly fails to show any diligence on the part of the defendant in seeking, before the trial, the evidence which he claims to have discovered after the trial. But were it otherwise, the showing would still be insufficient also as to the other witnesses, Earl and Knox, for it is not supported by their affidavits. In asking for a new trial on the ground of newly discovered evidence, it is not sufficient for the moving party to state in his affidavit what, as he has learned, certain persons know about the matter, and how, as he believes, they will testify. He must produce the affidavits of the newly discovered witnesses as to what they know, and as to what they will testify. The affidavit of the party himself is but hearsay testimony, and cannot be received unless for good cause shown; the affidavits of the newly discovered witnesses cannot be obtained in time, or in such further time as may have been granted for that purpose." So where the new evidence consists of memoranda by which the party expects to refresh the memory of a witness, the memoranda must be set forth in the affidavit.[5]

§ 93a. **Counter-affidavits.**—Upon the ground that the court will not try the merits of a case upon a preliminary motion, it is well settled that an affidavit of merits upon such a motion as one

[5] Case v. Codding, 38 Cal. 191.

to set aside a judgment upon default, cannot be contradicted by counter-affidavits. A motion for a new trial is somewhat similar in its effect, and it has been contended with considerable show of reason that the newly discovered evidence which the unsuccessful party sets out as a ground for a new trial should not be attacked by counter-affidavits; that such party should be permitted to present such newly discovered evidence to another jury, whose exclusive province it would be to determine as to the credibility of the witnesses, and the truth of the facts sought to be established. This argument loses sight of the object of granting a new trial on this ground, and the reason therefor, which is based upon the theory that if the evidence is such that it cannot be said that the unsuccessful party had a fair and impartial trial on the merits, a new trial should be granted. This question rests in the discretion of the trial court alone, and it is essential that that court should be permitted to determine it with all the facts before it, not the least important of which is naturally the weight and the credibility of the newly discovered evidence itself.

For this reason it is well settled in this and many other states that not only may the facts of diligence and materiality be inquired into, but the truth of the evidence itself, or the truth of the facts as alleged, as well as the weight thereof and the credibility of the witnesses, may be contested by counter-affidavits.

"To hold otherwise," said Angellotti, J., for the court, in People v. Sing Yow,[1] "would be to make it necessary for the trial court, in many cases, to grant a new trial upon the *ex parte* affidavits of perjured witnesses, where it is easily within the power of the other side to demonstrate that the new witnesses are utterly unworthy of credit, and that the allegations of their affidavits are entirely without foundation, and can be overwhelmingly overcome by the evidence of reputable persons. In such a case it would be manifest that the interests of justice did not demand a new trial, that no substantial right of the defendant had been impaired by his failure to produce the evidence on the trial, and that there was no reasonable probability of a different result by reason of such newly discovered evidence."[2]

[1] 145 Cal. 1, 78 Pac. 235.

[2] See Doyle v. Sturla, 38 Cal. 456; Merk v. Gelzhaeuser, 50 Cal. 631; Thompson v. Thompson, 88 Cal. 110, 25 Pac. 962; People v. Mesa, 93 Cal. 580, 29 Pac. 116; People v. Fice, 97 Cal. 459, 32 Pac. 531; In re McClellan's Estate, 21 S. D. 209, 111 N. W.

Counter-affidavits may be filed after the time limited by the code upon a showing that they were prepared and served, but filing was inadvertently omitted.[3]

§ 93b. Miscellaneous—Affidavits.—The motion must be made upon affidavits,[1] and it is never error or abuse of discretion to deny a motion for a new trial on this ground, when there is nothing to support it but the unverified statement of counsel, and no affidavit as to the character, or the materiality of the evidence, or when it was discovered, or why it could not have been produced at the trial, or any showing of diligence.[2] The affidavits must set

540; State v. Webb, 20 Wash. 500, 55 Pac. 935; Kenway v. Hoffman, 51 Wash. 105, 98 Pac. 98. In Shafer v. Willis, 124 Cal. 36, 56 Pac. 635, Temple, J., undertook to question this doctrine, but his views did not receive the assent of the court, and in the particular case a determination of the point was not required: "If a showing is made which satisfies the statute, the party is entitled to a new trial. The court cannot, in lieu of such new trial, determine the issue of fact on affidavits and find that, though such evidence, material under the rigid rules especially applied to these motions, and which, if true, would probably require a different judgment, can be produced, nevertheless the opposing party can refute the new testimony by other evidence, also new. This would be to retry the issue on affidavits, and to deny the trial according to established procedure, such as the statutes provide the moving party who makes such a case shall have." And see In re McClellan's Estate, 21 S. D. 209, 111 N. W. 540, where the contrary doctrine was upheld.

[3] Spottiswood v. Weir, 80 Cal. 448, 22 Pac. 289.

[1] Section 658, California Code of Civil Procedure.

[2] People v. Eppinger, 114 Cal. 350, 46 Pac. 97.

An affidavit of an officer of a corporation to the effect that the newly discovered evidence was discovered on a certain day, and that he did not know it in time to produce it at the former trial by the exercise of the utmost diligence, is insufficient if it does not appear that the facts were not in the knowledge of some other officer or agent of the corporation. Lee-Kinsey Co. v. Jenks, 13 Colo. App. 265, 57 Pac. 191.

In Nicholson v. Metcalf, 31 Mont. 276, 78 Pac. 483, upon the subject of the showing required, the court, said: "Whether reasonable diligence has been used is a question to be determined by the court upon the affidavits presented, and therefore these affidavits should state with particularity what acts were performed. They should show that diligence was used, how the new evidence was discovered, why it was not discovered before the trial, and such other facts as make it clear that the failure to produce the evidence was not their own fault, or because of want of diligence on their part." To the same effect, see Butler v. Vassault, 40 Cal. 74; Hendy v. Desmond, 62 Cal. 260; Bagnall v. Roach, 76 Cal. 106, 18 Pac. 137; Barton v. Laws, 4 Colo. App. 212, 35 Pac. 284; Caruthers v. Pemberton, 1 Mont. 111, 4 Morr. Min. Rep. 622; Gregg v. Kommers, 22 Mont. 511, 57 Pac. 92; Rand v. Kipp. 27 Mont. 138, 69 Pac. 714; Twine v. Kilgore, 3 Okl. 640, 39 Pac. 388; State v. Power, 24 Wash. 34, 63 Pac. 1112, 63 L. R. A. 902. In Rand v. Kipp, it was held that a mere statement of due diligence, where it appeared that the examination of certain books in his possession at the time of the trial would have apprised him of the newly discovered facts, is not sufficient as a showing of diligence, even though the evidence be material. In Re Colbert's Estate, 31 Mont. 461, 107 Am. St. Rep. 439, 78

forth such of the general facts of the case as will show the relevancy of the evidence.[3] If the newly discovered evidence consists of documents, the affidavits should contain proof of the genuineness and validity of the same.[4] Affidavits must be filed in time, and must be made by the witnesses to the facts, if possible;[5] and affidavits made upon information and belief by counsel for the movant are not sufficient.[5a] But the motion must in all cases be supported by the affidavit of the moving party himself.[5b]

The rule as to conflict applies.[6] The evidence must be as to matters transpiring before trial.[7] The question as to the discretion of the trial court is not affected by the fact that the judge who hears the motion is not the one who presided at the trial.[8] Evi-

Pac. 971, 80 Pac. 248, 3 Ann. Cas. 952, it was held that the affidavit must state particularly what was done in obtaining the new evidence, and how and when it was discovered, so as to give the adverse party an opportunity to traverse the showing. In Walling v. Warren, 2 Colo. 434, it was held that the affidavit must show what diligence was used, the reason why the evidence was not produced and the names of the witnesses, and their addresses.

An affidavit which states that certain evidence could and would be offered on a new trial is insufficient unless it is also stated that it is newly discovered, and there is an adequate excuse for not introducing it on the former trial. Goose River Bank v. Gilmore, 3 N. D. 188, 54 N. W. 1032. If no steps were taken to procure the evidence, a new trial will be denied, even though the party may not have known that it would be necessary. Gaines v. White, 2 S. D. 410, 50 N. W. 901, 1 S. D. 434, 47 N. W. 524.

[3] People v. Voll, 43 Cal. 166.

[4] Smithers v. Fitch, 82 Cal. 153, 22 Pac. 935.

[5] People v. Fice, 97 Cal. 459, 32 Pac. 531; Pilot Rock etc. Co. v. Chapman, 11 Cal. 161; Elliott v. Martin, 27 Mont. 519, 71 Pac. 756; Huster v. Wynn, 8 Okl. 569, 58 Pac. 736; Lander v. Miles, 3 Or. 40. Or its absence satisfactorily accounted for. Id.

The reason of this requirement, as stated in Arnold v. Skaggs, 35 Cal. 684, and Holland v. Huston, 20 Mont. 84, 49 Pac. 390, is the fact that otherwise the affidavit must be hearsay, or founded upon information and belief.

[5a] Cole v. Thornburg, 4 Colo. App. 95, 34 Pac. 1013; Holland v. Huston, 20 Mont. 84, 49 Pac. 390.

[5b] Smith v. Shook, 30 Mont. 30, 75 Pac. 513. The affidavit must contain a showing that the new evidence was not known to him at the time of the trial, and the affidavits of other persons will not suffice. In Colorado Springs etc. Co. v. Allen, 48 Colo. 4, 108 Pac. 990, it was held that the attorney could not make the affidavit in a case of surprise.

[6] See Bank of Bisbee v. Graf, 12 Ariz. 156, 100 Pac. 452; People v. Woon Tuck Wo, 120 Cal. 294, 52 Pac. 833; People v. Rushing, 130 Cal. 449, 80 Am. St. Rep. 141, 62 Pac. 742; Kataoka v. Hanselman, 150 Cal. 673, 89 Pac. 1082; Crystal Lake Ice Co. v. McAulay, 75 Cal. 631, 17 Pac. 924; Ross v. Sedgwick, 69 Cal. 247, 10 Pac. 400; People v. Mesa, 93 Cal. 580, 29 Pac. 116; People v. Fice, 97 Cal. 459, 32 Pac. 531.

[7] Miller v. Luco, 80 Cal. 257, 22 Pac. 195. A tax title acquired *pendente lite* is not available as newly discovered evidence. It can only be set up by supplemental pleading. Nor can a conveyance *pendente lite*. The chief reason is to be found in the fact, so often stated, that a new trial is a re-examination of an issue, and not an original examination.

[8] Hausmann v. Sutter Street Ry. Co., 139 Cal. 174, 72 Pac. 905.

dence that is merely argumentative, or a repetition of that used at the trial, is not ground for a new trial, conceding it to be newly discovered.[9] Nor is hearsay evidence sufficient for the purpose.[9a] Self-contradictory affidavits are seldom regarded as sufficient.[9b]

A new trial is seldom granted for newly discovered evidence to be given by an accomplice.[10]

A motion on the ground of newly discovered evidence may be made in some states after a motion on other grounds has been denied.[11]

[9] Thompson v. Thompson, 88 Cal. 110, 25 Pac. 962. This kind of evidence is little else than cumulative, in so far as it may be described as a repetition.

In State v. Nordstrom, 7 Wash. 506, 35 Pac. 382, it was held that where the proposed testimony is such as would merely elaborate the former, particularly where it tends to contradict the same, it will be regarded as insufficient.

[9a] Holland v. Huston, 20 Mont. 84, 49 Pac. 390; State v. Nordstrom, 7 Wash. 506, 35 Pac. 382.

[9b] Leyson v. Davis, 17 Mont. 220, 42 Pac. 775, 31 L. R. A. 429; State v. Nordstrom, 7 Wash. 506, 35 Pac. 382.

[10] State v. Anderson, 14 Mont. 541, 37 Pac. 1; State v. Hyde, 22 Wash. 551, 61 Pac. 719.

[11] Fuller etc. Co. v. Child, 22 S. D. 351, 117 N. W. 523.

CHAPTER XIII.

GROUNDS OF THE MOTION—EXCESSIVE DAMAGES.

§ 94. The statute—Scope of subject.
§ 95. Unless verdict so excessive as to indicate passion or prejudice, it should not be disturbed on this ground.

§ 94. The Statute—Scope of the Subject.—The fifth subdivision of section 657 of the California Code of Civil Procedure is as follows: "Excessive damages appearing to have been given under the influence of passion or prejudice." This provision has been in the statute since 1851.[1]

The phraseology, "excessive damages," taken separately, implies damages not justified by the evidence, and such damages are clearly within the scope of the sixth subdivision.[1a] So damages may be inadequate, and relief by means of the same subdivision is within reach of the injured party. In other words, if damages are not what they ought to be, a motion for a new trial is appropriate upon the ground that the decision is not justified by the evidence; and this is true whether there is passion or prejudice or not.

This is the fair implication from the language of the court in Du Brutz v. Jessup,[2] where the presiding justice (speaking from the bench) said:

"We are of opinion that, so far as the party against whom the verdict has gone depends upon the circumstance that damages have been allowed in too great or too small a sum, he may rely upon the ground that the verdict is not sustained by the evidence. Even when, in the case of excessive damages, he is prepared to show that the excess indicates passion or prejudice, in such case he may rely upon either one of these two grounds—that the evidence does not sustain the verdict, or that the verdict is the result of passion or prejudice."

But the court manifestly lost sight of the very important consideration that, as to their method of determination, damages are of two kinds, and there are some that may be said to be so far

[1] Laws of 1851, p. 81, sec. 193. See section 23, *ante*, for code provisions of other states.

[1a] See chapter 14, *post*.

[2] 54 Cal. 118.

within the discretion of the jury that they cannot be proved as an ordinary fact; as, for example, in the case of personal injury and mental anguish; and hence, their determination is never a question of the sufficiency of the evidence to justify the decision.[2a] It was to meet this difficulty that this provision was evidently framed. Where a party is entitled to actual damages only, and the damages are not what they ought to be, complete relief may be had on the ground of insufficiency of the evidence, and it is a matter of indifference to him whether the verdict indicates passion or prejudice or not. But if the amount of the damages is within the "sound discretion" and "dispassionate judgment" of the jury, the motion for a new trial could not be made upon the ground of "insufficiency of the evidence to justify the decision." The court could not set aside such a verdict merely because it would have rendered a different verdict upon the evidence presented. If the discretion of the jury were to be controlled in this way, there would manifestly be no discretion in dealing with this class of cases.

The true rule would seem to be that if the case be one in which the jury are called upon to give damages, and to determine the amount thereof from the evidence introduced as to such damage, and by legal standards and rules, and the damages are excessive, a motion for a new trial on the ground of the insufficiency of the evidence to justify the verdict is the proper remedy. If, on the other hand, the case be one in which the jury must exercise their discretion as to the amount of damage, and if it appears that in the exercise of this discretion they have given excessive damages under the influence of passion or prejudice, the motion for a new trial should be made under subdivision 5.[2b]

[2a] See Parke v. Frank, 75 Cal. 364, 17 Pac. 427, where it was said: "It seems not infrequently to be lost sight of in the trial courts that, in actions upon contracts, the amount of damages caused by an alleged breach is to be proved as a fact. This is not an action for a tort; the amount of the recovery was not to be left, upon general principles, to the 'sound discretion' or 'dispassionate judgment' of the jury. Where there is a legal measure of damages, the jury must determine the amount as a fact; otherwise the law which so measures the damages would be of no avail."

Also, to same effect, Norddeutschen etc. v. Bertheau, 79 Cal. 495, 21 Pac. 975.

[2b] It cannot be denied that the courts do not always maintain this very essential distinction in dealing with the subject of "excessive damages." The case of Williams v. Spokane etc. Co., 42 Wash. 597, 84 Pac. 1129, and 44 Wash. 363, 87 Pac. 491, is a fair illustration of the difficulties that beset both bench and bar in a case where this distinction has been lost sight of. The respondent unquestionably treated the assignment of "excessive damages" as being

For a discussion of the duty of the court to act under the cumulative remedy provided by section 662, Code of Civil Procedure, and set aside a verdict of its own motion when rendered under the influence of passion or prejudice, see section 10, *ante*.

§ 95. The Verdict Should not be Disturbed on the Ground of Excessive Damages, Unless the Amount is so Excessive as to Indicate Passion or Prejudice.—This is the result of the cases; but it may conduce to a clearer understanding of the rule if it be stated in the language of the decisions. In Taylor v. Cal. Stage Co.,[1] the supreme court refused to interfere with the verdict on the ground that "the amount assessed was not so outrageous as to shock the conscience of the court who tried the case, or raise the presumption of passion or prejudice." So in Weaver v. Page,[2]

under subdivison 5, necessitating a showing of apparent passion or prejudice, whereas the court regarded it as merely an assignment of insufficiency of the evidence. In note 8 of this section is collected a numerous list of cases, wherein the damages were in some held excessive, and in others, not excessive; but in very few, indeed, can it be said indubitably that the assignment of prejudice was under either subdivision 5 or subdivision 6. In very few indeed is there any reference to passion or prejudice, yet in all the damages were assigned as "excessive." This want of a proper distinction may be said to permeate the entire subject, and to involve some parts of it in extreme confusion. It is difficult, for example, to understand the principle upon which appellate courts declare damages excessive, and order their reduction, under subdivision 5 of the section of the code which fixes grounds for new trial, in the absence of a suggestion of passion or prejudice, yet it is often done, and in some jurisdictions the verdict of the jury is seldom allowed to remain undisturbed. There are cases where the court expressly holds that there is nothing to indicate the influence of passion or prejudice, yet the amount of the verdict is held to be excessive, and is reduced, for that specific reason. This was the fact in the Williams case, above cited. The power of an appellate court to revise the verdict of a jury, when, as matter of law, it is clearly unjustified by the evidence, cannot be questioned; and, under its power to modify a judgment, or to attach a condition to its revisory action, it is not to be denied that it may require a part of the verdict to be remitted, thereby, in effect, imposing its own judgment in the place of the judgment of the jury; but such practice must always be attended with doubt, and when the court does undertake to disturb a verdict as excessive under an assignment of damages given under the influence of passion or prejudice, and bases its decision upon the fact that the verdict is merely greater than courts customarily allow in cases of like character, or than appears to the court to be fair compensation for the injury suffered, and at the same time expressly exonerates the jury from any indication of passion or prejudice, two things must be apparent: First, the legislature may as well have stopped in the framing of subdivision 5, with the words, "excessive damages," or omitted that subdivision altogether, since the same thing may be more correctly done under subdivision 6; and, second, the work of juries in fixing the amount of damages for personal torts may as well be dispensed with. The cases collected in note 8, of this section, clearly illustrate this decidedly unsatisfactory state of the law.

[1] 6 Cal. 228.

[2] 6 Cal. 681.

the court said that it could not interfere "unless it clearly appears that injustice has been done." So in Aldrich v. Palmer,[3] Sanderson, C. J., delivering the opinion, said: "In actions for personal torts, the law does not attempt to fix any precise rule for the admeasurement of damages, but from the necessity of the case leaves their assessment to the good sense and unbiased judgment of the jury. Their verdict, as in all other cases, is subject to review by the court, but it will never be disturbed unless the amount of the damages is so obviously disproportionate to the injury proved as to justify the conclusion that the verdict is not the result of the cool and dispassionate consideration of the jury. The leading object of such actions is to obtain reasonable and just compensation for the injury sustained, comprehending both the present and the future. To ascertain what is a fair and just compensation in such cases is a judicial problem of difficult, if not impossible, solution. None, however, are more competent to its proper solution than the jury. Hence the courts have always sparingly exercised the power of granting new trials in such cases. Where the law furnishes no rule for the measurement of damages, their assessment is peculiarly the province of the jury, and the court will never interfere with their verdict merely on the ground of excess. Upon such a question the court has no right to substitute its opinions for that of the jury merely because it happens to differ from theirs." So in Boyce v. Cal. Stage Co.,[4] the same learned judge, delivering the opinion, said: "Nor can we disturb the verdict on the ground that the damages are excessive. The rule upon this point is well stated by Mr. Justice Wilde in Worster v. Proprietors of Canal Bridge, 16 Pick. 547—'In all cases where there is no rule of law regulating the assessment of damages, and the amount does not depend on computation, the judgment of the jury and not the opinion of the court is to govern, unless the damages are so excessive as to warrant the belief that the jury must have been influenced by partiality or prejudice, or have been misled by some mistaken view of the case. We do not consider whether or not we should have assessed the same amount of damages if the case had been submitted to the court to decide, for in a case like the present men of sound judgment may differ not a little in estimating the compensation which the circumstances

[3] 24 Cal. 513.

[4] 25 Cal. 460.

of the injury would justify; and it is the judgment of the jury and not that of the court which must govern. To justify the interposition of the court, the damages must be manifestly exorbitant.'" So in Wheaton v. N. B. & M. R. R.,[5] the court said that a verdict would not be disturbed "unless the amount is so large as to induce a reasonable person upon hearing the circumstances to declare it outrageously excessive, or as to suggest at the first blush passion, prejudice, or corruption on the part of the jury." So in Wilson v. Fitch,[6] Crockett, J., delivering the opinion, said: "'It is not, therefore, a case calling for punitive damages. Nevertheless, the law implies that every libelous publication causes some damage to the injured party, and it is the peculiar province of the jury to estimate the amount. The court will not interfere in such cases, unless the amount awarded is so grossly excessive as to shock the moral sense and to raise a reasonable presumption that the jury was under the influence of passion or prejudice."

So in Swain v. Fourteenth St. R. R. Co.,[6a] the court said:

"The amount of the verdict in this case is large, but we cannot say that it is suggestive of either passion or prejudice on the part of the jury. In fixing damages in this class of cases, much is left to the discretion of the jury; and when the verdict has been approved by the trial court, this court is not authorized to grant a new trial upon the ground of excessive damages, except in a case where it is plain that the verdict was not the result of the fair and honest judgment of the jury."

So in Howland v. Oakland C. St. Ry. Co.,[6b] the court, Van Fleet, J., delivering the opinion, said:

"While we might not, had the question rested with us, have awarded damages in so large an amount, yet we are unable, under all the circumstances, to say that the amount is so far excessive as to imply that it was awarded under the influence of passion or prejudice."

So in Mize v. Hearst,[6c] the court said:

" But, on well-settled principles, an appellate court is not warranted in setting aside the verdict of a jury on this ground, unless the amount of damages assessed is so unreasonably large

[5] 36 Cal. 590.
[6] 41 Cal. 363, 9 Morr. Min. Rep. 55.
[6a] 93 Cal. 179, 28 Pac. 829.
[6b] 110 Cal. 513, 42 Pac. 983.
[6c] 130 Cal. 630, 63 Pac. 30.

and extravagant as to show that the jury were actuated by passion, prejudice or corruption; "

So in Tedford v. Los Angeles Electric Co.,[64] the court said:

"The amount of damages awarded by the jury was, under the circumstances, quite large; a smaller amount would, perhaps, have been more just; but we cannot say that, as a matter of law, the verdict should be set aside on the ground of excessive damages."

So in Bonneau v. North Shore R. R. Co.,[65] the court said:

"It is claimed that the damages are excessive. We can only disturb a verdict in this class of cases when it appears that the damages are so excessive that the award can be sustained on no other theory than that it was the result of passion or prejudice on the part of the jury."

So in Gomez v. Scanlan,[66] the court said:

"A court is justified in overturning a verdict as excessive only where its amount is 'obviously so disproportionate to the injury proved as to justify the conclusion that the verdict is not the result of the cool and dispassionate discretion of the jury.' (Morgan v. Southern Pacific Co., 95 Cal. 501.)"

So in many other cases, similar language in support of the rule has been made use of.[67]

[64] 134 Cal. 76, 66 Pac. 76, 54 L. R. A. 85.

[65] 152 Cal. 406, 125 Am. St. Rep. 68, 93 Pac. 106.

[66] 155 Cal. 528, 102 Pac. 12.

[67] *California:* Harris v. Zanone, 93 Cal. 59, 28 Pac. 845; Smith v. Whittier, 95 Cal. 279, 30 Pac. 529; Gorman v. Southern Pacific Co., 97 Cal. 1, 33 Am. St. Rep. 157, 31 Pac. 1112; Lee v. Southern Pacific Co., 101 Cal. 118, 35 Pac. 572; Clare v. Sacramento etc. Co., 122 Cal. 504, 55 Pac. 326; Doolin v. Omnibus Cable Co., 125 Cal. 141, 57 Pac. 774; Roche v. Redington, 125 Cal. 174, 57 Pac. 890; Dunn v. Hearst, 139 Cal. 239, 73 Pac. 138; Kimic v. San Jose etc. Co., 156 Cal. 273, 104 Pac. 312; Hale v. San Bernardino etc. Co., 156 Cal. 713, 106 Pac. 83; Valente v. Sierra etc. Co., 158 Cal. 412, 111 Pac. 95; James v. Oakland etc. Co., 10 Cal. App. 785, 103 Pac. 1082; Scally v. Garratt, 11 Cal. App. 138, 104 Pac. 325; Clark v. Tulare etc. Co., 14 Cal. App. 414, 112 Pac. 564.

Colorado: Wall v. Livezay, 6 Colo. 465; Denver v. Dunsmore, 7 Colo. 328, 3 Pac. 705; Sanderson v. Frazier, 8 Colo. 79, 54 Am. Rep. 544, 5 Pac. 632; Colorado Midland Co. v. O'Brien, 16 Colo. 219, 27 Pac. 701; Denver v. Stein, 25 Colo. 125, 53 Pac. 283; Union etc. Co. v. Crawford, 29 Colo. 511, 69 Pac. 600, 22 Morr. Min. Rep. 213; Colorado Springs etc. Co. v. Petit, 37 Colo. 326, 86 Pac. 121; Colorado Springs etc. Co. v. Nichols, 41 Colo. 272, 92 Pac. 691, 20 L. R. A., N. S., 215; Denver etc. Co. v. Heckman, 45 Colo. 470, 101 Pac. 976; Colorado City v. Smith, 17 Colo. App. 172, 67 Pac. 909.

Idaho: Horn v. Canal Co., 7 Idaho, 640, 65 Pac. 145; McLean v. Lewiston, 8 Idaho, 472, 69 Pac. 478.

Montana: Sweeney v. Butte, 15 Mont. 274, 39 Pac. 286; Helena etc. Co. v. Lynch, 25 Mont. 497, 65 Pac. 919; Lewis v. Northern Pacific Co., 36 Mont. 207, 92 Pac. 469; Rand v. Butte etc. Co., 40 Mont. 398, 107 Pac. 87;

Where, however, the amount is so excessive as to show passion or prejudice on the part of the jury, a new trial will be awarded.

Neary v. Northern Pacific Co., 41 Mont. 480, 110 Pac. 226.

Nevada: Solen v. Railroad Co., 13 Nev. 106; Roberts v. Webster, 25 Nev. 94, 57 Pac. 180, 58 Pac. 411; Taylor v. Nevada etc. Co., 26 Nev. 415, 69 Pac. 858; Powell v. Nevada etc. Co., 28 Nev. 40, 78 Pac. 978; Christenson v. Floriston Co., 29 Nev. 552, 92 Pac. 210; Murphy v. Southern Pacific Co., 31 Nev. 120, 101 Pac. 322; Burch v. Southern Pacific Co. (Nev.), 104 Pac. 225.

New Mexico: Waldo v. Beckwith, 1 N. M. 182; Schmidt v. Southwestern etc. Co. (N. M.), 107 Pac. 677.

North Dakota: Flugel v. Henschel, 6 N. D. 205, 69 N. W. 195.

Oklahoma: St. Louis etc. Co. v. Richards, 23 Okl. 256, 102 Pac. 92, 23 L. R. A., N. S., 1032; Chicago etc. Co. v. Wehrman, 25 Okl. 147, 105 Pac. 328.

Oregon: Adcock v. Oregon etc. Co., 45 Or. 173, 77 Pac. 78; Sorensen v. Oregon Power Co., 47 Or. 24, 82 Pac. 10; Doyle v. Southern Pacific Co. (Or.), 108 Pac. 201.

South Dakota: Murray v. Leonard, 11 S. D. 22, 75 N. W. 272; Davis v. Holy Terror Co., 20 S. D. 399, 107 N. W. 374; Hanson v. Henderson, 20 S. D. 456, 107 N. W. 670.

Utah: Bowers v. Union Pacific Co., 4 Utah, 215, 7 Pac. 251; Griffiths v. Clift, 4 Utah, 462, 11 Pac. 609; Daniels v. Union Pacific Co., 6 Utah, 357, 23 Pac. 762; Chapman v. Southern Pacific Co., 12 Utah, 30, 41 Pac. 551.

Washington: Robinson v. Marino, 3 Wash. 434, 28 Am. St. Rep. 50, 28 Pac. 752; Sears v. Seattle etc. Co., 6 Wash. 227, 33 Pac. 389, 1081; Sutton v. Snohomish, 11 Wash. 24, 48 Am. St. Rep. 847, 39 Pac. 273; Lorence v. Ellensburgh, 13 Wash. 341, 52 Am. St. Rep. 42, 43 Pac. 20; Roth v. Union Depot Co., 13 Wash. 525, 43 Pac. 641, 44 Pac. 253, 31 L. R. A. 855; Ogle v. Jones, 16 Wash. 319, 47 Pac. 747; Smith v. Spokane, 16 Wash. 403, 47 Pac. 888; Rush v. Spokane etc. Co., 23 Wash. 501, 63 Pac. 500; Uren v. Golden Tunnel Co., 24 Wash. 261, 64 Pac. 174, 21 Morr. Min. Rep. 261; Jordan v. Seattle, 30 Wash. 298, 70 Pac. 743; Selby v. Vancouver, 32 Wash. 522, 73 Pac. 504; Young v. O'Brien, 36 Wash. 570, 79 Pac. 211; Froman v. Ayars, 42 Wash. 385, 85 Pac. 14; Ashley v. Aberdeen, 46 Wash. 385, 90 Pac. 210; Jordan v. Seattle, 47 Wash. 503, 92 Pac. 284; Adams v. Peterman Co., 47 Wash. 484, 92 Pac. 339; Larsen v. City, 49 Wash. 134, 94 Pac. 938; Garthley v. Seattle etc. Co., 49 Wash. 616, 96 Pac. 155; Tills v. Great Northern Co., 50 Wash. 536, 97 Pac. 737; Reeks v. Seattle etc. Co., 54 Wash. 609, 104 Pac. 126; Breeden v. Seattle etc. Co. (Wash.), 111 Pac. 771; Bluher v. Earles (Wash.), 111 Pac. 1057; Haggard v. Seattle (Wash.), 112 Pac. 503.

And see cases cited in note 8, below.

In the case of Bond v. United Railroads of San Francisco, 159 Cal. 270, 113 Pac. 366, it was said by Shaw, J., that the power of the appellate court "over excessive damages exists only when the facts are such that the excess appears as a matter of law, or is such as to suggest at first blush passion, prejudice or corruption on the part of the jury." In view of the other decisions of the supreme court on this subject herein cited, it would seem that the learned justice erred in stating that the revisory power of the court can be exercised on the ground that a verdict is excessive *as a matter of law*. It is well settled in this state that the only ground of reversal for excessive damages is that of the amount being such as to suggest passion or prejudice on the part of the jury. Indeed, this position necessarily follows from the wording of subdivision 5 of section 657, Code of Civil Procedure, which prescribes, as a ground for the granting of a new trial, "excessive damages appearing to have been given under the influence of passion or prejudice." From the wording of the statute it would appear, also, that the statement that the excess must be such as to suggest *corruption* on the part of the jury is unwarranted. This expression appears not only in the opinion of

Thus in Morgan v. Southern Pacific Co.,[6h] where there was no averment in the complaint of any special damage, and no averment of any damage at all, except the general statement that the child died, "to the damage of plaintiff in the sum of fifty thousand dollars," and there was no evidence whatever introduced or offered upon the subject of damage, the court said:

" The jury, therefore, had nothing before them upon which to base damages, except the naked fact of the death of a female child two years old; and it is apparent at first blush that 'the amount of the damages is obviously so disproportionate to the injury proved as to justify the conclusion that the verdict is not the result of the cool dispassionate discretion of the jury.' "

And in Sloane v. Southern California Ry. Co.,[6k] the court said:

" While the amount of damages that may be awarded in a case like the present is in the discretion of the jury, it must be a reasonable, and not an unlimited, discretion, and must be exercised intelligently and in harmony with the testimony before them. We think that the jury in the present case must have been influenced by other considerations than the testimony before them in arriving at the amount of their verdict."

So in Sherwood v. Kyle,[6l] the court said:

"It is true that in actions for damages for a personal tort the court should not substitute its judgment for that of the jury. The judge should not grant a new trial merely because he deems the

Justice Shaw, above cited, but in the opinions rendered in Wheaton v. N. B. & M. R. R. Co., 36 Cal. 590, Howland v. Oakland C. St. Ry. Co., 110 Cal. 513, 42 Pac. 983; Mize v. Hearst, 130 Cal. 630, 63 Pac. 30, and Hale v. San Bernardino etc. Co., 156 Cal. 713, 106 Pac. 83. The statutory provision, which deals with suggestions of passion or prejudice, excludes suggestions of corruption. The point is not merely a verbal one, because, to justify the granting of a new trial, under the subdivision here considered, it must be made to appear to the trial court, not only that the damages are excessive, but that the excess is due to the influence of passion or prejudice. If he knows or believes that the jury was not prejudiced or under the influence of passion, but was simply corrupt and influenced by money, it would seem, if the statute is to be taken literally, that the ground for a new trial must be sought under the second subdivision of the section. But even if this strict construction of subdivision 5 be untenable, it is evident that corruption of the jury does not come within its terms. The same remark may be made as to the language used in some of the cases above cited to the effect that a new trial may be awarded when the amount of the damages warrants the conclusion that the verdict is not the result of the cool and dispassionate consideration of the jury. There is no such statutory ground for a new trial.

[6h] 95 Cal. 510, 29 Am. St. Rep. 143, 30 Pac. 603, 17 L. R. A. 71.

[6k] 111 Cal. 668, 44 Pac. 320, 32 L. R. A. 193.

[6l] 125 Cal. 652, 58 Pac. 270.

verdict excessive, unless it is so excessive as to indicate that it was the result of passion or prejudice. But the motion for a new trial was based, in part, upon the ground of excessive damages given under the influence of passion or prejudice. The court sustained this contention, holding that the damages were given under the influence of passion or prejudice. The learned judge had advantages over us in regard to the matter. "

So in Fox v. Oakland etc. Co.,[6m] the court said:

"From these considerations we think it obvious, as contended, that the verdict was prompted by improper motives on the part of the jury. While it is the province of the latter to estimate the extent of the injury, the right is not arbitrary, but must be justly exercised within the evidence. And where it is apparent that the award 'is obviously so disproportionate to the injury proved as to justify the conclusion that the verdict is not the result of the cool and dispassionate discretion of the jury,' it will be set aside."

And so in other cases.[6n]

Where the damages are excessive, but the plaintiff is entitled to something, the usual course is for the court to make an order granting a new trial in case the plaintiff shall refuse to remit what the court considers the excess.

In Kinsey v. Wallace,[7] the supreme court directed a new trial conditionally upon the plaintiffs refusing to remit the excess, and

[6m] 118 Cal. 55, 62 Am. St. Rep. 216, 50 Pac. 25.

[6n] See Fisher v. Southern Pacific Co., 89 Cal. 399, 26 Pac. 894; Clowdis v. Flume etc. Co., 118 Cal. 315, 62 Am. St. Rep. 238, 50 Pac. 373; and see Lee v. Southern Pacific Co., 101 Cal. 118, 35 Pac. 572; Harrison v. Sutter Street Co., 116 Cal. 156, 47 Pac. 1019; and see cases cited in note 7, below.

See, also, Deep Mining Co. v. Fitzgerald, 21 Colo. 533, 43 Pac. 210; Page v. Yool, 28 Colo. 464, 65 Pac. 636; Denver etc. Co. v. Scott, 34 Colo. 99, 81 Pac. 763; Maloney v. Winston, 18 Idaho, 740, 111 Pac. 1080; Kennon v. Gilmer, 5 Mont. 257, 51 Am. Rep. 45, 5 Pac. 847; S. C., 9 Mont. 108, 22 Pac. 448; Hamilton v. Great Falls Co., 17 Mont. 334, 42 Pac. 860, 43 Pac. 713; Quigley v. Railroad Co., 11 Nev. 350, 21 Am. Rep. 757; Brown v. Southern Pacific Co., 7 Utah, 288, 26 Pac. 579; Vowell v. Issaquah Co., 31 Wash. 103, 71 Pac. 725; McDannald v. Washington etc. Co., 31 Wash. 585, 72 Pac. 481; Shaw v. Seattle, 39 Wash. 590, 81 Pac. 1057; Wright v. Beardsley, 46 Wash. 16, 89 Pac. 172; Barclay v. Puget Sound etc. Co., 48 Wash. 241, 93 Pac. 430, 16 L. R. A., N. S., 140; Hemenway v. Washington etc. Co., 49 Wash. 338, 95 Pac. 269; Pate v. Columbia etc. Co., 52 Wash. 166, 100 Pac. 324; Mueller v. Washington etc. Co., 56 Wash. 556, 106 Pac. 476; Union Pacific Ry. Co. v. Hause, 1 Wyo. 27.

[7] 36 Cal. 462. The decision was by a divided court, however. See, also, Swett v. Gray, 141 Cal. 63, 74 Pac. 439; and see section 166, *post*.

Also, see Sherwood v. Kyle, 125 Cal. 652, 58 Pac. 270; and Sloane v. Southern California etc. Co., 111 Cal. 668, 44 Pac. 320, 32 L. R. A. 193.

Crockett, J., delivering the opinion of a majority of the court, said: "There is no inflexible or definite rule by which courts can be governed in reviewing verdicts in such cases, and each case must, in the nature of things, depend more or less on its own circumstances. But whilst we do not desire to restrict juries within very narrow limits in assessing damages in this class of cases, the ends of justice demand that we should not allow verdicts to stand which so far exceed all reasonable bounds as to raise a just presumption that they proceeded from passion or prejudice. We think this verdict is of that character, and we deem it to be our duty to reverse the judgment for that reason, unless the plaintiff shall remit the excess."

Neither the source of this power nor the reason of the rule is very clear,[7a] although, as a rule of practice, it has been long recognized in connection with the sixth ground for a new trial, insufficiency of the evidence. But, in connection with the ground of excessive damages, it is by no means uniformly accepted. In cases where the injury sustained is readily measured by well-understood legal standards, and the damages computed according to clearly defined rules, the court may, with the evidence before it, not only say whether the amount of the verdict is justified by the evidence, but may go further, and, if that amount is not justified, may say what the compensation really ought to be. But, as already stated, these are not the kind of cases to which the subdivision under consideration is properly applicable; and, where there is no standard of computation, there is no rule of measurement. The amount that will compensate the injured person rests solely with the discretion of the jury, and the exercise of such discretion can be disturbed only for its abuse; and, even if the abuse is manifest, the court cannot say what the amount ought to be. The question is not whether the amount of the verdict is great or small, or whether the verdict is justified by the evidence, or otherwise, but whether the jury abused its discretion by allowing itself to be influenced by passion or prejudice in determining the amount justly due.[7b]

[7a] Latter part of note 6g herein.

[7b] See notes 2a and 2b, section 94, *ante*. The following cases illustrate the principle. In Williams v. Williams, 20 Colo. 51, 37 Pac. 614, it was held that in an action for damages for enticing away husband or wife there was no absolute rule as to measure of damages, and that it rested solely in the discretion of the jury. In Union etc. Co. v. Smith, 16 Colo. 361, 27 Pac. 329, the same was held in an action for false imprisonment. So in Leitensdorfer v. King, 7 Colo. 436, 4 Pac. 37, as to attorney's fees fixed by a jury. In Horn v.

A study of the cases is essential to an understanding of varying views of the courts upon the subject.[76]

Canal Co., 7 Idaho, 640, 65 Pac. 145, and McLean v. Lewiston, 8 Idaho, 472, 69 Pac. 478, it was held that where it is not possible to measure the damages by some recognized legal standard, it is a question for the discretion of the jury solely, and the exercise of such discretion will not be disturbed except for abuse. The question is not whether the amount of the verdict is great or small, but whether the jury had abused its lawful discretion by allowing bias or prejudice to enter into its computation.

In Wall v. Livezay, 6 Colo. 465, and Denver v. Dunsmore, 7 Colo. 328, 3 Pac. 705, it was held that in personal injury cases the amount of damages rests largely in the sound discretion of the jury. So in St. Louis etc. Co. v. Richards, 23 Okl. 256, 102 Pac. 92, 23 L. R. A., N. S., 1032; Bourke v. Butte etc. Co., 33 Mont. 267, 83 Pac. 470; and Campbell v. Wheelihan-Weidauer Co., 45 Wash. 675, 89 Pac. 161, similar language was made use of. An attempt is sometimes made to fix a standard of computation for physical injuries; as, for example, $500 for the loss of a finger, $1,000 for the loss of a thumb, $2,500 for the loss of a left hand, $5,000 for the loss of a right hand, $7,500 for the loss of an eye, $15,000 for total blindness, and so on, leaving only the damages for the pain, humiliation, etc., to the arbitrary judgment of the jury; but such a standard is itself wholly arbitrary, and not easily distinguishable from judicial legislation, and results in reducing the right of trial by jury to a meaningless shadow. See the case of Maloney v. Winston (Idaho), 111 Pac. 1080, where a more or less complete list of authorities on the subject are to be found. See Sweeney v. Butte, 15 Mont. 274, 39 Pac. 286; Sanderson v. Frazier, 8 Colo. 79, 54 Am. Rep. 544, 5 Pac. 632; Kennon v. Gilmer, 5 Mont. 257, 51 Am. Rep. 45, 5 Pac. 847.

[76] The following cases seem to support the power of the trial court to require a remission of the excess where the damages were clearly excessive. In Dorsett v. Crew, 1 Colo. 18, interest was allowed, contrary to law. The court required that the excess be remitted, or a new trial would be granted. In Citizens' etc. Co. v. Stanley, 6 Colo. App. 181, 40 Pac. 693, the claim was for $208. A verdict for $275 was required to be reduced. (In this case, the ground for the motion was insufficiency.) In Denver v. McAllister, 6 Colo. 261, and Cross v. Moffatt, 11 Colo. 210, 17 Pac. 771, errors in computation were required to be corrected to avoid a new trial, and in Hochmark v. Richter, 16 Colo. 263, 26 Pac. 818, it was held that where there was a manifest error in the computation, the plaintiff had a right to remit the excess, and could not be compelled to submit to a second trial. And this principle was upheld in the following cases: Consolidated etc. Co. v. Raber, 1 Colo. 511, 1 Morr. Min. Rep. 405; Chapin v. Goodell, 2 Colo. 608; Winnie v. Colorado Springs Co., 3 Colo. 155; Duncan v. Whedbee, 4 Colo. 143; Bissell v. Cushman, 5 Colo. 76; Denver etc. Co. v. McAllister, 6 Colo. 261; Cross v. Moffat, 11 Colo. 210, 17 Pac. 771. In Central v. Wilcoxen, 3 Colo. 566, however, it was held that the excess must be some certain and definite amount, and that plaintiff could not remit a definite amount to cover an indeterminate error. In Winnie v. Colorado Springs, 3 Colo. 155, Duncan v. Whedbee, 4 Colo. 143, and Consolidated etc. Co. v. Raber, 1 Colo. 511, 1 Morr. Min. Rep. 405, it was held that the remission might take place in the supreme court.

In Teller v. Hartman, 16 Colo. 447, 27 Pac. 947, it was held that an error in including improper items in a verdict, for goods sold and delivered, might be cured by voluntary remission.

As a matter of course, voluntary remissions may be made, and cannot be attacked by other than the losing party. See Colorado City v. Liafe. 28 Colo. 468, 65 Pac. 630. And it is not error to give plaintiff an opportunity to remit the excess, and when he does,

to deny the motion for a new trial. See Chicago etc. Co. v. O'Marr, 25 Mont. 242, 64 Pac. 506; Schofield v. Territory, 9 N. M. 526, 56 Pac. 306; Ross v. Robertson, 12 N. D. 27, 94 N. W. 765; Bailey v. Cascade Timber Co., 35 Wash. 295, 77 Pac. 377; Doyle v. Edwards, 15 S. D. 648, 91 N. W. 322.

Upon the question as to whether the trial court has the power, against the objection of either party, to render judgment for the balance of the verdict after requiring the remission of an amount deemed to be excessive, and given under the influence of passion or prejudice, the courts are not united. In Southern Pacific Co. v. Fitchett, 9 Ariz. 128, 80 Pac. 359, denying this power, the court said:

"Upon this question there is an apparent conflict in the authorities, attributable in some measure to the varying provisions of the local codes. It seems to be well settled that in this class of actions any excess in the verdict above what the evidence satisfactorily establishes may, with the assent of the party in whose favor it is rendered, be eliminated by *remittitur*, and judgment entered for the residue. 'The exercise of such power,' it has been said, 'is sanctioned on the theory that the excess arises from misapprehension of the law or the facts, or error in computation, not necessarily permeating and vitiating the entire verdict, and which it is competent to correct, with the assent of the party whom alone the correction could prejudice, by striking therefrom any distinct item, or excess in the computation of its value, appearing to be unsupported by the evidence.' The rule is a salutary one, and, when employed with discretion, terminates litigation while promoting justice. But in that class of actions in which the opinion of the jury, unaided by any known standard of valuation, determines the magnitude of the recovery, the power of the court over an excessive verdict is considered by many authorities to be quite different. Although the verdict, if purged of any supposed excess, might, in the opinion of the court, be well sustained as to the residue by the facts disclosed, yet the manifest presence and influence of passion, prejudice, or partiality in producing the excess vitiates the verdict *in toto*, and, according to these authorities, excludes the power of the court to validate or save any part of it against the consent of either party. It was a theory of the common law that the money value of personal wrongs which could have no certain standard of measurement should not be committed to the arbitrament of a single mind, but should be measured by the average of impartial opinion, of which the concurrence of twelve minds, uninfluenced by passion, resentment, or corruption, would be a fair expression. 'It is the peculiar province of the jury,' observes a noted law-writer, 'to decide such cases under appropriate instructions from the court, and the law does not recognize in the latter the power to substitute its own judgment for that of the jury. Although the verdict may be considerably more or less than, in the judgment of the court, it ought to have been, still it will decline to interfere, unless the amount is so great or small as to indicate that the jury must have found it while under the influence of passion, prejudice, or gross mistake, or, in other words, that it is the result of accident or perverted judgment, and not of cool and impartial deliberation. When the verdict is thus excessive or deficient, the trial court, in its discretion, will interpose and set it aside.' 2 Sutherland on Damages, 3d ed., sec. 459. But when a verdict is tainted by the presence of any such infirmities, is it safe to permit any portion of it to stand as the basis of the judgment? If recklessness has controlled in measuring the extent, may it not be probable that it also controlled in determining the right of recovery? In Southern Pacific Co. v. Tomlinson, 4 Ariz. 126, 33 Pac. 710, this court, speaking through Mr. Justice Sloan, said: 'A trial court has the power, where excessive damages have been allowed by the

jury, and where the motion to set aside the verdict is based on this ground, to make a remission a condition precedent to overruling the motion. Of course, if it is apparent to the trial court that the verdict was the result of passion or prejudice, a *remittitur* should not be allowed, but the verdict should be set aside. In passing upon this question the court should not look alone to the amount of the damages awarded, but to the whole case.' The case which evoked the foregoing expression was an action based upon injuries resulting in death. It is therefore readily distinguishable from the case at bar, in the point that the damages therein were susceptible of accurate computation from the evidence. The supreme court of Georgia holds that, in suits to recover for personal injuries, it is not competent for the trial court to say that the verdict shall stand for any definite sum less than it designates, as a condition for refusing a new trial. Savannah etc. Ry. Co. v. Harper, 70 Ga. 119. The rule in that state is that, where general damages have been recovered for a personal tort, if they be so excessive as to lead the court to suspect bias or prejudice, the judge has no power to require a portion of the damages written off, and thereupon refuse a new trial; but it is otherwise where the damages claimed are special, and from the testimony can with accuracy be computed in dollars and cents, as in cases of tortious homicides. Savannah etc. Ry. Co. v. Godkin, 104 Ga. 655, 69 Am. St. Rep. 187, 30 S. E. 378. In Kentucky the trial court cannot, in an action to recover for personal injuries, require the plaintiff, in order to avoid a new trial, to accept a judgment for less than the verdict awards; and, if such judgment is accepted under protest, it will be reversed either upon the defendant's appeal or upon cross-appeal. Louisville etc. Ry. Co. v. Earl's Admr., 94 Ky. 368, 22 S. W. 607. The Texas courts denied the power to require a *remittitur* in actions to recover damages for torts, but the rule has been changed by statute. Texas etc. Ry. Co. v. Syfan, 91 Tex. 562, 44 S. W. 1064. The same view of the main question seems to be favored in West Virginia. Vinal v. Core, 18 W. Va. 1; Unfried v. Railroad Co., 34 W. Va. 260, 12 S. E. 512. It is also indorsed in Arkansas Railway Co. v. Hall, 53 Ark. 7, 13 S. W. 138. This is also the view in Missouri as to the supreme court, but not as to the trial courts. In Gurley v. Railway Co., 104 Mo. 211, 16 S. W. 11, it was said by the former court: 'Whenever the verdict does not, upon its face, appear to be the result of passion or prejudice, it is wholly within the province of the jury; but, when it does so appear, then it ought to be set aside. We have no scales by which we can determine what portion is just, and the result of reason, based upon the evidence, and what part is poisoned with passion or prejudice. We do not think it within our province to assess the damages. When we set aside any part of the verdict, we destroy its integrity, and we have no right to set ourselves up as triers of facts, and render another and a different verdict. We think the only logical course in such cases is to let the verdict stand or set it aside as an entirety.' The supreme court of Colorado had this subject under discussion in a recent and well-considered case, in which the authorities were reviewed, and an attempt made to distinguish and harmonize them. The conclusion there reached was that in an action for personal injuries, where the verdict was excessive, and apparently the result of passion or prejudice, the trial court could not order a *remittitur* of the excessive part and give judgment for the residue, but must grant a new trial. Davis Iron Works Co. v. White, 31 Colo. 82, 71 Pac. 384. The supreme court of the United States, speaking through Mr. Justice White, in Hansen v. Boyd, 161 U. S. 397, 16 Sup. Ct. Rep. 571, 40 L. ed. 746, said: 'The rule has been adopted by this court that it is proper either for the trial

court, upon an application for a new trial, or for an appellate court in reviewing a judgment, to permit the party in whose favor a verdict or judgment has been returned or entered to avoid the granting of a new trial on account of error affecting a part thereof, by entering a *remittitur* as to such erroneous part, when the court can clearly distinguish and separate the same.' The practice of ordering a *remittitur* within the limits of the last-mentioned rule involves no departure from sound principle, and is expressly sanctioned by our code. Paragraphs 1450, 1455, Revised Statutes of 1901. Authorities are also to be found which will support the practice in both appellate and trial courts of reducing judgments and verdicts, even in those cases where no standard of measurement exists, and although it be apparent that the jury's excessive finding must have been influenced by passion, prejudice, or a perverse disregard of justice, but we are disposed to question their soundness in principle. In the case at bar the trial court was of the opinion that more than half of the damages awarded for the appellee's 'injured feelings' were excessive. It was impossible to tell how the jury made up their verdict, but it was evidently not the result of cool and dispassionate consideration. Under these circumstances, we think it was not the province of the court to substitute its own estimate of the damages for that which it had rejected, but that the question of the proper sum to be awarded was one of fact, which should have been submitted to the determination of another jury."

Clearly, a distinction must be drawn between cases where the amount of the damages rests solely in the discretion of the jury, and those which may be computed by known and recognized standards. In the latter class of cases, the amount may be determined as readily by the court as by the jury, conceding that it is endowed with power to do so. In the other, the amount must be determined by the jury alone, since the law makes it the final arbiter in the matter; and if one jury abuses its discretion in the matter, another jury must be procured. But there is still another, and perhaps a stronger, reason, for the doctrine of the above case; i. e., the inference that if the amount is influenced by improper considerations, the finding itself may also be tainted. "If it can be seen and fairly said the jury gave the excessive verdict by reason of prejudice, passion or other improper motive, a new trial should be awarded, for the inference would be a fair one that the finding for the plaintiff was brought about by improper influences." See Davis etc. Co. v. White, 31 Colo. 82, 71 Pac. 384, quoting from Burdict v. Railway Co., 123 Mo. 221, 45 Am. St. Rep. 528, 27 S. W. 453, 26 L. R. A. 384.

In the Davis case, *supra*, the conclusion was as follows: "Where, in an action for personal injuries, and others standing on like grounds, a verdict is excessive, and was returned as the result of passion or prejudice upon the part of the jury, it should be set aside in its entirety, and a new trial awarded." And that, "It is beyond the power of a trial court to order a *remittitur* as to the part which it deems excessive, and enter judgment for the residue, because the entire verdict is vitiated by the improper motive, and it is impossible for the court to determine that any particular part is free from objection, and some other part is bad."

A review of the cases goes very far to sustain this view. In Salida v. McKinna, 16 Colo. 523, 27 Pac. 810, sometimes cited in support of the theory that the court may remit a part of an excessive verdict as a condition to denying a motion for a new trial, the excess was clearly traced to the admission of improper testimony, and not to passion or prejudice. In Sills v. Hawes, 14 Colo. App. 157, 59 Pac. 422, the action was for unlawful taking and conversion of personal property. Hence, the damages were such as might be computed by recognized legal standards. In the

If the plaintiff expressly waives the excess complained of, the court may make an unconditional order denying the motion, but the waiver should be recited therein.[7d]

As above stated, damages which cannot be measured or computed according to legal standards, or known and established rules, are necessarily left to the "sound discretion" or "dispassionate judgment" of the jury.[7e] Such damages, as contradistinguished from those which may be so measured and computed, are commonly defined as *discretionary*.[7f] Damages of this character are within

cases first above cited, either no objection was raised, or the privilege of making a remission was asked and granted. In Caldwell v. Willey, 16 Colo. 169, 26 Pac. 161, the basis for the damages asked was breach of contract, and the same remark applies. Besides it was the opinion of the court that the verdict should have been unhesitatingly set aside on the ground of bias and prejudice, or improper motives in computing the amount of the verdict. In Elevator Co. v. Craddock, 5 Colo. App. 203, 37 Pac. 950, it was said that when the verdict is evidently the result of bias or prejudice, it should always be set aside. See, also, Bell v. Morse, 48 Kan. 601, 29 Pac. 1086; Adcock v. Oregon etc. Co., 45 Or. 173, 77 Pac. 78; Sorenson v. Oregon etc. Co., 47 Or. 24, 82 Pac. 10; Hanson v. Henderson, 20 S. D. 456, 107 Pac. 670.

The subject is greatly shrouded in doubt, and nothing short of a study of the cases themselves will serve to elucidate it fully. It may be said, however, that while the supreme court of Washington has gone very far in the revision of excessive verdicts apparently given under the influence of passion or prejudice, and much further than any other court, it is doubtful if that court, even, would hold differently from the above. Out of a very large number of cases where a remission was adjudged, a small proportion only is noted of verdicts thus reduced originally tainted by passion or prejudice, and expressly so determined. See Lewis v. Northern Pacific Co., 36 Mont. 207, 92 Pac. 469; Ross v. Robertson, 12 N. D. 27, 94 N. W. 765; Lohr v. Honsinger (N. D.), 128 N. W. 1035; Doyle v. Edwards, 15 S. D. 648, 91 N. W. 322; Mostellar v. Holborn, 20 S. D. 545, 108 N. W. 13; Reddon v. Union Pacific Co., 5 Utah, 344, 15 Pac. 262; Brown v. Southern Pacific Co., 7 Utah, 288, 26 Pac. 579; Mahood v. P. V. Coal Co., 8 Utah, 85, 30 Pac. 149; English v. Southern Pacific Co., 13 Utah, 407, 57 Am. St. Rep. 772, 45 Pac. 47; Yost v. Tracy, 13 Utah, 431, 45 Pac. 346; Kohler v. Fairhaven, 8 Wash. 452, 36 Pac. 253, 681; Winter v. Shoudy, 9 Wash. 52, 36 Pac. 1049; Rigney v. Tacoma etc. Co., 9 Wash. 245, 37 Pac. 297; Washington v. Spokane etc. Co., 13 Wash. 9, 42 Pac. 628; McDonough v. Great Northern Co., 15 Wash. 244, 46 Pac. 334; Hughes v. Dexter Horton Co., 26 Wash. 110, 66 Pac. 109; Cogswell v. West etc. Co., 5 Wash. 46, 31 Pac. 411; Bailey v. Cascade Timber Co., 35 Wash. 295, 77 Pac. 377; Wait v. Robertson etc. Co., 37 Wash. 282, 79 Pac. 926; Walker v. McNeill, 17 Wash. 582, 50 Pac. 518; McDannald v. Railroad Co., 31 Wash. 585, 72 Pac. 481; Stone v. Seattle, 33 Wash. 644, 74 Pac. 808; Morrison v. Railroad Co., 34 Wash. 70, 74 Pac. 1064; Gallamore v. Olympia, 34 Wash. 379, 75 Pac. 978; Halverson v. Electric Co., 35 Wash. 600, 77 Pac. 1058; Williams v. Spokane etc. Co., 42 Wash. 597, 84 Pac. 1129, 44 Wash. 363, 87 Pac. 491.

[7d] Bentley v. Hurlburt, 153 Cal. 796, 96 Pac. 890.

[7e] See section 94, note 2a, *ante*, and cases cited; and see Lee v. Southern Pacific Co., 101 Cal. 118, 35 Pac. 572, and cases there cited.

[7f] It is not to be inferred that the jury is permitted to travel outside the evidence at will for information upon

the exclusive province of the jury, and its conclusion is not subject to review merely because the amount is in excess of what is justified by the evidence, or what the court itself, or another jury, would perhaps have fixed.[7g] It is only when the jury disregards the evidence, and gives damages in excess of that which may be said to be fairly sustained by the evidence, under the influence of passion or prejudice, that its action is subject to review on motion for new trial.[7h]

The question for review is not whether the verdict is justified by the evidence, or whether it is merely excessive, but whether it is so excessive as to indicate passion or prejudice.[7k] It is true, the court must first decide whether the verdict is excessive, and for this purpose it must weigh the evidence and consider the credibility of the witnesses, as though the motion were made on the "insufficiency of the evidence to justify the verdict or other decision."[7m]

The question is one addressed to the discretion of the trial court, and its action will not be disturbed except for clear abuse.[7n]

In the review of this exercise of discretion, the question for the determination of the appellate court depends upon whether the court below has granted or denied the motion—whether it has exercised its discretion or refused to exercise it. If the former, the appellate court is called upon to say whether the discretion was wisely exercised, or was abused; if the latter, the same question is presented to the appellate court as was presented to the trial court, viz., Was the verdict given under the influence of passion or prejudice? The appellate court, in reviewing the action of the court below in granting a new trial upon this ground, will not reverse the order merely because it differs with the trial court as to what would have been just compensation, unless the difference of opinion is such as to justify the conclusion that the court abused its dis-

which to fix the amount of their verdict. Damages of this character, as well as those defined as *actual*, depend upon and are deduced from the evidence.

[7g] See Lee v. Southern Pacific Co., 101 Cal. 118, 35 Pac. 572, and cases there cited.

[7h] See cases cited in note 6h et seq., above.

[7k] See cases above cited. And see Tedford v. Los Angeles etc. Co., 134 Cal. 76, 66 Pac. 76, 54 L. R. A. 85; Storrs v. Los Angeles Traction Co., 134 Cal. 91, 66 Pac. 72.

[7m] See Harrison v. Sutter Street Ry. Co., 116 Cal. 156, 47 Pac. 1019; Doolin v. Omnibus etc. Co., 125 Cal. 141, 57 Pac. 774.

[7n] See Lee v. Southern Pacific Co., 101 Cal. 118, 35 Pac. 572, and cases cited in note 7f, above. And see Ingraham v. Weidler, 139 Cal. 588, 73 Pac. 415.

cretion;[7p] nor, if there is a reasonable, or fairly debatable, justification for the granting thereof.[7q] But where the question comes, as may be said, straight from the jury, the court below having denied the motion for a new trial, the question whether the verdict is so disproportionate to the facts proved as to shock the moral sense, is uppermost, and unless passion or prejudice, one or the other, or both, is manifest, the order of denial will not be disturbed.[7r]

The rule as to conflict of evidence applies here, equally as in the case of a motion made on the insufficiency of the evidence.[7s]

Damages that are less than the injury suffered by the plaintiff justifies, as shown by the uncontradicted evidence produced, cannot be regarded as excessive.[8]

[7p] Lee v. Southern Pacific Co., 101 Cal. 118, 35 Pac. 572; and see, also, cases cited in note 7f, *supra*.

Also, Harris v. Zanone, 93 Cal. 59, 28 Pac. 845.

[7q] See Harrison v. Sutter Street Ry. Co., 116 Cal. 156, 47 Pac. 1019.

[7r] See Lee v. Southern Pacific Co., 101 Cal. 118, 35 Pac. 572, and cases there cited; and see cases cited in note 7f, *supra*. Also Harris v. Zanone, 93 Cal. 59, 28 Pac. 845.

To same effect, see Tedford v. Los Angeles Electric Co., 134 Cal. 76, 66 Pac. 76, 54 L. R. A. 85; and Storrs v. Los Angeles Traction Co., 134 Cal. 91, 66 Pac. 72.

[7s] Doolin v. Omnibus etc. Co., 125 Cal. 141, 57 Pac. 774. See, also, Clowdis v. Flume etc. Co., 118 Cal. 315, 62 Am. St. Rep. 238, 50 Pac. 373.

[8] Pereira v. Smith, 79 Cal. 232, 21 Pac. 739.

The following are instances of decisions in relation to applications for new trial on the ground of excessive damages: In 1856, $5,000 for breaking plaintiff's legs, one leg being shorter than the other as a result, was held not to be so excessive as to warrant the interference of the court. Taylor v. Cal. Stage Co., 6 Cal. 228. In the same year the court refused to disturb a verdict of $15,000 in a malicious attachment case, although that amount was "undoubtedly much more than the pecuniary damage proved." Weaver v. Page, 6 Cal. 681. It was afterward said by Sawyer, C. J. (Kinsey v. Wallace, 36 Cal. 462), that the decision in Weaver v. Page went "to the very verge of the rule requiring verdicts to be sustained by appellate courts where the ground of appeal is excessive damages." In 1864 it was held that the court could not disturb a verdict for $2,250 for an injury to plaintiff's foot, whereby he lost two of his toes and acquired a permanent limp. Aldrich v. Palmer, 24 Cal. 513. In the same year it was held that the court could not disturb a verdict of $16,500 for personal injuries of a very serious nature. Boyce v. Cal. Stage Co., 25 Cal. 460. In 1868 it was held that a verdict of $7,600 in a malicious attachment case was excessive, and the plaintiff was required to reduce it to $3,000, for which sum the verdict was allowed to stand. Kinsey v. Wallace, 36 Cal. 462. In Wilson v. Fitch, 41 Cal. 363, 9 Morr. Min. Rep. 155, it was held that the court could not say that a verdict for $7,500 for a libel by a newspaper was excessive. In Myers v. San Francisco, 42 Cal. 215, it was held that $5,000 for the death of a child was not excessive. In Russell v. Dennison, 45 Cal. 337, it was held that $7,000 in a malicious prosecution case was not excessive; but the court afterward, on rehearing, required plaintiff to remit one-half of the amount. 50 Cal. 243. In Siemers v. Eisen, 54 Cal. 418, it was held that $1,400 for personal injuries was not excessive. In Beeson v. Green Mountain G. M. Co., 57 Cal. 20, it was held that a verdict for $8,000, awarded to a widow for the death of her husband, was not excessive. So in Cook

v. Clay St. Hill R. R. Co., 60 Cal. 604, 9 Pac. C. L. J. 605, it was held that a verdict of $8,000, awarded to the widow and daughter of the deceased, was not excessive. So in Nehrbas v. C. P. R. R. Co., 62 Cal. 320, it was held that a verdict of $10,800, awarded to a father for the killing of his five children, was not excessive. In St. Ores v. McGlashen, 74 Cal. 148, 15 Pac. 452, $1,100 held not excessive for wanton attack on aged cripple. In Razzo v. Varni, 81 Cal. 289, 22 Pac. 848, $500 held not excessive for forcible trespass, accompanied by insult and fright to plaintiff's wife, causing prolonged illness. In O'Callaghan v. Bode, 84 Cal. 489, 24 Pac. 269, $3,000 held not excessive for injuries resulting in death of plaintiff's decedent, where he was a young man, twenty-three years old, of good habits, and the sole support of his mother (plaintiff) and her four minor children, to whom his earnings of forty or fifty dollars per month were given, and for whose benefit the judgment was given. In Dwyer v. Carroll, 86 Cal. 298, 24 Pac. 1015, $500 held not excessive for injury to property and business caused by enforced vacation of business premises on account of alterations and repairs. In Fisher v. Southern Pacific Co., 89 Cal. 399, 26 Pac. 894, $30,000 held excessive for personal injuries, where the evidence as to permanency and extent of plaintiff's injuries was conflicting, and tended to show that they were less serious than claimed. In Harris v. Zanone, 93 Cal. 59, 28 Pac. 845, $5,000 was held not excessive for libel. In Swain v. Fourteenth Street R. R. Co., 93 Cal. 179, 28 Pac. 829, $7,000 was held not excessive for personal injuries to police officer where the patrol wagon appeared to have been negligently run into by a car, and the officer severely injured. In Morgan v. Southern Pacific Co., 95 Cal. 501, 30 Pac. 601, $15,000 held not excessive for permanent injuries accompanied by continual suffering. In Gorman v. Southern Pacific Co., 97 Cal. 1, 33 Am. St. Rep. 157, 31 Pac. 1112, $500 was held not excessive for injuries caused by being expelled from train with unnecessary violence. In Marshall v. Taylor, 98 Cal. 55, 35 Am. St. Rep. 144, 32 Pac. 867, $25,000 held not excessive for seduction, where plaintiff was a chaste, virtuous female of sixteen years, and the defendant a man of wealth and standing, and the circumstances such as to show that the latter had a distinct advantage over the former in a contest of that kind. In Chapell v. Schmidt, 104 Cal. 511, 38 Pac. 892, $2,500 held not excessive for injuries caused by a wanton assault upon an infirm man. In Sloane v. Southern California Ry. Co., 111 Cal. 668, 44 Pac. 320, 32 L. R. A. 193, $1,400 was held excessive. In Warner v. Southern Pacific Co., 113 Cal. 105, 54 Am. St. Rep. 327, 45 Pac. 187, $5,000 held excessive for ejecting passenger from train. In McDowell v. Hyman, 117 Cal. 67, 48 Pac. 984, $900 was held not excessive for injury to property on account of accumulations of dust and debris from improvements to building. In Fox v. Oakland etc. Co., 118 Cal. 55, 62 Am. St. Rep. 216, 50 Pac. 25, $6,000 held excessive for death of infant child. In Clowdis v. Flume etc. Co., 118 Cal. 315, 62 Am. St. Rep. 238, 50 Pac. 373, $5,500 held not excessive for perhaps permanent injury. In Nofsinger v. Goldman, 122 Cal. 609, 55 Pac. 425, $5,000 held not excessive where plaintiff was nearly flayed by escaping steam caused by defendant's negligence. In Doolin v. Omnibus etc. Co., 125 Cal. 141, 57 Pac. 774, $20,000 held excessive. In Roche v. Redington, 125 Cal. 174, 57 Pac. 890, $4,000 held not excessive where injury resulted in permanently shortened limb. In Williams v. Casebeer, 126 Cal. 77, 58 Pac. 380, $2,000 held not excessive for malicious prosecution. In Clare v. Sacramento etc. Co., 122 Cal. 504, 55 Pac. 326, $2,000 held not excessive for injuries to sight, hearing and nervous system. In Mize v. Hearst, 130 Cal. 630, 63 Pac. 30, $2,650 held not excessive for libel. In Wahlgren

v. Market Street Ry. Co., 132 Cal. 656, 62 Pac. 308, 64 Pac. 993, $1,000 held not excessive for broken arm, where plaintiff was prevented thereby from working for three months. In Trabing v. California etc. Co. (Cal.), 65 Pac. 478, $1,500 held not excessive for wrongful ejection from defendant's vessel. In Storrs v. Los Angeles Traction Co., 134 Cal. 91, 66 Pac. 72, $2,000 was held not excessive for injuries of a more or less permanent character which seriously diminished plaintiff's capacity to earn money. In Sheyer v. Lowell, 134 Cal. 357, 66 Pac. 307, $300 held not excessive for injuries lasting nearly a year. In Tedford v. Los Angeles Electric Co., 134 Cal. 76, 66 Pac. 76, 54 L. R. A. 85, $15,000 held not excessive for injuries sustained by a shock of electricity. In Dolan v. Sierra etc. Co., 135 Cal. 435, 67 Pac. 686, $7,000 held not excessive for permanent injuries sustained in a railroad wreck. In Skelton v. Pacific Lumber Co., 140 Cal. 507, 74 Pac. 13, $18,000 held not excessive for injuries causing death of wage-earner, where there were other elements of damages within the consideration of the jury, although such sum might not be considered in accordance with said wage-earner's capacity. In Reeve v. Colusa etc. Co., 152 Cal. 99, 92 Pac. 89, $30,000 held not excessive under the circumstances. In Bonneau v. North Shore etc. Co., 152 Cal. 406, 93 Pac. 106, $7,500 held not excessive for permanent injuries where the cost of medical treatment was upward of $2,000. In Perkins v. Sunset etc. Co., 155 Cal. 712, 103 Pac. 190, $25,000 held not excessive under the circumstances.

In the following cases the appellate court declined to interfere with the amount of the verdict; but the report does not indicate clearly whether the question of the influence of passion or prejudice was raised or not. In other words, while the amount is attacked as excessive, in each instance, it does not appear whether the question was raised upon an assignment of "excessive damages appearing to have been given under the influence of passion or prejudice," or upon one of "insufficiency of the evidence to justify the verdict," etc.:

Arizona: Davis v. Simmons, 1 Ariz. 25, 25 Pac. 535; Hobson v. N. M. & A. R. Co., 2 Ariz. 171, 11 Pac. 545; Phoenix etc. Co. v. Landis (Ariz.), 108 Pac. 247.

California: Perkins v. Sunset etc. Co., 155 Cal. 712, 103 Pac. 190; Dow v. Sunset etc. Co., 157 Cal. 182, 106 Pac. 587; Klein v. Atchison etc. Co., 12 Cal. App. 285, 107 Pac. 147.

Colorado: Union Depot Co. v. Smith, 16 Colo. 361, 27 Pac. 329; Denver etc. Co. v. Gunning, 33 Colo. 280, 80 Pac. 727; Northern etc. Co. v. Allera, 46 Colo. 224, 104 Pac. 197; Manger v. Grodnick, 3 Colo. App. 534, 34 Pac. 688.

Idaho: York v. Pacific etc. Co., 8 Idaho, 574, 69 Pac. 1042; Tarr v. O. S. L. Ry. Co., 14 Idaho, 192, 125 Am. St. Rep. 151, 93 Pac. 957.

Montana: John v. Northern Pacific Co., 42 Mont. 18, 111 Pac. 632; Osterholm v. Boston etc. Co., 40 Mont. 508, 107 Pac. 499.

Nevada: Wedekind v. Southern Pacific Co., 20 Nev. 292, 21 Pac. 682; Paul v. Cragnas, 25 Nev. 293, 59 Pac. 857, 60 Pac. 983.

New Mexico: Schmidt v. Southwestern etc. Co. (N. M.), 107 Pac. 677.

Oklahoma: Oklahoma City v. Welsh, 3 Okl. 288, 41 Pac. 598; Long v. McWilliams, 11 Okl. 562, 69 Pac. 882.

Oregon: Skottowe v. Oregon etc. Co., 22 Or. 430, 30 Pac. 222, 16 L. R. A. 593.

Utah: Chipman v. Union Pacific Co., 12 Utah, 68, 41 Pac. 562; Johnson v. Union Pacific Co., 35 Utah, 285, 100 Pac. 390.

Washington: Columbia etc. Co. v. Hawthorne, 3 Wash. Ter. 353, 19 Pac. 25; Saunders v. United States etc. Co., 25 Wash. 475, 65 Pac. 782; Durham v. Spokane, 27 Wash. 615, 68 Pac. 383; Grissom v. Hofius, 39 Wash. 51, 80 Pac. 1002, 4 Ann. Cas. 125; Whelan v. Washington etc. Co., 41 Wash. 153, 111 Am. St. Rep. 1006, 83 Pac. 98; Curtis v. Barber Asphalt Co., 44 Wash. 334, 87 Pac. 345; Nor-

man v. Bellingham, 46 Wash. 205, 89 Pac. 559; Maloney v. Stetson etc. Co., 46 Wash. 645, 90 Pac. 1046; Connell v. Seattle etc. Co., 47 Wash. 510, 92 Pac. 377; Cook v. Chehalis etc. Co., 48 Wash. 619, 94 Pac. 189; Murray v. Seattle etc. Co., 50 Wash. 444, 97 Pac. 458; Matthews v. Spokane, 50 Wash. 107, 96 Pac. 827; Duskey v. Green Lake Co., 51 Wash. 145, 98 Pac. 99; Pearson v. Alaska Co., 51 Wash. 560, 130 Am. St. Rep. 1117, 99 Pac. 753; Nelson v. Western etc. Co., 52 Wash. 177, 100 Pac. 325; Harris v. Puget Sound etc. Co., 52 Wash. 289, 100 Pac. 838; Bugge v. Seattle etc. Co., 54 Wash. 483, 103 Pac. 824; Rood v. Seattle etc. Co., 55 Wash. 217, 104 Pac. 249; Hoseth v. Preston Mill Co., 55 Wash. 416, 104 Pac. 612; Wilson v. Seattle etc. Co., 55 Wash. 656, 104 Pac. 1114; Dunkin v. Hoquiam, 56 Wash. 47, 105 Pac. 149; Falldin v. Seattle, 57 Wash. 307, 106 Pac. 914; Alkire v. Myers Lumber Co., 57 Wash. 300, 106 Pac. 915; Kincaid v. Walla Walla etc. Co., 57 Wash. 334, 135 Am. St. Rep. 982, 106 Pac. 918; Olsen v. Gill etc. Co., 58 Wash. 151, 108 Pac. 140; Luper v. Henry, 59 Wash. 33, 109 Pac. 208; Pierce v. Spokane etc. Co., 59 Wash. 615, 110 Pac. 537; Denny v. Seattle etc. Co. (Wash.), 111 Pac. 450; Tecker v. Seattle etc. Co. (Wash.), 111 Pac. 791; Dukette v. Northwest etc. Co. (Wash.), 111 Pac. 1065; Cox v. Wilkenson etc. Co. (Wash.), 112 Pac. 231; Starck v. Washington etc. Co. (Wash.), 112 Pac. 235; Hall v. Northwest Co. (Wash.), 112 Pac. 369; Mrozevich v. Western etc. Corp. (Wash.), 112 Pac. 925; Myhra v. Chicago etc. Co. (Wash.) 112 Pac. 929; Yount v. Strickland, 17 Wyo. 526, 101 Pac. 942.

In Montague v. Hanson, 38 Mont. 376, 99 Pac. 1063, and Bourke v. Butte etc. Co., 33 Mont. 267, 83 Pac. 470, the court seemed to decide the question as upon the evidence. And the same may be said of Linforth v. San Francisco etc. Co., 156 Cal. 58, 103 Pac. 320. In neither of these cases was any reference made to the probability of passion or prejudice of the jury. In Easterly v. Eatonville etc. Co. (Wash.), 111 Pac. 876, the amount of the verdict was said to be "not flagrantly excessive." In Well v. Moran, 55 Wash. 102, 104 Pac. 172, it was said that the amount was not so disproportionate as to require to be set aside or reduced.

In the following cases the amount of the verdict was reduced, as being excessive; but, again, as in the preceding list, in each case there is a doubt as to which ground, whether five or six, was assigned, and determined by the court:

Colorado: Kilpatrick v. Inman, 46 Colo. 514, 105 Pac. 1080, 26 L. R. A., N. S., 188.

Montana: Yergy v. Helena etc. Co., 39 Mont. 213, 102 Pac. 310; Stewart v. Pillsbury etc. Co., 42 Mont. 200, 111 Pac. 723; Forquer v. North, 42 Mont. 272, 112 Pac. 439.

Utah: Mahood v. Pleasant Valley Co., 8 Utah, 85, 30 Pac. 149; Riley v. Salt Lake etc. Co., 10 Utah, 428, 37 Pac. 681; English v. Southern Pacific Co., 13 Utah, 407, 57 Am. St. Rep. 772, 45 Pac. 47.

Washington: Mitchell v. Tacoma etc. Co., 13 Wash. 560, 43 Pac. 528; Walker v. McNeill, 17 Wash. 582, 50 Pac. 518; Stone v. Seattle etc. Co., 33 Wash. 644, 74 Pac. 808; Morrison v. Northern Pacific Co., 34 Wash. 70, 74 Pac. 1064; Gallamore v. Olympia, 34 Wash. 379, 75 Pac. 978; Bailey v. Cascade Timber Co., 35 Wash. 295, 77 Pac. 377; Halverson v. Seattle etc. Co., 35 Wash. 600, 77 Pac. 1058; Hart v. Cascade Timber Co., 39 Wash. 279, 81 Pac. 738; Leeson v. Sawmill, 41 Wash. 423, 83 Pac. 891; Melse v. Alaska etc. Co., 42 Wash. 356, 84 Pac. 1127; Kirby v. Wheeler-Osgood Co., 42 Wash. 610, 85 Pac. 62; Smith v. Dow, 43 Wash. 407, 86 Pac. 555; Comrade v. Atlas etc. Co., 44 Wash. 470, 87 Pac. 517; Campbell v. Wheelihan-Weidauer Co., 45 Wash. 675, 89 Pac. 161; Meyers v. Syndicate Co., 47 Wash. 48, 91 Pac. 549; Robinson v. Spokane etc. Co., 47 Wash. 303, 91 Pac. 972; Ball v. Peterman etc Co.,

The amount of damages adjudged cannot go beyond the amount prayed for without being regarded as excessive.[9]

47 Wash. 653, 92 Pac. 425; Barclay v. Puget Sound etc. Co., 48 Wash. 241, 93 Pac. 430, 16 L. R. A., N. S., 140; Hemenway v. Washington etc. Co., 49 Wash. 338, 95 Pac. 269; Olsen v. Tacoma etc. Co., 50 Wash. 128, 96 Pac. 1036; Billings v. Snohomish, 51 Wash. 135, 98 Pac. 107; Rangenier v. Seattle etc. Co., 52 Wash. 401, 100 Pac. 842; Nelson v. Bromley, 55 Wash. 256, 104 Pac. 251; Smith v. Hewitt etc. Co., 55 Wash. 357, 104 Pac. 651; Helland v. Bridenstine, 55 Wash. 470, 104 Pac. 626; Ohrstrom v. Tacoma, 57 Wash. 121, 106 Pac. 629; Hase v. Seattle, 57 Wash. 230, 107 Pac. 515; Walters v. Spokane etc. Co., 58 Wash. 293, 108 Pac. 593; Swanson v. Pacific Co. (Wash.), 110 Pac. 795.

[9] Burke v. Koch, 75 Cal. 356, 17 Pac. 228.

CHAPTER XIV.

GROUNDS OF THE MOTION — INSUFFICIENCY OF THE EVIDENCE, ETC.

§ 96. The statute—Scope of subject.
§ 97. The motion made on this ground is addressed to the sound discretion of the trial court.
§ 98. Full weight must be given, upon a question of the insufficiency of the evidence, to evidence that would have been excluded, had objection been made, and to relevant evidence erroneously admitted.
§ 99. "Or that it is against law."
§ 99a. Vacation of judgment and entry of judgment under sections 663 and 663a, California Code of Civil Procedure.

§ 96. The Statute—Scope of the Subject.—The sixth subdivision of section 657 of the California Code of Civil Procedure is as follows: "Insufficiency of the evidence to justify the verdict or other decision, or that it is against law." This provision has been in the statute since 1851.[1] The language has been held to embrace two distinct matters, viz., "insufficiency of the evidence to justify the decision," and that "it is against law." These will be considered separately, the latter forming the subject of the last section of this chapter.

The insufficiency of the evidence is the ground upon which the motion should be made where it is claimed that the evidence given at the trial called for other findings or a different verdict. It is not the judgment, but the verdict or decision of facts, against which the attack should be directed. It is inexact to say that the judgment is not supported by the evidence.[2] The judgment rests upon the verdict or findings, and the verdict or findings upon the evidence. The judgment may be supported by the verdict or findings, which may be entirely unsupported by the evidence, and *vice versa*. When a party considers that the judgment is not supported by the findings or verdict, his only course is to appeal from the judgment.[3] When he desires to test the question whether the evidence justifies the verdict or findings, his ordinary course is to move for a new trial under the sixth subdivision, on the ground of the insufficiency of the evidence, etc.[4] This he may do whether there

[1] Laws of 1851, p. 81, sec. 193. See section 23, *ante*.

[2] See People v. Banvard, 27 Cal. 470; Martin v. Matfield, 49 Cal. 42.

[3] See section 1, *ante*.

[4] A motion to amend the findings would be irregular. Pico v. Sepulveda, 66 Cal. 336, 5 Pac. 515.

are written findings or not.[5] Before the adoption of the Code of Civil Procedure this was the only remedy of the party;[6] he could not present the question of the insufficiency of the evidence otherwise than on motion for new trial.[7] In the early cases it was held that this rule did not apply to equity cases, in which it was said that the court could review the evidence without a motion for new trial. But this doctrine was subsequently repudiated, and it was held that the rule applied to equity cases[8] as well as to other actions.[9]

[5] Within the meaning of the subdivision stipulations are evidence (Lorenzana v. Camarillo, 41 Cal. 467; Carpentier v. Small, 35 Cal. 346), unless the stipulation amounts to an agreed statement of facts. See section 249, *post*. If there are no express findings, the specifications of the insufficiency of the evidence should be directed at the implied findings. Reed v. Bernal, 40 Cal. 628; and look at Steinbach v. Krone, 36 Cal. 303; Morrill v. Chapman, 35 Cal. 85. Under the system of implied findings which prevailed between 1861 and 1873, if upon the submission of the cause written findings were requested, the party was entitled to wait until his request was complied with before proceeding with his motion for new trial. See Polhemus v. Carpenter, 42 Cal. 375. But if none were requested, and none were filed, it was necessary for him to determine for himself what were the ultimate facts upon which the judgment rested, and direct his specifications at such supposed findings. Reed v. Bernal, above. Under the system of express findings, as is elsewhere shown, it is incumbent upon the court to file findings, whether they are requested or not, unless they are waived. If they are waived, findings in support of the judgment are implied as under the old system (see section 239, note 18), and in such case it is necessary to direct the specifications of the insufficiency of the evidence at the implied findings as above explained.

[6] See cases cited in note 7, below.

[7] Griswold v. Sharpe, 2 Cal. 17; Brown v. Graves, 2 Cal. 118; Smith v. Phelps, 2 Cal. 120; Ingraham v. Gildermeester, 2 Cal. 483; Covillaud v. Tanner, 7 Cal. 39; Thompson v. Lee, 8 Cal. 275, 1 Morr. Min. Rep. 610; White v. Clark, 8 Cal. 513; Marzion v. Pioche, 8 Cal. 522; Garwood v. Simpson, 8 Cal. 101; Rhine v. Bogardus, 13 Cal. 73; Liening v. Gould, 13 Cal. 598; Myers v. Casey, 14 Cal. 542; Deputy v. Stapleford, 19 Cal. 302; Allen v. Fennon, 27 Cal. 68; Doll v. Anderson, 27 Cal. 248; Burnett v. Pacheco, 27 Cal. 408; People v. Banard, 27 Cal. 470; Buckout v. Swift, 27 Cal. 433, 87 Am. Dec. 90; Hihn v. Peck, 30 Cal. 280; Green v. Clark, 31 Cal. 591; James v. Williams, 31 Cal. 211; Racouillat v. Rene, 32 Cal. 450; Keeran v. Allen, 33 Cal. 542; Rice v. Inskeep, 34 Cal. 224; Reed v. Bernal, 40 Cal. 628; Yates v. Smith, 40 Cal. 662; Brown v. Brown, 41 Cal. 88; People v. Holloway, 41 Cal. 409; Rycraft v. Rycraft, 42 Cal. 444; City of Stockton v. Creanor, 45 Cal. 247. See, also, Floyd v. Colorado etc. Co., 10 Colo. App. 54, 50 Pac. 864; Ness v. Jones, 10 N. D. 587, 88 Am. St. Rep. 755, 88 N. W. 706; Whitmore v. Shiverick, 3 Nev. 288; Cooper v. Pacific Mutual etc. Co., 7 Nev. 116, 8 Am. Rep. 705; James v. Goodenough, 7 Nev. 324; Conley v. Chedwick, 7 Nev. 336; Burbank v. Rivers, 20 Nev. 81, 16 Pac. 430; Tacoma etc. Co. v. Barlow, 12 Wash. 21, 40 Pac. 380.

For an exhaustive discussion of this subject, see Emerson v. Ditch Co., 18 Mont. 247, 44 Pac. 969.

[8] See section 7; and also Duff v. Fisher, 15 Cal. 375; Gagliardo v. Hoberlin, 18 Cal. 394; Green v. Butler, 26 Cal. 595; Allen v. Fennon, 27 Cal. 68; Harris v. S. F. S. Co., 41 Cal. 393; and see Laws of 1861, p. 589. To same effect, see Thompson v. White, 63 Cal. 505; Pico v. Sepulveda, 66 Cal. 336, 5 Pac. 515.

[9] The rule applied although the evidence is all one way. Reed v. Bernal, 40 Cal. 628; look at Brown v.

But this rule, so well settled under the old Practice Act, was changed by the Code of Civil Procedure. The code provided that the question of the insufficiency of the evidence may be presented on appeal from the judgment, provided the appeal be taken within sixty days from the rendition of the judgment;[10] to that extent the old rule is changed. But the code does not take away the right to present the question on motion for new trial; the two remedies are concurrent.

Where a party attacks a verdict or other decision of fact on the ground that it is not supported by the evidence, he must, as is elsewhere shown, specify the particulars wherein the evidence is insufficient.[11] In the absence of the evidence the findings are conclusive.[12]

§ 97. A Motion for New Trial on the Ground of the Insufficiency of the Evidence is Addressed to the Sound Discretion of the Trial Court.—As is elsewhere shown, the supreme court will not disturb the ruling of the court below upon a motion for new trial on the ground under consideration, if there be a substantial conflict in the evidence.[1] The multitude of decisions laying down this rule proceed upon the theory that the motion is addressed to the discretion of the judge; and that it is so addressed has been frequently decided;[2]

Brown, 41 Cal. 88. It applied to cases tried by a referee. Hihn v. Peck, 30 Cal. 280; and look at section 8.

[10] See section 204, *post* (note 9a).

[11] See section 150, *post*.

[12] See section 285, *post* (note 2).

[1] See section 288, *post*.

[2] *California:* Watson v. McClay, 4 Cal. 288; Weddle v. Stark, 10 Cal. 301; Burnett v. Whitesides, 15 Cal. 35; Quinn v. Kenyon, 22 Cal. 82; O'Brien v. Brady, 23 Cal. 243; Hall v. Bark Emily Banning, 33 Cal. 522; Harrison v. Peabody, 34 Cal. 178; Phelps v. Union M. C. Co., 39 Cal. 407; Pierce v. Shaden, 55 Cal. 406; Bronner v. Wetzlar, 55 Cal. 419; Gerold v. Brunswick-Balke etc. Co., 67 Cal. 124, 7 Pac. 306; Pico v. Cohn, 67 Cal. 258, 7 Pac. 680; Breckinridge v. Crocker, 68 Cal. 403, 9 Pac. 426; Nally v. McDonald, 77 Cal. 284, 19 Pac. 418; Grigsby v. Schwartz, 82 Cal. 278, 22 Pac. 1041; Curtiss v. Starr, 85 Cal. 376, 24 Pac. 806; Bjorman v. Fort Bragg etc. Co., 92 Cal. 500, 28 Pac. 591; Domica v. Casassa, 101 Cal. 411, 35 Pac. 1024; Cole v. Wilcox, 99 Cal. 549, 34 Pac. 114; Jones v. Sanders, 103 Cal. 678, 37 Pac. 649; In re Carriger, 104 Cal. 81, 37 Pac. 785; Bates v. Howard, 105 Cal. 173, 38 Pac. 715; Warner v. Thomas, 105 Cal. 409, 38 Pac. 960; Anderson v. Hinshaw, 110 Cal. 682, 43 Pac. 389; In re Martin, 113 Cal. 479, 45 Pac. 813; Brooks v. San Francisco etc. Ry. Co., 110 Cal. 173, 42 Pac. 570; Bledsoe v. Decrow, 132 Cal. 312, 64 Pac. 397; Hausmann v. Sutter Street Ry. Co., 139 Cal. 174, 72 Pac. 905; Drathman v. Cohen, 139 Cal. 310, 73 Pac. 181; Lyon v. Aronson, 140 Cal. 365, 73 Pac. 1063; Cooper v. Spring Valley Water Co., 145 Cal. 207, 78 Pac. 654; Cutten v. Pearsall, 146 Cal. 690, 81 Pac. 25; Baldwin v. Napa Wine Co., 1 Cal.

App. 215, 81 Pac. 1037; Central Trust Co. of California v. Stoddard, 4 Cal. App. 647, 88 Pac. 806; Wehner v. Bauer, 10 Cal. App. 171, 101 Pac. 417; Crocker v. Garland, 4 Cal. App. 13, 87 Pac. 209; Kramm v. Stockton etc. Co., 3 Cal. App. 606, 86 Pac. 738, 903; Morgan v. L. A. P. Co., 13 Cal. App. 12, 108 Pac. 735; Eidinger v. Sigwart, 13 Cal. App. 667, 110 Pac. 521; Witter v. Redwine, 14 Cal. App. 393, 112 Pac. 311.

Colorado: Tiger v. Lincoln, 1 Colo. 394; Murphy v. Cunningham, 1 Colo. 467; Matthews v. Glines, 1 Colo. 472.

Idaho: Buckle v. McConaghy, 12 Idaho, 733, 88 Pac. 100; Wolfe v. Ridley, 17 Idaho, 173, 104 Pac. 1014; Walsh v. Winston, 18 Idaho, 768, 111 Pac. 1090.

Montana: Chauvin v. Valiton, 7 Mont. 581, 19 Pac. 215; McCauley v. Tyler, 11 Mont. 51, 27 Pac. 391; Murray v. Heinze, 17 Mont. 353, 42 Pac. 1057, 43 Pac. 714; Beckstead v. Montana etc. Co., 19 Mont. 147, 47 Pac. 795; Hamilton v. Nelson, 22 Mont. 539, 57 Pac. 146; Case v. Kramer, 34 Mont. 142, 85 Pac. 878; Fournier v. Coudert, 34 Mont. 484, 87 Pac. 455; Ettien v. Drum, 35 Mont. 81, 88 Pac. 659; White v. Barling, 36 Mont. 413, 93 Pac. 348; Mullen v. Butte, 37 Mont. 183, 95 Pac. 597; Hamilton v. Monidah etc. Co., 39 Mont. 269, 102 Pac. 335; Welch v. Nichols, 41 Mont. 435, 110 Pac. 89; Flaherty v. Butte etc. Co., 42 Mont. 89, 111 Pac. 348.

Nevada: Rosina v. Trowbridge, 20 Nev. 105, 17 Pac. 751; Edwards v. Carson etc. Co., 21 Nev. 469, 34 Pac. 381.

New Mexico: Archibeque v. Miera, 1 N. M. 160; Lacey v. Woodward, 5 N. M. 583, 25 Pac. 785; Green v. Brown, 11 N. M. 658, 72 Pac. 17; Duncan v. Holder (N. M.), 107 Pac. 685.

North Dakota: Gull River Lumber Co. v. Osborne etc. Co., 6 N. D. 276, 69 N. W. 691; Black v. Walker, 7 N. D. 414, 75 N. W. 787; Heyrock v. McKenzie, 8 N. D. 601, 80 N. W. 762; Pengilly v. J. I. Case Co., 11 N. D. 249, 91 N. W. 63; Galvin v. Tibbs, 17 N. D. 600, 119 N. W. 39; Nilson v. Horton (N. D.), 123 N. W. 397.

Oregon: Merchants' National Bank v. Pope, 19 Or. 35, 26 Pac. 622; McCormick v. Hovey, 36 Or. 259, 59 Pac. 189; Ruckman v. Ormond, 42 Or. 209, 70 Pac. 707; Multnomah Co. v. Willamette etc. Co., 49 Or. 204, 89 Pac. 389; Manning v. Portland etc. Co., 52 Or. 101, 96 Pac. 545; Stern v. Volz, 52 Or. 597, 98 Pac. 148.

South Dakota: Alt v. Chicago etc. Ry. Co., 5 S. D. 20, 57 N. W. 1126; Rochford v. Albaugh, 16 S. D. 628, 94 N. W. 701; Kunz v. Dinneen, 18 S. D. 262, 100 N. W. 165.

Utah: Newton v. Brown, 2 Utah, 126.

Washington: Rotting v. Cleman, 12 Wash. 615, 41 Pac. 907; Tacoma v. Tacoma etc. Co., 16 Wash. 288, 47 Pac. 738; Holgate v. Parker, 18 Wash. 206, 51 Pac. 368; Snyder v. Parker, 19 Wash. 276, 67 Am. St. Rep. 726, 53 Pac. 59; Friedman v. Manley, 21 Wash. 43, 56 Pac. 832; Welever v. Advance etc. Co., 34 Wash. 331, 75 Pac. 863; Wait v. Robertson etc. Co., 37 Wash. 282, 79 Pac. 926; Colvin v. Northern Pacific Co., 42 Wash. 5, 84 Pac. 616; Cook v. Skinner, 46 Wash. 246, 89 Pac. 553; Olson v. Humbird etc. Co., 48 Wash. 136, 92 Pac. 897; Farrell v. Ihrig, 50 Wash. 281, 97 Pac. 52; Angus v. Wamba, 50 Wash. 353, 97 Pac. 246; Coffer v. Erickson (Wash.), 112 Pac. 643.

Wyoming: Edwards v. O'Brien, 2 Wyo. 493.

Also Tide Land Reclamation District v. Cunningham, 71 Cal. 221, 16 Pac. 711; Bennett v. Hobro, 72 Cal. 178, 13 Pac. 473; Rolling Mill Co. v. Telegraph Hill Co., 79 Cal. 340, 21 Pac. 840; Sharp v. Hoffman, 79 Cal. 404, 21 Pac. 846; Mills v. Oregon etc. Co., 102 Cal. 357, 36 Pac. 772; Holtum v. Germania etc. Co., 139 Cal. 645, 73 Pac. 591; City of Petaluma v. White, 152 Cal. 190, 92 Pac. 177.

See, also, Harnett v. C. P. R. R. Co., 78 Cal. 31, 20 Pac. 154; Crooks v.

and an order granting a new trial on the ground referred to will not be disturbed except for a clear abuse of discretion.[2a] And the rule applies to criminal cases as well as civil.[2b] It follows that the judge may set aside a verdict and grant a new trial, although the

Miller, 89 Cal. 35, 26 Pac. 615; Blum v. McHugh, 92 Cal. 497, 28 Pac. 592; Anglo-Nevada Corp. v. Ross, 123 Cal. 520, 56 Pac. 335.

And see section 288, *post*, particularly cases cited in notes 32 and 39.

[2a] *California:* Gerold v. Brunswick-Balke etc. Co., 67 Cal. 124, 7 Pac. 306; Pico v. Cohn, 67 Cal. 258, 7 Pac. 680; Breckinridge v. Crocker, 68 Cal. 403, 9 Pac. 426; Rolling Mill Co. v. Telegraph Hill Co., 79 Cal. 340, 21 Pac. 840; Nally v. McDonald, 77 Cal. 284, 19 Pac. 418; Grigsby v. Schwartz, 82 Cal. 278, 22 Pac. 1041; Crooks v. Miller, 89 Cal. 35, 26 Pac. 615; Blum v. McHugh, 92 Cal. 497, 28 Pac. 592; Bjorman v. Fort Bragg etc. Co., 92 Cal. 500, 28 Pac. 591; Cole v. Wilcox, 99 Cal. 549, 34 Pac. 114; Domico v. Casassa, 101 Cal. 411, 35 Pac. 1024; Jones v. Sanders, 103 Cal. 678, 37 Pac. 649; In re Carriger, 104 Cal. 81, 37 Pac. 785; Bates v. Howard, 105 Cal. 173, 38 Pac. 715; Warner v. Thomas, 105 Cal. 409, 38 Pac. 960; Anderson v. Hinshaw, 110 Cal. 682, 43 Pac. 389; In re Martin, 113 Cal. 479, 45 Pac. 813; Brooks v. San Francisco etc. Co., 110 Cal. 173, 42 Pac. 570; Anglo-Nevada Corp. v. Ross, 123 Cal. 520, 56 Pac. 335; Bledsoe v. Decrow, 132 Cal. 312, 64 Pac. 397; Hausmann v. Sutter Street Ry. Co., 139 Cal. 174, 72 Pac. 905; Drathman v. Cohen, 139 Cal. 310, 73 Pac. 181; Holtum v. Germania etc. Co., 139 Cal. 645, 73 Pac. 591; Lyon v. Aronson, 140 Cal. 365, 73 Pac. 1063; Cooper v. Spring Valley etc. Co., 145 Cal. 207, 78 Pac. 654; Baldwin v. Napa Wine Co., 1 Cal. App. 215, 81 Pac. 1037; Central Trust Co. v. Stoddard, 4 Cal. App. 647, 88 Pac. 806; Wehner v. Bauer, 10 Cal. App. 171, 101 Pac. 417.

See, also, Reclamation Co. v. Cunningham, 71 Cal. 221, 16 Pac. 711; Bennett v. Hobro, 72 Cal. 178, 13 Pac. 473; Harnett v. Central Pacific etc. Co., 78 Cal. 31, 20 Pac. 154; Sharp v. Hoffman, 79 Cal. 404, 21 Pac. 846; Curtiss v. Starr etc. Co., 85 Cal. 376, 24 Pac. 806; Mills v. Oregon etc. Co., 102 Cal. 357, 36 Pac. 772.

Montana: Orr v. Haskell, 2 Mont. 225, 4 Morr. Min. Rep. 492; Mattock v. Goughnour, 11 Mont. 265, 28 Pac. 301; Haggin v. Saile, 14 Mont. 79, 35 Pac. 514; McIntyre v. McCabe, 19 Mont. 333, 48 Pac. 390; Boe v. Lynch, 20 Mont. 80, 49 Pac. 381; Butte etc. Co. v. Societe etc., 23 Mont. 177, 75 Am. St. Rep. 505, 58 Pac. 111; O'Rourke v. Sherman, 23 Mont. 310, 58 Pac. 810.

Washington: Rinehart v. Watson, 11 Wash. 526, 40 Pac. 127; Corbitt v. Harrington, 14 Wash. 197, 44 Pac. 132; McBroom v. Wilson Co., 18 Wash. 79, 50 Pac. 572; Spokane v. Amsterdamsch etc. Co., 18 Wash. 81, 50 Pac. 1088; O'Rourke v. Jones, 22 Wash. 629, 61 Pac. 709.

Wyoming: Bank of Chadron v. Anderson, 7 Wyo. 441, 53 Pac. 280.

And see cases cited in note 2, *supra*.

And see section 288, *post*.

[2b] Subdivision 6 of section 1181, Penal Code, provides that a new trial may be granted defendant "when the verdict is contrary to law or evidence."

See section 288, *post*, as to duty of trial judge in general.

The following criminal cases are in support of the doctrine: People v. Baker, 39 Cal. 686; People v. Ashnauer, 47 Cal. 98; People v. Hotz, 73 Cal. 241, 14 Pac. 856; People v. Lum Yit, 83 Cal. 130, 23 Pac. 228; People v. Brooks, 90 Cal. 174, 27 Pac. 72; People v. Flood, 102 Cal. 330, 36 Pac. 663; People v. Neary, 104 Cal. 373, 37 Pac. 943; People v. Knutte, 111 Cal. 453, 44 Pac. 166; People v. Chew Wing Gow, 120 Cal. 293, 298, 52 Pac. 657; People v. Tapia, 131 Cal. 647, 63 Pac. 1001.

Also the following Oregon decisions: Bowen v. State, 1 Or. 270; State v. Fitzhugh, 2 Or. 227; State v. Wilson, 6 Or. 428; State v. McDonald, 8 Or. 113; State v. Drake, 11 Or. 396, 4 Pac. 1204; State v. Becker, 12 Or. 318, 7 Pac. 329; State v. Mackey, 12 Or. 154, 6 Pac. 648; State v. Roberts, 15 Or. 187, 13 Pac. 896;

evidence be conflicting; and it has been held that it is his duty to do so if he is not satisfied with the verdict. This was clearly pointed out by Rhodes, J., delivering the opinion in Hawkins v. Reichert.[3] In that case it appeared from the record that the court below thought the verdict against the weight of the evidence, but refused a new trial on the ground that there was some conflict in the testimony; the supreme court reversed the order, saying that under the circumstances the court was bound to grant a new trial. The subject was again considered in Dickey v. Davis,[4] in which case

State v. Clements, 15 Or. 237, 14 Pac. 410; State v. Foot You, 24 Or. 61, 32 Pac. 1031, 33 Pac. 537; State v. Gardner, 33 Or. 149, 54 Pac. 809; State v. Hill, 39 Or. 90, 65 Pac. 518; also, State v. Symes, 17 Wash. 598, 50 Pac. 487.

[3] 28 Cal. 534. But see Amsby v. Dickhouse, 4 Cal. 102.

[4] 39 Cal. 565. See notes 2 and 3, section 288, *post*, for cases illustrating the doctrine of conflicting evidence in the appellate court.

See, also, the recent decision of the Nevada supreme court in the case of Goldfield etc. Co. v. Frances etc. Co. (Nev.), 112 Pac. 42, where both the leading cases and the stock arguments, *pro* and *con*, are collected, and considered in detail. The trial judge had declined to pass upon the ground of insufficiency of the evidence as a ground for a new trial, although expressing an opinion strongly against the fairness and justice of the verdict, "for the reason," as given by him, "that I believe it would be contrary to the spirit and letter of the jury system, for a court to say that the jury had not properly weighed the evidence." Among several pages of citations and quoted authorities is to be found the following from an opinion of Justice Brewer, while that eminent jurist was a member of the Kansas supreme court:

"The one [the trial judge] has the same opportunity as the jury for forming a just estimate of the credence to be placed in the various witnesses, and if it appears to him that the jury have found against the weight of the evidence, it is his imperative duty to set the verdict aside. We do not mean that he is to substitute his own judgment in all cases for the judgment of the jury, for it is their province to settle questions of fact; and when the evidence is nearly balanced, or is such that different minds would naturally and fairly come to different conclusions therefrom, he has no right to disturb the findings of the jury, although his own judgment might incline him the other way. In other words, the finding of the jury is to be upheld by him as against any mere doubts of its correctness. But when his judgment tells him that it is wrong, that, whether from mistake, or prejudice, or other cause, the jury have erred, and found against the fair preponderance of the evidence, then no duty is more imperative than that of setting aside the verdict, and remanding the question to another jury." Kansas Pac. R. R. Co. v. Kunkel, 17 Kan. 145, 172.

See, also, Harrison v. Sutter Street etc. Co., 116 Cal. 156, 47 Pac. 1019, the supreme court, Van Fleet, J., delivering the opinion saying:

"That the granting of a new trial is a thing resting so largely in the discretion of the trial court that its action in that regard will not be disturbed except upon the disclosure of a manifest and unmistakable abuse has become axiomatic and requires no citations of authority in its support. It is true that such discretion is not a right to the exertion of a mere personal or arbitrary will of the judge, but is a power governed by fixed rules of law, and to be reasonably exercised within those rules to the accomplishment of justice; but so long as a case-made presents an instance showing a reasonable or even fairly debat-

Crockett, J., delivering the opinion, said: "The court below was not satisfied with the verdict, but refused to disturb it because there was some conflict in the evidence. This is not the correct rule. In this court where there is a substantial conflict in the evidence we decline to set aside a verdict or finding of facts as being contrary to the evidence, solely because we have had no opportunity to observe the manner of the witnesses, and to decide upon their credibility. But this reason does not apply to the district judge, and though it is the peculiar province of the jury to decide upon the facts submitted to them, generally, in doubtful cases, the verdict ought not to be set aside as contrary to the weight of the evidence; nevertheless, if the judge is not satisfied with the verdict, and is convinced that it is clearly against the weight of the evidence, it is his duty to set it aside, even though there may have been some conflict in the testimony. He has had the same opportunity as the jury to observe the manner of the witnesses, and to decide upon their credibility, and it is his duty to see that the verdict is not clearly against the weight of the evidence. He must exercise a wholesome and discreet supervision over the jury in this respect. 'The fact that there may have

able justification, under the law, for the action taken, such action will not be here set aside, even if, as a question of first impression, we might feel inclined to take a different view from that of the court below as to the propriety of its action. More especially is this true where, as here, the question rests largely in fact, and involves a proper deduction to be drawn from the evidence." Harrison v. Sutter Street etc. Co. was quoted with approval in Kramm v. Stockton etc. Co., 10 Cal. App. 271, 101 Pac. 914.

And in Green v. Soule, 145 Cal. 96, 78 Pac. 337, quoted in the same case, Shaw, J., for the court, said:

"There is a clear and obvious distinction between the duty of a trial court and the duty of an appellate court with respect to the decision of such questions. The trial court cannot rest upon a conflict in evidence, but must weigh and consider the evidence for both parties, and determine for itself the just conclusion to be drawn from it. If the judge is not satisfied with the verdict, and is convinced that it is clearly against the weight of the evidence, it is his duty to set it aside, even though there may have been some conflict in the testimony. Of course, the judge should give due respect to the verdict of the jury, and may sometimes properly deny a new trial in cases where if submitted to him without a jury he might upon the evidence have made a different decision. He must be clearly satisfied that the verdict is wrong; otherwise he should let it stand. But in considering the question upon the motion he must act upon his own judgment as to the effect of the evidence. The parties are entitled to the judgment of the jury in reaching a verdict in the first instance; but upon a motion for a new trial they are equally entitled to the independent judgment of the judge as to whether such verdict is supported by the evidence."

So in Kramm v. Stockton etc. Co., *supra* (California court of appeals of the third district), it was said:

"It is clear, therefore, that, when the trial judge is satisfied that a verdict is wrong and opposed to the evidence, if he refuses to set it aside he violates his oath of office."

been evidence submitted to the jury on both sides of the points at issue does not exclude the exercise of this beneficial supervision. If it did, no matter how weak the testimony on one side and how strong on the other, the judge would be restrained from interference, notwithstanding the verdict was manifestly against the weight of the evidence. If such a rule was adopted, litigants would be sure to accommodate themselves to it by introducing mere formal (if they could command no other) evidence to oust the authority of the court.' (3 Graham & Waterman's New Trials, 1207.) This reasoning appears to us to be conclusive; and whilst the court should be careful not to trench upon the province of the jury in deciding facts when the evidence is nearly balanced, it is equally true that it is its duty to set aside the verdict when plainly against the weight of the evidence, even though there may have been some conflict in the testimony."

So in Curtiss v. Starr and Co.[4a] the supreme court said:

" The rule as to conflict of evidence does not apply in the trial court. The judge should set aside the verdict whenever he is not satisfied with it upon the evidence, and his order in that regard will not be disturbed on appeal if the evidence is substantially conflicting."

So in Condee v. Gyger[4b] the court said:

" It is the duty of the judge of the trial court to grant a new trial whenever he is not satisfied with the verdict, if tried by a jury, or with the findings if tried by the court (Curtiss v. Starr, *supra*); and he is not bound by the rule as to conflicting evidence as is this court."

So in Churchill v. Flournoy,[4c] and Pollitz v. Wickersham,[4d] the language last quoted was reiterated.

From the cases last cited it is clear that there is no difference in application between cases tried by jury and those tried by the court.[4e]

The rule has been maintained in all the cases where it was raised and none is more firmly fixed in the practice.[5]

[4a] 85 Cal. 376, 24 Pac. 806.

[4b] 126 Cal. 546, 59 Pac. 26.

[4c] 127 Cal. 355, 59 Pac. 791.

[4d] 150 Cal. 238, 88 Pac. 911.

[4e] In Curtiss v. Starr & Co., *supra*, the court said: "The learned counsel is in error in supposing that this rule is confined to cases tried without a jury," and substantially the same ruling was made in the later cases.

[5] The cases in point have been collected under note 39, of section 288,

§ 98. Where the Insufficiency of the Evidence is the Question to be Determined, Full Weight must be Given to Evidence Which Would have Been Excluded had Objection Been Made, and Even to Evidence Erroneously Admitted Against Objection, Provided It be Relevant.—Evidence may tend to prove the issues and yet be incompetent. In such case, if the objection of incompetency be not made, full weight must be given to the evidence in determining whether or not it is sufficient to sustain the decision. This has frequently been decided. In Goode v. Smith [1] one of the questions was whether certain land was owned jointly by two persons. A witness was permitted to swear that it was so held. On appeal, Baldwin, J., delivering the opinion, said: "It is true that the evidence of the witness who swore that the property was owned jointly by Smith and Brown may not be the best mode of proving this fact; but no objection seems to have been taken to this kind of proof when offered, and if a party permits his antagonist to prove a fact by secondary evidence, we know of no rule which allows him afterward to object that it was not proved by the best." So where, in order to prove a bill of sale of a mining claim, an entry in a book purporting to be

post. And see Mason v. Austin, 46 Cal. 385; Sherman v. Mitchell, 46 Cal. 576; Higuerra v. Bernal, 46 Cal. 580.

The rule established by Hawkins v. Reichert and Dickey v. Davis, and the other cases above cited, is that the judge *must* set aside the verdict if it is not satisfactory to him. It follows, of course, that he must set aside verdict after verdict until he obtains one that coincides with his views of the evidence. Such being the case, it is evident that it is the opinion of the judge which always prevails, and not that of the jury. Perhaps the rule is too well settled to be disturbed at this late day. Nevertheless, it is submitted with deference that it is not in accordance with the spirit of the clause in the Constitution which provides that "judges shall not charge juries with respect to matters of fact." This provision has been held to prevent the judge from assuming a fact in his charge, and even from intimating his opinion concerning it. Now, if it is the opinion of the judge which must always prevail in the end, and if he must set aside verdict after verdict until he succeeds in getting a jury which hits upon his view of the evidence, what is the purpose of making him studiously conceal his opinion from them? Upon the rule laid down by the cases, it is indeed difficult to see that the jury serves any useful purpose at all. If the opinion of the judge must be taken in the end, and must prevail, why not take it in the first instance? At common law the judge had the power to advise the jury as to the verdict they ought to render upon the evidence, and was given the power to set aside the verdict if the jury did not choose to follow the advice. That system involved the absurdity of having expensive and complicated machinery to obtain a verdict which, after all, was of no force unless it agreed with the verdict of the judge; but it did not compel the judge to make a secret of his opinion as our system does. It is submitted that if we are to have jury trials at all, the only rational course is to apply in the lower court the rule which prevails in the supreme court, viz., to permit the judge to set aside the verdict only where there is no substantial conflict in the evidence.

[1] 13 Cal. 81.

a record of such transfers was held to be sufficient in the absence of an objection.[2] So in Jansen v. Brooks,[3] the court said: "It may be conceded that the testimony was incompetent if objected to, but it was not, and the court was justified in entertaining it for the purpose of determining what should be the judgment upon the motion for a nonsuit. Moreover, for the purposes of the motion for a new trial, so far as the same was grounded upon the sufficiency or insufficiency of the evidence, the court was also bound to treat the testimony as competent, for, not having been objected to at the time it was admitted, it was then too late to claim that it proved nothing because it was incompetent." So where a party, instead of producing a witness as to a fact, produced his affidavit as to the fact, and no objection was made, it was held that the affidavit was sufficient proof.[4] So where, in order to prove a sale, the party introduced a copy of the instrument of conveyance, no objection being made, it was held that the proof was sufficient.[5] So a copy of a letter of attorney introduced without objection was held to prove the authority of the agent.[6]

Upon the same principle, even if the evidence be erroneously admitted against objection, it must (if relevant) be considered in determining a question as to the insufficiency of the evidence. The error, if excepted to, can be reviewed as an "error in law" under the seventh subdivision, or upon an appeal from the judgment; but it does not exclude the evidence from consideration where the question is whether the verdict is justified by the evidence introduced. This was clearly explained in McCloud v. O'Neall.[7] In that case, Cope, J., delivering the opinion, said:

"It is admitted that if all the evidence in the case was properly before the jury this order cannot be disturbed. We think that no

[2] St. John v. Kidd, 26 Cal. 263, 4 Morr. Min. Rep. 454.

[3] 29 Cal. 214.

[4] Bliss v. Ellsworth, 36 Cal. 310.

[5] Rewrick v. Goldstone, 48 Cal. 554.

[6] Frink v. Alsip, 49 Cal. 103. See, also, Curiac v. Packard, 29 Cal. 194; Tebbs v. Weatherwax, 23 Cal. 60; Bullard v. Stone, 67 Cal. 477, 8 Pac. 17; Story v. Nidifer, 146 Cal. 549, 80 Pac. 692; Durkee v. Chino etc. Co., 151 Cal. 561, 91 Pac. 389. And see section 103, *post*. And look at Williams v. Hawley, 144 Cal. 97, 77 Pac. 762, wherein it is said: "Where incompetent evidence tending to prove a fact is admitted without objection, the question of its competence cannot be considered upon a specification that the evidence was insufficient." See, also, Tubbs v. Roberts, 40 Colo. 498, 92 Pac. 220; Gassert v. Black, 18 Mont. 35, 44 Pac. 401.

The principle which is at the basis of this rule is that which is so well settled as to be almost an axiom, that objections to the admission of evidence cannot be raised for the first time on appeal. See section 103, *post*.

[7] 16 Cal. 392.

question can be raised upon this subject; and that the court in passing upon a motion for a new trial could not properly have disregarded any portion of the evidence upon which the jury acted in making up their verdict. The jury were bound to consider all the evidence before them; and the question for the court was whether upon this evidence they had arrived at a correct conclusion. In other words, the court was called upon to determine whether the jury had properly discharged their duty, and it is obvious that for the purpose of determining this question it was necessary that full effect should be given to the evidence. When the competency of the evidence has been declared by the court the jury are compelled to receive it, and make it the basis of their verdict, and we are unable to see upon what principle any part of it can be disregarded upon a subsequent inquiry as to the correctness of the verdict. As a matter of course, a verdict obtained upon incompetent testimony may be set aside; but this cannot be done where the evidence was admitted without objection; nor can it be done when the evidence was objected to upon the ground that effect was given to it by the jury. That which vitiates the verdict, in such a case, is the error of the court in admitting the evidence; and if the party seeking to set aside the verdict is not in a position to take advantage of this error, he cannot be heard to object that the evidence was improperly admitted. Where the only objection is that the verdict was not authorized by the evidence, the question of competency is not a matter for the consideration of the court; and whatever was before the jury must be regarded as proper and legitimate evidence."

This decision was approved in Pierce v. Jackson,[8] and its correctness is too manifest to admit of question. The principle was applied to a question of nonsuit in Wright v. Roseberry,[8a]

The foregoing propositions, however, have this qualification, namely, that the evidence must be relevant to the issues. Evidence, and even findings, outside of the issues, can have no force under any circumstances. But where the allegation or denial is defective merely, and it is apparent from the record that the case was tried in the court below, upon the theory that the allegation

[8] 21 Cal. 636. Also, Ashton v. Dashaway etc., 84 Cal. 61, 22 Pac. 660, 23 Pac. 1091, 7 L. R. A. 809.

[8a] 81 Cal. 87, 22 Pac. 336. See, also, O'Callaghan v. Bode, 84 Cal. 489, 24 Pac. 269.

or denial was sufficient, the party will not be allowed to maintain its insufficiency in the supreme court.[9]

Evidence that has been stricken out cannot be considered in determining whether the verdict or other decision is sufficiently sustained by the evidence.[10]

If the findings of the court are otherwise sufficiently supported, it will be presumed that incompetent evidence was not considered.[11]

§ 99. "Or That It is Against Law."—The phrase "against law," as used in the statute, does not mean that a party can move for a new trial on the ground that the *judgment* is against law. That a judgment is against law is not ground for a motion for new trial.[1] As was said by Sawyer, C. J., delivering the opinion in Shepard v. McNeil:[2] "It is no ground for a new trial of the issues of fact that the judgment is broader than the facts alleged and found would justify. Such an error in no way affected the findings. The error occurred in entering the judgment subsequent to the findings. It did not occur in the course of the trial but afterward, and it is therefore not one of the grounds for new trial." So in Martin v. Matfield,[3] where the ground stated in the notice of intention was "insufficiency of the evidence to justify the *judgment*, and that it is against law," it was held that the notice was insufficient to support an order granting a new trial, and Wallace, C. J., delivering the opinion, said: "That a judgment is against law is not ground for a motion for a new trial. A verdict or other

[9] See section 115, *post*.

[10] Golden Gate etc. Co. v. Hendy Machine Co., 82 Cal. 184, 23 Pac. 45.

[11] Finlen v. Heinze, 28 Mont. 548, 73 Pac. 123.

[1] See section 1, *ante*.

[2] 38 Cal. 72.

[3] 49 Cal. 42. See Marshall v. Golden Fleece etc. Co., 16 Nev. 156. See, also, Polk v. Boggs, 122 Cal. 114, 54 Pac. 536, where it was said that a notice "that the evidence is against law" precludes a consideration of an objection that the court failed to find upon a material issue.

In Marshall v. Golden Fleece etc. Co., 16 Nev. 156, after reviewing the cases of the text, said:

"From the foregoing, as well as upon reason, we conclude that, if the decision or finding of a court or referee is against law, a new trial is the proper remedy, and that the decision is against law if it is contrary to, or inconsistent with, the case made and embraced within the issue."

In other words, that a verdict outside the issues is also against law, as well as a failure upon the part of the court to find upon all the issues.

In Barnes v. Sabron, 10 Nev. 217, 4 Morr. Min. Rep. 673, it was also held that the court might review the question whether the findings sustained the judgment under an assignment that the findings were against law.

In the case of Hamilton v. Murray, 29 Mont. 80, 74 Pac. 75, the court seemed to decide that any variation of a verdict from the issues was a decision against law.

decision of fact may be set aside, and a new trial granted, if such verdict or decision of fact be against law; that is, if an error of law be committed resulting in an erroneous decision of fact.[4] If the decree in this case, as entered of record, be other than that resulting from the conclusions of law arrived at by the court below, we cannot correct it on this appeal, inasmuch as the appeal is taken only from the order granting a new trial." And Rhodes, J., in his concurring opinion, said: "The question whether the judgment is authorized by the pleadings or findings cannot be agitated on the motion for new trial, for it is not involved in a re-examination of the issues of fact. The code has provided other and sufficient modes for the determination of both branches of that question; and it is very clear that the question whether the issues of fact were correctly found does not depend in any manner upon the question whether a pleading states sufficient facts to entitle a party to the relief granted by the judgment, or whether the issues as found sustain the judgment." For the reasons stated by the learned justices, above quoted, it is believed that the fact that a judgment is against law is not ground for a new trial. The word "it" in the phrase "it is against law" refers to the verdict or other decision of fact, and not to the judgment.

And the phrase "against law" does not mean "unsupported by the evidence." This was held in Brummagim v. Bradshaw.[4a] In that case the moving party failed to specify the particulars wherein the evidence was insufficient to justify the verdict, and upon such failure being urged against his motion sought to present the question of the insufficiency of the evidence to justify the verdict, under the allegation that "it is against law." But the supreme court held that this could not be done, and Crockett, J., delivering the opinion, said:

"It is not enough to aver that the verdict is against law and then offer to support the averment by showing that the verdict is not supported by the evidence, and is for that reason 'against law.' If such a course of proceeding was tolerated, all the other specific grounds for new trial enumerated in the statute might, for the same reason, be condensed into the one general ground that 'the verdict is against law'; for in that general sense it would

[4] The learned chief justice probably did not intend this language to mean that "errors in law occurring at the trial" are included in the phrase "against law," for such errors constitute a distinct and separate ground for the motion.

[4a] 39 Cal. 24.

be 'against law' if there was any valid reason whatsoever for a new trial. But the statute in authorizing a new trial on the ground that the verdict 'is against law' evidently does not intend to include in that phrase all, or any, of the other several distinct and separate grounds of the motion which are specified in the act. Whatever may be the class of cases to which that phrase was intended to apply, it is clear that it has no application to cases falling within either of the other subdivisions into which the grounds for a new trial are divided by the statute."[4]

The phrase "it is against law," therefore, means neither that the judgment is against law nor that the verdict or other decision is unsupported by the evidence. What then does it mean? In other states the phrase seems to be used to cover cases where there is no conflict in the evidence, and the verdict can only be accounted for upon the hypothesis that the jury disregarded or misapprehended the instructions given. In this sense the phrase means "against the law as laid down by the court," or in other words, "against instructions." This meaning of the term was adopted in at least one California case. In Emerson v. Santa Clara County,[5] the verdict was set aside because the jury disobeyed instructions, the court saying: "A verdict of the jury in disobedience of instructions is a verdict *against law* within the meaning of subdivision 6, section 193, of the Practice Act, and for that reason should be set aside without further consideration." And in Declez v. Save,[6] citing the case of Emerson v. Santa Clara, *supra*, and Bunten v. Orient Ins. Co.,[6a] the court said: "A verdict in disobedience to the instructions of the court upon a point of law is a verdict 'against law.'" One meaning of the term "against law," therefore, is "against instructions." In order to obtain a new trial upon this ground two things must be shown. In the first place, there must have been an instruction which was disregarded; it is not enough that the jury disregarded a principle of law not

[4] 40 Cal. 543. In this case the instruction disobeyed by the jury was *erroneous*, and in view of this fact it is difficult to see how any injury was caused to the losing party. The correctness or incorrectness of the instruction can be inquired into to ascertain whether injury was done, and if upon such inquiry it be seen that the instruction was incorrect, it seems plain that no injury could have been done. The dissenting opinion of Crockett, J., seems unanswerable. The case was cited in Helbing v. Svea Ins. Co., 54 Cal. 156, 35 Am. Rep. 72.

[5] 71 Cal. 552, 12 Pac. 722. But if the instructions are contradictory, the rule cannot apply. Altoona Q. M. Co. v. Integral Q. M. Co., 114 Cal. 100, 45 Pac. 1047, 18 Morr. Min. Rep. 410.

[6a] 4 Bosw. (N. Y.) 254.

embodied in an instruction. If no instruction is involved, and the verdict is not such as the evidence calls for, the motion must be on the ground of the insufficiency of the evidence, with proper specifications of the particulars wherein it is insufficient;[7] and this is so even where there is no conflict in the evidence.[8] In the next place, there must be no substantial conflict in the evidence, for if there be such conflict it cannot reasonably be inferred that the jury disregarded the instructions; it is rather to be assumed that they arrived at their verdict through a certain view of the conflicting evidence.[9] When, however, these two things are shown, that is to say, when there is no substantial conflict in the evidence, and the law was fully stated to the jury in the charge, it is safe to infer that a wrong verdict was arrived at by a disregard or misapprehension of the instructions,[10] and upon that assumption a new trial can be granted on the ground that the verdict is "against law."

The foregoing applies only to the verdict of a jury. It is true that the conclusions of law of a judge correspond to the determination of the law by the jury under the instructions of the court. And in view of this similarity it may, perhaps, be thought that if the conclusions of law are incorrect the decision is "against law," and that a new trial may be granted on that ground. There is great plausibility in this view. But the two cases are not similar, and the difference is this,—in the general verdict of a jury the finding of facts and the conclusions of law are so blended that it is impossible to separate them; one cannot be set aside without the other. The erroneous view taken by the jury as to the law cannot be corrected without granting a new trial, and this is why the

[7] Brummagin v. Bradshaw, 39 Cal. 24; and see section 150.

[8] Reed v. Bernal, 40 Cal. 628.

[9] Speet v. Gregg, 51 Cal. 198.

[10] This condition of affairs does not frequently occur, and even when it does occur, the party may proceed upon the ground of the insufficiency of the evidence. A motion upon this ground proceeds independently of instructions, and may be granted by the court below, whether there be a conflict in the evidence or not. See section 97. It is a much more extensive and convenient remedy than the one above discussed, and is the one usually resorted to.

That a verdict or other decision is "against law" is ground for a new trial; so, also, is insufficiency of the evidence "as matter of law," but these two are by no means the same thing and must not be confounded. As to the latter, it may be said here that its addition to the ground "insufficiency of the evidence" does nothing toward bolstering up the case of the moving party, and may therefore be omitted. The appellate court may determine that the evidence is insufficient, "as matter of law," to support the verdict or other decision, but the appellant adds nothing to the strength of his case by so specifying it, and it may therefore be omitted.

correction of the erroneous conclusion of law involves a re-examination of the issues of fact. In the findings of a judge, however, the findings of fact and conclusions of law are separately stated. Being separate, the latter can be set aside and the former stand. It is entirely unnecessary to disturb the findings of fact in order to correct the conclusions of law; and if it be unnecessary it must be improper. The law does not require the performance of such a vain thing as the destruction of findings of fact which are correct in themselves, and which have, perhaps, been the fruit of a long and expensive trial, in order to correct something from which they are separate and upon which they have no dependence. The definition of a new trial excludes the idea of such a result. The statute defines a new trial to be "a re-examination of an issue of *fact*." It is not the re-examination of a conclusion of law, and except in cases where the two are inseparably blended it is not necessary or proper to grant a new trial on account of an erroneous conclusion of law.[11] The court may set aside its conclusions of law and substitute other conclusions upon the same facts without any motion therefor, if judgment has not been entered;[12] and if judgment has been entered the remedy is to appeal from the judgment.[13] For the foregoing reasons it is believed that the circumstance that the "conclusions of law" are incorrect does not make the decision "against law" within the meaning of the subdivision under consideration.[13a]

The result of the foregoing examination is that the phrase "against law" applies only to cases where *it can be seen* that the verdict of the jury was against instructions. There is, however, another meaning given to the term, viz., that where the findings

[11] See beginning of this section; see, also, section 1; and Shepard v. McNeil, 38 Cal. 72; Jenkins v. Frink, 30 Cal. 586, 89 Am. Dec. 134; Martin v. Matfield, 49 Cal. 42. The opinion of McKee, J., in Simmons v. Hamilton, 56 Cal. 493, was concurred in by one justice only. Ross, J., dissented, and Sharpstein, McKinstry and Myrick, JJ., concurred on the ground that an error in law had been committed.

[12] Condee v. Barton, 62 Cal. 1; See, also, section 247, *post*.

[13] See section 1, *ante*.

[13a] The following decisions illustrate the practice where the verdict was assigned as being against the instructions of the court: Murray v. Heinze, 17 Mont. 353, 42 Pac. 1057, 43 Pac. 714; Fearon v. Mullins, 38 Mont. 45, 98 Pac. 650; Hoffman v. Bosch, 18 Nev. 360, 4 Pac. 703; McMillen v. Atchison, 3 N. D. 183, 54 N. W. 1030; Myers v. Fear, 21 Okl. 498, 129 Am. St. Rep. 795, 96 Pac. 642; Jacobs v. Oren, 30 Or. 593, 48 Pac. 431. The jury should follow the instructions of the court, even though erroneous. Murray v. Heinze, 17 Mont. 353, 42 Pac. 1057, 43 Pac. 714. See note 6a, section 132, *post*; Trumbull v. Clallam Co., 22 Wash. 631, 61 Pac. 714.

of a judge are defective in omitting to dispose of some material issue, the decision is "against law," and that a new trial may be granted on that ground. It is not perceived upon what principle this proposition rests; and if it is to be maintained, it would seem to follow that where some of the issues are left undisposed of by a jury, or where *all* the issues are left unfound by a judge, or where there is a mistrial for any other reason, the verdict or decision is "against law," within the meaning of the subdivision. The proposition above mentioned is so well settled, however, that it will probably not be disturbed.[14]

[14] See note 5a, section 1, *ante*.

Knight v. Roche, 56 Cal. 15; Soto v. Irvine, 60 Cal. 436; Brown v. Burbank, 59 Cal. 535; Spotts v. Hanley, 85 Cal. 155, 24 Pac. 738; Langan v. Langan, 89 Cal. 186, 26 Pac. 764; Nuttall v. Lovejoy, 90 Cal. 163, 27 Pac. 69; Brison v. Brison, 90 Cal. 323, 27 Pac. 186; McTarnahan v. Pike, 91 Cal. 540, 27 Pac. 784; Adams v. Helbing, 107 Cal. 298, 40 Pac. 422; Haight v. Tryon, 112 Cal. 4, 44 Pac. 318; Polk v. Boggs, 122 Cal. 114, 54 Pac. 536; Petaluma Paving Co. v. Singley, 136 Cal. 616, 69 Pac. 426; Kaiser v. Dalto, 140 Cal. 167, 73 Pac. 828; Swift v. Occidental etc. Co., 141 Cal. 161, 74 Pac. 700; Dwinnell v. Dyer, 145 Cal. 12, 78 Pac. 247, 7 L. R. A., N. S., 763; Great Western Gold Co. v. Chambers, 153 Cal. 307, 95 Pac. 151; Societe etc. v. Mantel, 1 Cal. App. 107, 81 Pac. 659; Winchester v. Becker, 8 Cal. App. 362, 97 Pac. 74; Merced Bank v. Price, 9 Cal. App. 177, 98 Pac. 383.

See *contra*, Thompson v. Los Angeles, 125 Cal. 270, 57 Pac. 1015; Churchill v. Flournoy, 127 Cal. 355, 59 Pac. 791.

In the first of these last-cited cases the court seems to have accepted as a rule of law that on an appeal from a new trial order errors upon the face of the judgment-roll could not be considered, and that as a failure to find upon some material issue so appeared, the question could not be reviewed otherwise than on appeal from the judgment. In Churchill v. Flournoy, the court positively states, "The failure to find upon a material issue is no ground for granting a new trial." If such ever was the correct doctrine it has failed to receive the support of any other case in the reports, and is clearly contradicted by the decisions above cited.

See, also, the following: Estate of Burton, 64 Cal. 428, 1 Pac. 702; Porter v. Muller, 65 Cal. 512, 4 Pac. 531; West v. Girard (Cal.), 4 Pac. 565; Millard v. Supreme Council etc. (Cal.), 21 Pac. 825; Aydelotte v. Billing, 8 Cal. App. 673, 97 Pac. 698; Wilson v. Dahler, 9 Cal. App. 500, 99 Pac. 723; Black v. Harrison Home Co., 155 Cal. 121, 99 Pac. 494; Brown v. Macey, 13 Idaho, 451, 90 Pac. 339; Warren v. Quill, 9 Nev. 259. And see Hamilton v. Murray, 29 Mont. 80, 74 Pac. 75.

Under the provisions of section 7229, Revised Codes of North Dakota (section 5630, Revised Statutes of 1899, or the so-called "Newman Law"), new trials of cases tried to the court upon the grounds of insufficiency of the evidence, that the decision is against law, and errors at law occurring at the trial, are dispensed with, and provision is made for trial *de novo* in the supreme court. For a full discussion of the unique procedure, see Farmers' Bank v. Davis, 8 N. D. 83, 76 N. W. 998. This provision does not apply to cases properly and necessarily triable by a jury. Nor does it apply to cases where a jury is called in for advisory purposes, as in equity. See Peckham v. Van Bergen, 8 N. D. 595, 80 N. W. 759.

As to failure to find on all the issues, see Chaffee-Miller Land Co. v. Barber, 12 N. D. 478, 97 N. W. 850.

Contradictory findings, where they may be said to neutralize each other, are the same as no findings at all, and come within the meaning of a "decision against law" and the rule that a failure to find upon some material issue is ground for a new trial.[15]

The failure of a referee to find is within the rule.[16]

§ 99a. Vacation of Judgment and Entry of New Judgment Under Sections 663 and 663a, California Code of Civil Procedure.[1] As heretofore referred to, there are cases where the conclusions of law are misapplied in framing the judgment, or where they are erroneous on their own account. Errors of this kind cannot be reached by motion for new trial.[2] Yet it is often the case that reflection will make plain such an error, and it is to enable the trial court to correct it, and so obviate the necessity of an appeal from the judgment, with its attendant labor and expense, that these sections were provided.[3]

In their present form sections 663 and 663a are as follows:

"Sec. 663. A judgment or decree of a superior court, when based upon findings of fact made by the court, or the special verdict of a jury, may, upon motion of the party aggrieved, be set aside and vacated by the same court, and another and different judgment entered, for either of the following causes, materially affecting the substantial rights of such party and entitling him to a different judgment:

"1. Incorrect or erroneous conclusions of law not consistent with or not supported by the findings of fact; and in such case when the judgment is set aside the conclusions of law shall be amended and corrected.

[15] Langan v. Langan, 89 Cal. 186, 26 Pac. 764; Nuttall v. Lovejoy, 90 Cal. 163, 27 Pac. 69.

[16] Clark v. Hewitt, 136 Cal. 77, 68 Pac. 303.

[1] The subject here treated cannot be said to have any but the remotest connection with proceedings for a new trial. Inasmuch, however, as it has for its object relief of a character which may be said to be somewhat supplementary to that reached by motion for new trial, an attempt is made to cover it in this place.

[2] See section 99, *ante*.

[3] Section 663 was enacted in 1873. Stats. 1873–74, p. 319. It was amended in 1877 (Stats. 1877–78, p. 100); repealed in 1880 (Stats. 1880, p. 64); and re-enacted in 1897 in its existing form (Stats. 1897, p. 58).

Section 663a was added to the code in 1897 with the re-enactment of section 663, under the numerical designation of 663½ (Stats. 1897, p. 59). It was amended in 1907, as 663a, in its existing form (Stats. 1897, p. 717).

The practice provided by these two sections has no counterpart in the procedure of other states.

"2. A judgment or decree not consistent with or not supported by the special verdict.

"Sec. 663a. The party intending to make the motion mentioned in the last section must, within ten days after notice of the entry of judgment, serve upon the adverse party and file with the clerk of the court a notice of his intention, designating the grounds upon which, and the time at which the motion will be made, and specifying the particulars in which the conclusions of law are not consistent with the findings of facts, or in which the judgment or decree is not consistent with the special verdict. The time designated for the making of the motion must not be more than sixty days from the time of the service of the notice. An order of the court granting such motion may be reviewed in the same manner as orders made on motions for a new trial, and a statement to be used on such appeal may be prepared in the same manner as statements after a motion is heard upon the minutes of the court, as provided in section six hundred and sixty-one."

The situation which calls for relief under these sections is not insufficiency of the evidence to justify the findings, but an inconsistency between the findings and the conclusions of law, or the judgment. As above stated, it is not such a question as may be reviewed by new trial proceedings, although similarly presented.

The real scope of this remedy seems to have been completely lost sight of by the respondents in the recent case of Parkinson Co. v. Building Trades Council,[4] where objection was made to the consideration of the insufficiency of the evidence to justify the findings on the ground that the appellants had neglected to ask for the application of the remedy prescribed by sections 663 and 663a, to which contention Beatty, C. J., for the court, replied:

"This objection is wholly unfounded. The defendants do not ask us to review the evidence on their appeal from the judgment, and their right to have it reviewed on their appeal from the order is not prejudiced by their failure to move under the sections cited upon the grounds that the facts found do not support the judgment."

The remedy is wholly independent of the proceedings on motion for new trial. Nor is it intended to supplant the usual remedy by appeal from the judgment, but is merely cumulative thereof.[5]

[4] 154 Cal. 581, 98 Pac. 1027, 21 L. R. A., N. S., 550, 16 Ann. Cas. 1165.

[5] Patch v. Miller, 125 Cal. 240, 57 Pac. 986.

The result in each case is the same, and the error, if established, would be corrected in either way.

The cases themselves clearly illustrate both the scope of the remedy, and the practice.[6]

[6] See Shafer v. Lacy, 121 Cal. 574, 54 Pac. 72; Patch v. Miller, 125 Cal. 240, 57 Pac. 986; Hayes v. Plummer, 126 Cal. 107, 77 Am. St. Rep. 153, 58 Pac. 447; McGorray v. Stockton, 131 Cal. 321, 63 Pac. 479; Kaiser v. Dalto, 140 Cal. 167, 73 Pac. 828; Swift v. Occidental etc. Co., 141 Cal. 161, 74 Pac. 700; Sharp v. Bowie, 142 Cal. 462; Gibson v. Hammang, 145 Cal. 454, 78 Pac. 953; Bill v. Fuller, 146 Cal. 50, 79 Pac. 592; Boggs v. Ganeard, 148 Cal. 711, 84 Pac. 195; Forsyth v. Los Angeles Ry. Co., 149 Cal. 569, 87 Pac. 24; McLean v. Baldwin, 150 Cal. 615, 89 Pac. 429; Sutter Co. v. Nichols, 153 Cal. 688, 93 Pac. 872, 15 L. R. A., N. S., 616, 14 Ann. Cas. 900; Parkinson Co. v. Building Trades Council, 154 Cal. 581, 98 Pac. 1027, 21 L. R. A., N. S., 550; Ballerino v. Superior Court, 2 Cal. App. 759, 84 Pac. 225; Beaulieau Vineyard v. Superior Court, 6 Cal. App. 242, 91 Pac. 1015.

CHAPTER XV.

GROUNDS OF THE MOTION—ERROR IN LAW OCCURRING AT THE TRIAL—IMPANELING THE JURY.

§ 100. The statute—Scope of subject.
§ 100a. Errors in rulings of court made during impanelment of jury.

§ 100. The Statute—Scope of the Subject.—The seventh subdivision of section 657 is as follows: "Error in law occurring at the trial and excepted to by the party making the application." This provision has been in the statute since 1851.[1] In order to understand the scope of the subject, it is necessary to consider what is an error in law occurring at the trial.

The phrase "error" or "error in law" is frequently used to characterize any improper proceeding in a cause. In this general sense it includes irregularities and abuses of discretion. As already stated,[2] it is difficult to define or classify "irregularities." Whatever that term may mean, it certainly does not include "errors in law" within the meaning of the subdivision under consideration. Errors in law are errors in *rulings* made by the court upon questions presented during the trial. Many of such rulings, however, are concerning matters which rest in the discretion of the court;[3] and such do not come within this subdivision; for a motion for new trial on the ground of "errors in law" is not addressed to the discretion of the court.[4] The errors to be considered here are errors in rulings upon matters of strict law as contradistinguished from rulings upon matters of discretion. But this again has to be limited. It is not every error in ruling upon matters of strict law which is ground for a new trial under this subdivision. The error must be one "occurring at the trial." Errors in matters occurring previously to the trial (such as errors in rulings upon demurrers to pleadings)[5] cannot be reviewed upon the motion. Nor can

[1] Laws of 1851, p. 81, sec. 193, subd. 7.

[2] See section 29, *ante*.

[3] See section 51, *ante*.

[4] Cochran v. O'Keefe, 34 Cal. 554, 3 Morr. Min. Rep. 288; O'Brien v. Brady, 23 Cal. 243; Hinkle v. S. F. & N. P. R. R. Co., 55 Cal. 627, 5 Morr. Min. Rep. 645. See, also, Case v. Kramer, 34 Mont. 142, 85 Pac. 878; United States v. Trabing, 3 Wyo. 144, 6 Pac. 721.

[5] Jacks v. Buell, 47 Cal. 162; Mason v. Austin, 46 Cal. 385; and see section 1, *ante*.

errors in matters occurring subsequently to the trial (such as errors in entering judgment) be reviewed upon the motion; for even if that be an "error in law," it does not occur at the trial, but afterward.[6]

The errors with which we have to deal, therefore, are errors in rulings upon matters of strict law made at the trial. The word "trial" has several significations. As shown in section 1, however, the word is used in the provisions in relation to new trials to mean trials of the issues of fact raised by the pleadings. And the only question necessary to be examined in this connection is when does "the trial" end. This is not entirely clear. In common language, the trial ends with the submission of the cause for decision, at least where there is no jury. For the purposes of the provisions in relation to new trials, however, it seems to have been for a long time the received acceptation of the term, that the trial did not end until the rendition of the decision. This notion was founded upon the language of the act of 1851. By section 193 of that act it was provided that the losing party should give his notice of intention within two days "after the trial." And inasmuch as the statute could not be supposed to involve the absurdity of requiring a notice of intention to be given before the decision had been rendered, and consequently before it was known who would be the losing party, it was held that the "trial" lasted until the decision was rendered, even though the cause was taken under advisement for some time. This signification of the word remained after the language of the act of 1851 above referred to was changed. Thus in Hastings v. Hastings,[7] where it was held that the court had power, after the announcement of its decision, and before its entry in the minutes, to continue the cause for further hearing, the court said: "Until the decision itself has been entered in the minutes, or reduced to writing and signed by him, and filed with the clerk, the case has not been tried to a legal extent." So in Polhemus v. Carpenter,[8] where it was decided that under the system of implied findings, the time to give notice of intention, where written findings were requested, did not begin to run until such request was complied with. Crockett, J., in the course of the opinion, after quoting the provision of the act of 1851 above referred to, said: "Under these provisions it was held

[6] See Shepard v. McNeil, 38 Cal. 72.

[7] 31 Cal. 95.

[8] 42 Cal. 375.

that the 'trial' did not terminate until the written findings were filed, and consequently that a notice of motion for new trial was in time if served and filed within two days after the findings were filed. The court had no power to render an oral decision, and the trial, therefore, was not ended until written findings were filed."[8a] But the statute no longer provides that the notice of intention shall be given within a certain number of days "after the trial." The provision is that the notice shall be given within a certain number of days after notice of entry of judgment. The question therefore suggests itself, Is the "trial" thereby extended to entry of judgment, instead of being concluded, as formerly, by the decision? The proper answer is believed to be that it does not.[9] "The trial of a cause includes all the rulings of the court and the proceedings before it which conduce to the decision which it makes upon the issues in the case as the basis of its judgment. (People v. Turner, 39 Cal. 270; Moore v. Bates, 46 Cal. 29.)" This was the view taken by the courts in the earlier cases, when the time to give the notice of intention began to run from the conclusion of the trial, and it continued to be regarded as the true doctrine throughout all the changes of section 659, until the last.[9a]

For the purposes of the subdivision under consideration, it is believed to be sufficiently accurate, therefore, to say that the trial begins with the joinder of issues of fact, and is ended with the submission for decision, when the cause is tried by the court or referee, and with the verdict, when tried by a jury.

The most common "errors in law," within the meaning of subdivision 7 of section 657, Code of Civil Procedure, are errors in

[8a] The word "decision" means different things under different systems of findings. See section 1, *ante*. But the above meaning of the word "trial" is obtained under the system of implied findings. Hastings v. Hastings, *supra*. Under the present system of express findings, however, it is believed that the former definition of the word loses its significance. It is true, "submission" might not conclude the trial, and there is such a thing as "reopening" cases, after they have been submitted, for various purposes; but in all such cases it is manifest that the submission must be first set aside. For all practical purposes, therefore, a trial is ended when it is submitted to the court for decision, even though it may not be actually decided for months.

[9] See sections 16 to 20, *ante*, inclusive, as to the time when a notice of intention *must*, and when it *may*, be given.

[9a] See Green v. Duvergey, 146 Cal. 379, 80 Pac. 234.

The provision of section 656, California Code of Civil Procedure, as to definition of new trial, has been in the statute since 1851. See Laws of 1851, p. 81, sec. 192. But it seems not to have modified the meaning of the word "trial" as used in the decisions under the system of implied findings, nor to have affected the meaning as adopted later with the system of express findings.

impaneling the jury,[9b] errors in ruling upon questions of the admissibility of evidence, errors in ruling upon motions for nonsuit, and errors in giving or refusing instructions to the jury. There are other errors of law, miscellaneous in character, and incapable of classification, which may be availed of upon motion for new trial under this subdivision, but no attempt will be made to bring them together.[9c]

The errors as to impanelment of the jury will be treated in the following section; those relating to evidence, nonsuit and instructions will be considered in the succeeding chapters.

The remedy by motion under this subdivision of section 657 is concurrent with that of an appeal from the judgment.[10]

§ 100a. Errors in Rulings of the Court Made During the Impanelment of the Jury.—Errors in rulings of the court made during the impanelment of the jury in civil cases were not recognized as ground for a new trial under subdivision 7 of the section under consideration in the earlier cases. Indeed, the practice is not so well settled as yet, that it may be said to be entirely free from doubt. In Silcox v. Lang,[1] where there was an erroneous ruling upon appellant's challenge to a juror, the point was presented as an "irregularity in the proceedings of the court." Re-

[9b] Errors in impaneling the jury were not, in the earlier cases, regarded as "errors in law" within the meaning of section 657 (subdivision 7), and it was only when there were irregularities affecting the right of a litigant to a fair and impartial trial in some prejudicial manner that a ground for a new trial could arise at this stage of the proceedings. The point of departure is somewhat involved in obscurity; but the case of Silcox v. Lang, 78 Cal. 118, 20 Pac. 297, is believed to be the earliest direct expression. It was there decided that the impanelment of the jury was a part of the trial within the meaning of the code. This decision was later approved and followed. People v. Hawkins, 127 Cal. 372, 59 Pac. 697. Nor does there appear to be any earlier decision upon the point that an error of law in impaneling the jury is available as ground for a new trial. See section 100a, *post*.

[9c] In Green v. Duvergey, 146 Cal. 379, 80 Pac. 234, the supreme court held that an order of court requiring the plaintiffs to pay into court the sum of twenty-five thousand dollars as a condition upon which they could proceed to trial was held to be reviewable on motion for a new trial as an error of law occurring at the trial.

Error in law is committed when the court, either upon motion or *sua sponte*, makes an erroneous order or ruling upon some question of law properly before it, and within its jurisdiction. Pratt v. Pratt, 141 Cal. 247, 74 Pac. 742.

[10] Brown v. Tolles, 7 Cal. 398; Cravens v. Dewey, 13 Cal. 40; Walls v. Preston, 25 Cal. 59; Donahue v. Gallavan, 43 Cal. 576; Carpentier v. Williamson, 25 Cal. 154; Caldwell v. Parks, 47 Cal. 640.

[1] 78 Cal. 118, 20 Pac. 297. And see to same effect, People v. Hawkins, 127 Cal. 372, 59 Pac. 697.

spondents contended that it should have been presented as an error of law occurring during the trial, and this contention was sustained by the court in the following language:

"The impaneling of a jury is a part of the trial, within the meaning of the code, and any ruling of the court with respect thereto, if erroneous, is an error of law occurring at the trial, and not a mere irregularity. The term 'irregularity' cannot be applied to a ruling or decision made upon a question of law regularly presented for such decision during the trial. In such case the action is not irregular, but the decision rendered is erroneous."

This ruling was sustained in subsequent decisions. In Lombardi v. California Street Ry. Co.,[3] the alleged error was presented both as an error of law and as an irregularity, the appellant being in doubt. The court said, in response to this doubt:

". . . . The mode of presenting the question must depend upon circumstances. If the facts appear without contradiction, or in such form that but one conclusion can legally be drawn, it involves purely a question of law: otherwise, whether a juror is or is not qualified is a question of fact. Hence the circumstances of each case must determine the manner in which the question should be presented on appeal."

With the principle stated in the last case as a guide, objections to rulings of the court in the impanelment of the jury may be treated either as irregularities of the jury, as outlined in chapter 5, *ante*, or as errors of law occurring at the trial, as above defined; and the careful practitioner will present the same matter in both ways, if there is any real doubt as to whether it is the one or the other.

[3] 124 Cal. 311, 57 Pac. 66.

CHAPTER XVI.

GROUNDS OF THE MOTION—ERROR IN LAW OCCURRING AT THE TRIAL—EVIDENCE.

§ 101. Outline of discussion of subject—Rules of evidence not subject of consideration.
§ 102. The judge must pass on all questions as to the admissibility of evidence.
§ 103. There can be no error in the admission of evidence without objection, and objection must be made at the time it is offered.
§ 104. Evidence received subject to objection.
§ 105. Objections to evidence must be specific, unless they could not be obviated if pointed out.
§ 106. Evidence admissible for any purpose must be received—If in admissible for some purposes, its effect should be limited by an instruction.
§ 107. Exceptions to rulings upon evidence.
§ 108. Error in ruling upon the admissibility of evidence may be cured by subsequent proceedings.
§ 109. The order of the introduction of evidence rests in the discretion of the court.
§ 110. Ruling upon an offer to prove facts.
§ 111. Miscellaneous matters of practice in relation to evidence.

§ 101. It is not Proposed to enter into an examination of the rules of the law of evidence, but merely to give the results of the decisions in relation to the application of those rules; in other words, to give the rules of practice applicable where the motion for new trial is made upon the ground that errors in law occurred in admitting or rejecting evidence. Such errors are errors in law occurring at the trial,[1] and may be reviewed under the subdivision under consideration. They may also be reviewed on appeal from the judgment.[2]

§ 102. The Judge must Pass upon All Questions as to the Admissibility of Evidence.—The jury is to determine questions of fact, and the judge questions of law.[1a] It is error to leave to the

[1] Opinion of Sharpstein, J., in Simmons v. Hamilton, 56 Cal. 493; Cochran v. O'Keefe, 34 Cal. 554, 3 Morr. Min. Rep. 288.

[2] See cases cited in note 10 to section 100, *ante*, and see section 2102, California Code of Civil Procedure.

[1a] 1 Greenleaf on Evidence, sec. 49; and see section 120 hereof.

jury questions of the admissibility of evidence. An instance of such an error is to be found in the People v. Ivey.[2] In that case evidence of the good character of the prisoner was permitted to go to the jury without objection. But in reference to it the judge instructed the jury as follows: "The jury can consider evidence of the character of the accused only in relation to the particular crime charged in the indictment, and if none has been given upon this particular trait, the jury are not at liberty to consider evidence in respect to other traits of character." An exception to this instruction was held to be well taken, and the supreme court said: "The instruction was erroneous, because it submitted to the determination of the jury a question of mere law. If any portion of the evidence offered by the prisoner, tending to show his good character, concerned a trait not involved in the charge against him, objection should have been made by the prosecution to its introduction, for the pertinency of the evidence in such a case is a question of law. It will not do to submit the evidence to the jury hypothetically, that is, to be considered by them if they are of opinion that it is applicable to the issue, and to be disregarded if they are of a contrary opinion." So in Fairbank v. Hughson,[2a] where, upon objection that the witness was not an expert, the court said: "I shall hold it is for the jury to say how much he knows about it. I will admit the testimony," and the witness thereupon gave his testimony, it was held to be error requiring a reversal of the judgment.

As it is error to impose upon the jury the duty of passing upon questions of law, so it is error, in passing upon the admissibility of evidence, to invade the province of the jury and take from them the right to pass upon questions of fact presented for their determination. This point often arises upon the question of the admissibility of expert testimony, and the rule is that expert witnesses should not be permitted to testify to facts, the determination of which rests within the exclusive province of the jury. If such testimony is admitted it is error, and ground for a new trial. Thus in Sappenfield v. Main Street etc. Co.,[2b] where expert testimony was permitted by the court to be introduced over objection as to the "safety" of a certain clivis-pin in the drawhead of a single-tree, the supreme court said:

[2] 49 Cal. 56; look at Tabor v. Staniels, 2 Cal. 240.

[2a] 58 Cal. 314.

[2b] 91 Cal. 48, 27 Pac. 590.

"Whether it was safe or unsafe was a conclusion to be drawn by them [the jury], and the opinion of the witness was not to be substituted for theirs, nor was their verdict to be based upon his opinion."

And in Kauffman v. Maier,[2c] where the trial court permitted the expert testimony of a machinist, as an expert, to be given upon the point as to whether a certain shafthead was or was not more dangerous in a rough than in a smooth condition, the supreme court said:

"Such questions are to be determined by the jury themselves, either from their own experience in matters of common observation, or from all the evidence in the case, and cannot be asked of witnesses, even if such witnesses are experts in some particular art or science. (Sappenfield v. Main Street etc. Co., 91 Cal. 60.) If the court permits the jury to be influenced by the judgment of such witness, it deprives the litigants of their right to have the jury render its verdict upon the facts in the case, and to this extent substitutes the judgment of the expert for what should be the judgment of the jury."

And the same principle has been sustained in other cases.[2d]

[2c] 94 Cal. 269, 29 Pac. 481, 18 L. R. A. 124. "It was for the jury and not for the court to determine whether the matters assumed as facts by the hypothetical question were or would be ultimately sustained by the evidence as the real facts in the case." Colorado Midland Co. v. O'Brien, 16 Colo. 219, 27 Pac. 701.

[2d] Redfield v. Oakland etc. Co., 112 Cal. 220, 43 Pac. 1117; Limberg v. Glenwood Lumber Co., 127 Cal. 598, 60 Pac. 176, 49 L. R. A. 33; Luman v. Golden etc. Co., 140 Cal. 700, 74 Pac. 307.

Briefly stated, the general rule is that opinion evidence, or such as calls for an inference or a conclusion on the part of the witness, is inadmissible, because an invasion of the province of the jury. Whenever the inference is one that may be said to be commonly drawn by men in general, it is to be drawn by the jury, and not the witness. See Johnson v. Caughren, 55 Wash. 125, 104 Pac. 170. It matters not whether the witness be one introduced as an expert or not. The testimony of an expert which calls for a conclusion or an inference is not within the above definition. Such inference or conclusion is not protected by the rule as to expert testimony if it is one that may be commonly drawn by men in general. The principle is the same, therefore, whether the witness is an expert or not. The following cases illustrate the general principle involved: Parkin v. Grayson-Owen Co., 157 Cal. 41, 106 Pac. 210; In re Miller's Estate, 36 Utah, 228, 102 Pac. 996, and Pearson v. Alaska etc. Co., 51 Wash. 560, 130 Am. St. Rep. 1117, 99 Pac. 753; and see the following:

Arizona: Huachuca Water Co. v. Swain, 4 Ariz. 113, 77 Pac. 619; Cook v. Purnam, 10 Ariz. 216, 86 Pac. 6.

California: Redfield v. Oakland etc. Co., 112 Cal. 220, 43 Pac. 1117; Limberg v. Glenwood Lumber Co., 127 Cal. 598, 60 Pac. 176, 49 L. R. A. 33; Luman v. Golden etc. Co., 140 Cal. 700, 74 Pac. 307; Sampson v. Hughes, 147 Cal. 62, 81 Pac. 292; Spinks v. Clark, 147 Cal. 439, 82 Pac. 45; Huyck v. Rennie, 151 Cal. 411, 90 Pac. 929; Cragg v. Trust Co., 154 Cal. 663, 98 Pac.

Passing upon the admissibility of evidence often involves the determination by the judge of preliminary questions of fact.[3] But in so doing the judge must be careful not to encroach upon the province of the jury. It frequently happens that before evidence can be received it is necessary for the party offering it to make proof of some collateral fact. In such case it is necessary for the judge to pass upon the question as to the existence of such facts

1063, 16 Ann. Cas. 1061; Fanning v. Green, 156 Cal. 279, 104 Pac. 308; Doyle v. Eschen, 5 Cal. App. 55, 89 Pac. 836; Northwest etc. Co. v. Whitney, 5 Cal. App. 105, 89 Pac. 981; Walters v. Mitchell, 6 Cal. App. 410, 92 Pac. 315; Mabry v. Randolph, 7 Cal. App. 421, 94 Pac. 403; Greve v. Echo Oil Co., 8 Cal. App. 275, 96 Pac. 904; Baker v. Baker, 9 Cal. App. 737, 100 Pac. 892; Boye v. Andrews, 10 Cal. App. 494, 102 Pac. 551; In re Coburn, 11 Cal. App. 604, 105 Pac. 924; Evans etc. Co. v. Lakeside etc. Co., 13 Cal. App. 119, 108 Pac. 1027.

Colorado: Davis v. Shepherd, 31 Colo. 141, 72 Pac. 57, 22 Morr. Min. Rep. 575; Hubbard v. Mulligan, 34 Colo. 236, 82 Pac. 783; Ft. Collins etc. Co. v. France, 41 Colo. 512, 92 Pac. 953; Geiger v. Kiser, 47 Colo. 297, 107 Pac. 267; Denver etc. Co. v. Reiter, 47 Colo. 417, 107 Pac. 1100; Saxton v. Perry, 47 Colo. 263, 107 Pac. 281; Lehman v. Lindenmeyer, 48 Colo. 305, 109 Pac. 956; Colorado etc. Co. v. Lamb, 6 Colo. App. 255, 40 Pac. 251; John Stuart & Co. v. Asher, 15 Colo. App. 403, 62 Pac. 1051.

Idaho: Axtell v. Northern Pacific Co., 9 Idaho, 392, 74 Pac. 1075; Keane v. Pittsburg etc. Co., 17 Idaho, 179, 105 Pac. 60.

Montana: Bramlett v. Flick, 23 Mont. 95, 57 Pac. 869, 20 Morr. Minn. Rep. 103; Metz v. Butte, 27 Mont. 506, 71 Pac. 761; Lander v. Sheehan, 32 Mont. 25, 79 Pac. 406; Power v. Turner, 37 Mont. 521, 97 Pac. 950; Hamilton v. Monidah, 39 Mont. 269, 102 Pac. 335; Frederick v. Hale, 42 Mont. 153, 112 Pac. 70.

Nevada: Burns v. Loftus (Nev.), 104 Pac. 246.

Oklahoma: Tootle v. Kent, 12 Okl. 674, 73 Pac. 310; Chicago etc. Co. v. Stubbs, 17 Okl. 97, 87 Pac. 293.

Oregon: Farmers' Bank v. Saling, 33 Or. 394, 54 Pac. 190; United States v. McCann, 40 Or. 13, 66 Pac. 274; Taylor v. Brown, 49 Or. 423, 90 Pac. 673; Anderson v. Aupperle, 51 Or. 556, 95 Pac. 330; Rumble v. Cummings, 52 Or. 203, 95 Pac. 1111; Montgomery v. Somers, 50 Or. 259, 90 Pac. 674; Columbia etc. Co. v. Smith (Or.), 107 Pac. 465.

Utah: Saunders v. Southern Pacific Co., 15 Utah, 334, 49 Pac. 646; North Point etc. Co. v. Utah etc. Co., 16 Utah, 246, 67 Am. St. Rep. 607, 52 Pac. 168, 40 L. R. A. 851; Wooley v. Maynes-Wells Co., 18 Utah, 232, 54 Pac. 833; Stoll v. Daly etc. Co., 19 Utah, 271, 57 Pac. 295; Watson v. Butterfield Co., 24 Utah, 222, 66 Pac. 1067; Nichols v. Oregon etc. Co., 25 Utah, 240, 70 Pac. 996; Black v. Rocky Mountain Co., 26 Utah, 451, 73 Pac. 514; Meyers v. Highland etc. Co., 28 Utah, 96, 77 Pac. 347; Johnson v. Union Pacific Co., 28 Utah, 46, 76 Pac. 1089; Stone v. Union Pacific Co., 32 Utah, 185, 89 Pac. 715; S. C., 32 Utah, 207, 89 Pac. 723; Herndon v. Salt Lake City, 34 Utah, 65, 131 Am. St. Rep. 827, 95 Pac. 646.

Washington: Stossel v. Van De Vanter, 16 Wash. 9, 47 Pac. 221; Schwede v. Heinrich, 29 Wash. 124, 69 Pac. 643; De Wald v. Ingle, 31 Wash. 616, 96 Am. St. Rep. 927, 72 Pac. 469; Berg v. Humptulips etc. Co., 38 Wash. 342, 80 Pac. 528; Hoseth v. Preston Mill Co., 49 Wash. 682, 96 Pac. 423; Sullivan v. Seattle etc. Co., 51 Wash. 71, 130 Am. St. Rep. 1082, 97 Pac. 1109; Pantages v. Seattle etc. Co., 55 Wash. 453, 104 Pac. 629; Sanpere v. Sanpair, 57 Wash. 524, 107 Pac. 369; Olympia etc. Co. v. Harris, 58 Wash. 410, 108 Pac. 940; Kirk v. Seattle etc. Co., 58 Wash. 283, 108 Pac. 604.

[3] See Greenleaf on Evidence, 13th ed., note 3 to p. 65.

before admitting the evidence. But his decision upon such question is provisional only. It has reference to the admissibility of the evidence, and does not affect the final determination of the question by the jury. Thus before a writing can be admitted in evidence some proof of its execution must be introduced, and it is for the judge to determine whether there is sufficient proof of the fact of the execution before the document is admissible. But the whole controversy may turn upon whether the writing was really executed or not, and the opposite party's entire evidence may be directed to that point. The ultimate decision of the question is for the jury; and it would be error in the judge to take the question from the jury by hearing the opposing evidence before he passed upon the question of the admissibility of the document, and rejecting it because he believed such testimony in preference to that offered by the proponent of the evidence.[4]

To which it may be added that the sufficiency of the preliminary proof required to establish a *prima facie* case is addressed to the discretion of the trial court, and its conclusions thereon will not be disturbed except in case of manifest abuse.[4a] And the question as to whether counter-testimony will be admitted is one also addressed to the court's discretion, subject to the usual rule.[4b] If counter-testimony is admitted, and there is a substantial conflict, the rule as to conflict will supervene.[4c]

The principle here considered was well illustrated in the case of Bryce v. Joynt,[5] where the admission of certain books of record and account, relating to an alleged partnership, depended upon preliminary proof of such partnership. The preliminary proof was made without objection, but the right to introduce counter-testimony was demanded and denied. The supreme court said:

"Of course, the admissibility of the books depended upon the preliminary proof of partnership before the court at the time when the books were offered as evidence. But whether there was sufficient evidence of the fact, to serve as a foundation for their admis-

[4] Vernon v. McGregor, 23 Cal. 339, 2 Morr. Min. Rep. 365; Butler v. Beach, 55 Cal. 28; Bryce v. Joynt, 63 Cal. 375, 49 Am. Rep. 94; Webster v. San Pedro Lumber Co., 101 Cal. 326, 35 Pac. 871. See, also, Dennis v. Kolm, 131 Cal. 91, 63 Pac. 141.

[4a] Bryce v. Joynt, 63 Cal. 375, 49 Am. Rep. 94; Webster v. San Pedro Lumber Co., 101 Cal. 326, 35 Pac. 871; and see Dennis v. Kolm, 131 Cal. 91, 63 Pac. 141.

[4b] Bryce v. Joynt, 63 Cal. 375, 49 Am. Rep. 94; and see, also, Dennis v. Kolm, 131 Cal. 91, 63 Pac. 141.

[4c] Butler v. Beach, 55 Cal. 28.

[5] 63 Cal. 375, 49 Am. Rep. 94.

sion, was a question for the court, although the fact itself was ultimately to be found by the jury.

"It is conceded that the admissibility of the books was a question for the court; but it is claimed that the defendant had the right to introduce counter-testimony upon the point of access and examination of the books, and that the right was denied him. The record shows no denial of the right, if such existed; for it shows that after the witnesses who had testified to the defendant's access to and examination of the books had been cross-examined by his counsel, the counsel then stated to the court: 'If the court thinks the admissibility of the books depends on that testimony, which is a question for the court, I think we would have a right to introduce counter-testimony upon that point, as to whether Joynt ever examined the books. We offer to put Oren Joynt on the stand to show that he never did.' Upon this offer no ruling was made by the court, nor was one pressed; and the court ruled 'that the books were admissible under the showing made.' To that ruling no exception was taken. But when the entries on the books were offered, objections were made that '*they* were not admissible to prove partnership, and that the court should not pass upon the admissibility of the books until it has heard the evidence on both sides.' Those objections were overruled, and to *that* the defendant then excepted.

"But the ruling was not erroneous; for the books had been admitted, and the entries upon them, which were proposed to be read to the jury, tended to prove that the defendant was a member of the firm, and participated in its profits. Besides, a court is not bound to take counter-proof upon a preliminary question raised for its consideration and decision as to the admissibility of corroborative evidence of a fact in issue. It may permit such a course to be taken; but whether it will or not is a matter within its discretion, with which the appellate court will not interfere unless there has been an abuse of discretion."

So in Webster v. San Pedro Lumber Co.,[6] where certain account books were offered and objected to, the court said:

"The general rule is that where certain preliminary proof is necessary to the introduction of any kind of documentary evidence, the sufficiency of such proof is to be determined in the first

[6] 101 Cal. 326, 35 Pac. 871. And see to same effect, Dennis v. Kolm, 131 Cal. 91, 63 Pac. 141.

instance by the trial judge, and that his determination of the matter will not be disturbed unless there has been an abuse of discretion."

So, recurring to the subject of expert evidence, an application of the principle is to be recognized in the determination of the preliminary question as to the competence of expert witnesses; and it is well settled that this question is addressed to the discretion of the trial court, whose exercise thereof will not be disturbed except for manifest abuse.[7] And it is the same with respect to the qualification of a witness to give opinion evidence.[8] Thus in Czarecki v. Seattle etc. Co.,[9] it was held to be peculiarly within the discretion of the court to allow experienced miners to testify to their opinions in the nature of expert evidence on a showing of competency satisfactory to it. The competency of either expert or opinion witnesses must always be passed upon before being permitted to testify;[10] and, in truth, so must all other witnesses; by implication always, except when objection is raised, and then, expressly; and the general rule, as already outlined, is that the conclusion of the trial court rests in its sound discretion, and will not be disturbed, save for abuse.[11]

The determination of the question as to who is an intimate acquaintance within the meaning of subdivision 10, section 1870, Code of Civil Procedure of California, is in the trial court's discretion.[12]

§ 103. There can be No Error in Admitting Evidence Unless It be Objected to; and the Objection must be Made at the Time the Evidence is Offered.—There can be no error in admitting evidence unless it be objected to; in other words, a party cannot claim

[7] *Arizona:* Gila Valley etc. Co. v. Lyon, 9 Ariz. 218, 80 Pac. 337.

California: Howland v. Oakland etc. Co., 110 Cal. 513, 42 Pac. 983; Mabry v. Randolph, 7 Cal. App. 421, 94 Pac. 403; Perry v. Noonan Co., 8 Cal. App. 35; Evans etc. Co. v. Lakeside etc. Co., 13 Cal. App. 119, 108 Pac. 1027.

Montana: Yergy v. Helena etc. Co., 39 Mont. 213, 102 Pac. 310.

New Mexico: Lynch v. Grayson, 5 N. M. 487, 25 Pac. 992.

Oklahoma: Yates v. Garrett, 19 Okl. 449, 92 Pac. 142.

Oregon: Crosby v. Portland etc. Co., 53 Or. 496, 100 Pac. 300, 101 Pac. 204.

Utah: Garr v. Cranney, 25 Utah, 193, 70 Pac. 853.

[8] Wright v. Southern Pacific Co., 15 Utah, 421, 49 Pac. 309.

[9] 30 Wash. 288, 70 Pac. 750.

[10] Watson v. Colusa-Parrot etc. Co., 31 Mont. 513, 79 Pac. 14.

[11] This was held in Rimmer v. Wilson, 42 Colo. 180, 93 Pac. 1110, in connection with the competency of witnesses to value of property in controversy.

[12] In re Budan's Estate, 156 Cal. 236, 104 Pac. 442.

that an "error in law" has occurred in the admission of evidence, unless he has obtained a ruling in regard to it by a proper objection. Thus where a witness, in answer to a proper question, gave an improper answer, and no motion to strike it out was made, it was held that there was no error.[1] So where evidence was inadmissible under the pleadings, and an amendment was made which obviated the objection in part but not entirely, and the objection was not renewed, it was held that the objection applied to the pleadings before they were amended, and that there was no objection as to the amended pleadings, and consequently that there was no error.[2] So where the plaintiff put on the stand a witness whom the defendant believed to be interested, and they objected before the witness had disclosed his interest, it was held that the objection could not apply to interest subsequently disclosed, and that there was no error; and Sawyer, C. J., delivering the opinion, said: "If the objection, at the time and in the form in which it was made, could be regarded as extending to the whole testimony of the witness subsequently given,—and we have seen that it cannot,—such a mode of taking objections and exceptions covering all that a witness may subsequently say, whether proper or improper, without knowing what is expected to be proved by him, would be intolerable. The party offering evidence is entitled to have the particular portion of evidence objected to pointed out, and the specific ground of objection stated, in order that he may obviate the objection or waive the testimony, if he is unwilling to take the risk of error. When a witness takes the stand, the opposite party might just as well say, 'I object to all the testimony this witness is going to give, except to the overruling of the objection,' then go through a long examination without further objection; and if it should turn out that a few lines of it are improper testimony, claim that the judgment should be reversed on that ground. If exceptions like the one in question could be regarded on appeals, there would be but little chance of obtaining verdicts which could be held."[3] So where the admission of a deposition was assigned as error, there having been no appearance for the party at the trial, the supreme court said: "All objections to the testimony on the ground of any supposed

[1] Fox v. Fox, 25 Cal. 587.

[2] Clarke v. Phoenix Ins. Co., 36 Cal. 168.

[3] Satterlee v. Bliss, 36 Cal. 489. It cannot be assumed in advance that a question is improper, and an objection ought not to be interposed until it is asked. See Valensin v. Valensin, 73 Cal. 106, 14 Pac. 397.

illegality must be made in the court below at the trial, and cannot be interposed for the first time upon the motion for a new trial. The absence of the party against whom the evidence is offered makes no difference in the rule."[4]

So where it was objected on appeal that the oath of an insolvent (under the concluding clause of section 49 of the Insolvent Act) had not been made at the right time, and hence could not be considered, the supreme court said:

"A sufficient answer to this point is, that when respondent's oath was offered in evidence, no objection was made to it by appellant, and the objection comes now too late. If objection had been made at the proper time, respondent could, and probably would, have taken and subscribed a new oath, and thereby have removed any question of irregularity."[4a]

So the principle has been often applied.[4b]

It is sometimes said that failure to object at the proper time is, in effect, a waiver of such objection as might have been interposed. Thus in Brumley v. Flint,[4c] where a general objection was made and overruled, the evidence not being "absolutely inadmissible for any purpose,"[4d] it was held that the specific objection, which might have been sustained, not having been made, was waived, the court saying:

"The general rule is, that 'a party objecting to the admission of evidence must specify the ground of his objection when the evidence is offered, and will be considered as having waived all objections not so specified.' (People v. Manning, 48 Cal. 338.)"

So in People v. Smith,[4e] where it was contended that the venue could not be proved by a deposition introduced for another purpose, the supreme court said:

" The deposition was introduced and read in its entirety without objection, and while the primary purpose of its introduction was apparently other than to establish the venue, the purpose was not limited, and being in evidence, could be regarded

[4] Clark v. Gridley, 35 Cal. 398. Also, McGuire v. Drew, 83 Cal. 225, 28 Pac. 312, where it was held that a ruling upon the admission of evidence in the absence of a party who has failed to appear at the trial is not an order deemed excepted to, in the absence of a party, within the meaning of section 647, Code of Civil Procedure.

[4a] In re McEachran, 82 Cal. 219, 23 Pac. 46.

[4b] See cases cited below in note 4g.

[4c] 87 Cal. 471, 25 Pac. 683.

[4d] See Nightingale v. Scannell, 18 Cal. 315; and see section 105, post.

[4e] 121 Cal. 355, 53 Pac. 802.

in aid of any fact which it tended to establish. A defendant may waive the objection that evidence is incompetent, and a failure to object to it on that ground is such waiver."

Similar expressions were made use of in Estate of Scott,[47] where advantage was sought to be gained by means of a specific objection to the admission in evidence of a certain certificate, a general objection having been overruled, the court holding that such an objection, not having been made when the certificate was offered, was not available.

So in other cases.[48]

The truth of the proposition will be further manifest from the cases cited in illustration of the rule that objections must be

[47] 128 Cal. 57, 60 Pac. 527.

[48] *California:* Scott v. Sierra Co., 67 Cal. 71, 7 Pac. 131; In re Doyle, 73 Cal. 564, 15 Pac. 125; Knox v. Higby, 76 Cal. 264, 18 Pac. 381; Laughlin v. Thompson, 76 Cal. 287, 18 Pac. 330; People v. Keeley, 81 Cal. 210, 22 Pac. 593; Rankin v. Sisters, 82 Cal. 88, 22 Pac. 1134; Hitchcock v. Caruthers, 82 Cal. 523, 23 Pac. 48; Howland v. Oakland etc. Co., 115 Cal. 487, 47 Pac. 255; Shain v. Sullivan, 106 Cal. 208, 39 Pac. 606; Yaeger v. Southern California etc. Co. (Cal.), 51 Pac. 190; Barrell v. Lake View etc. Co., 122 Cal. 129, 54 Pac. 594; In re Arnold's Estate, 147 Cal. 583, 82 Pac. 252; Hubbard v. Lee, 6 Cal. App. 602, 92 Pac. 744; Womble v. Wilbur, 3 Cal. App. 535, 86 Pac. 916; Lacy etc. Co. v. Los Angeles etc. Co., 12 Cal. App. 37, 106 Pac. 413; In re Balfour & Garrette, 14 Cal. App. 261, 111 Pac. 615.

Colorado: Machette v. Wanless, 1 Colo. 225; Cody v. Butterfield, 1 Colo. 377; Watson v. Hahn, 1 Colo. 494; Consolidated etc. Co. v. Gregory, 1 Colo. 511, 1 Morr. Min. Rep. 405; Cowell v. Colorado Springs etc. Co., 3 Colo. 82; Coleman v. Davis, 13 Colo. 98, 21 Pac. 1018; Northern etc. Co. v. Richards, 22 Colo. 450, 45 Pac. 423; Teller v. Ferguson, 24 Colo. 432, 51 Pac. 429; Schlageter v. Gude, 30 Colo. 310, 70 Pac. 428; Tanner v. Harper, 32 Colo. 156, 75 Pac. 404; San Miguel etc. Co. v. Bonner, 33 Colo. 207, 79 Pac. 1025; Denver etc. Co. v. Mitchell, 42 Colo. 43, 94 Pac. 289; Guldman v. Wilder, 45 Colo. 551, 101 Pac. 759; Greenlaw etc. Co. v. Chambers, 46 Colo. 587, 105 Pac. 1091; Temple v. Teller etc. Co., 46 Colo. 497, 106 Pac. 8; Denver etc. Co. v. Reiter, 47 Colo. 417, 107 Pac. 1100; Benninghoff v. Palisade (Colo.), 108 Pac. 983; Jakway v. Rivers, 48 Colo. 49, 108 Pac. 999; Price v. Immel, 48 Colo. 163, 109 Pac. 941; Rabjohns v. Sorenson, 5 Colo. App. 425, 38 Pac. 992; Denver etc. Co. v. Rosuck, 7 Colo. App. 288, 43 Pac. 456; Nelson v. First National Bank, 8 Colo. App. 531, 46 Pac. 879; Employers' etc. Co. v. Morris, 14 Colo. App. 354, 60 Pac. 21.

Idaho: Heilner v. Brown, 2 Idaho, 242 (263), 12 Pac. 903; Darby v. Heagerty, 2 Idaho, 260 (282), 13 Pac. 85.

Montana: Story v. Black, 5 Mont. 26, 51 Am. Rep. 37, 1 Pac. 1; Merchants' National Bank v. Greenhood, 16 Mont. 395, 41 Pac. 250, 851; Gassert v. Black, 18 Mont. 35, 44 Pac. 401; Thornton etc. Co. v. Bretherton, 32 Mont. 80, 80 Pac. 10; Butte etc. Co. v. Radmilovich, 39 Mont. 157, 101 Pac. 1078; Smith v. Butte, 40 Mont. 445, 107 Pac. 409; Forquer v. North, 42 Mont. 272, 112 Pac. 439.

Nevada: Langworthy v. Coleman, 18 Nev. 440, 5 Pac. 65; Palmer v. Calverwell, 24 Nev. 114, 50 Pac. 1; Vietti v. Nesbitt, 22 Nev. 390, 41 Pac. 151, 18 Morr. Min. Rep. 247.

Oregon: Sutherlin v. Bloomer, 50 Or. 398, 93 Pac. 135; Simon v. Trummer (Or.), 110 Pac. 786.

Utah: Cooper v. Denver etc. Co., 11 Utah, 46, 39 Pac. 478; Sargent

specific,[5] and of the rule which prevails where evidence is admitted "subject to objection."[6]

The rule requires not only that the objection should be made at the trial, but that it should be made before the evidence is admitted. A party cannot wait to see what the answer of a witness will be, and move to strike it out if unfavorable to him. In B. R. & A. W. Co. v. Boles,[7] one of the witnesses disclosed his disqualification from interest at the beginning of his examination, but no objection was made until he had testified at length, when a motion was made to strike out his testimony. The supreme court held that the motion was properly denied, and said: "The witness directly informed them at the threshold of his testimony that he was interested. Then was the time to make the objection. Parties will not be permitted to experiment upon a witness by admitting his testimony without objection, and if it turns out to be favorable, accept it; but if unfavorable, move to strike it out. Had the plaintiff been ignorant of the interest of witness till it was developed by his testimony at this point of the trial, and the plaintiff as soon as the interest was discovered had moved to strike out his previous testimony, the court would doubtless have granted the motion, if there was no other

v. Union etc. Co. (Utah), 108 Pac. 928.

Washington: Uren v. Golden Tunnel Co., 24 Wash. 261, 64 Pac. 174, 21 Morr. Min. Rep. 243; Robinson v. Marino, 3 Wash. 434, 28 Am. St. Rep. 50, 28 Pac. 752; Gustin v. Jose, 11 Wash. 348, 39 Pac. 687; Kohne v. White, 12 Wash. 199, 40 Pac. 794; Titlow v. Cascade etc. Co., 15 Wash. 652, 47 Pac. 19; Carter v. Seattle, 19 Wash. 597, 53 Pac. 1102; Blewett v. Bash, 22 Wash. 536, 61 Pac. 770; Nunn v. Jordan, 31 Wash. 506, 72 Pac. 124; Knapp v. Order of Pendo, 36 Wash. 601, 79 Pac. 209; Young v. O'Brien, 36 Wash. 570, 79 Pac. 211; Anderson v. Hilker, 38 Wash. 632, 80 Pac. 848; Wagner v. Mahrt, 32 Wash. 542, 73 Pac. 675; Falldin v. Seattle etc. Co., 57 Wash. 307, 106 Pac. 914; Hall v. Northwest etc. Co., 61 Wash. 351, 112 Pac. 369.

The rule has been applied in New Mexico in chancery practice. See Williams v. Thomas, 3 N. M. 550, 9 Pac. 356. And in Bank v. Jacoby, 137 Cal. 17, 69 Pac. 690, it was held to apply to cross-examination.

[5] See section 105, *post.*

[6] See section 104, *post;* and see note 12 below. See, also, Posten v. Rassette, 5 Cal. 467; Potter v. Carney, 8 Cal. 574; Tebbs v. Weatherwax, 23 Cal. 58.

[7] 24 Cal. 359, 4 Morr. Min. Rep. 592. See, also, King v. Haney, 46 Cal. 560, 13 Am. Rep. 217. A party should always have an opportunity to interpose his objection, if he so desire, and if a witness answers so quickly as to deprive him of this opportunity, a motion to strike out such answer ought to be entertained. Barkly v. Copeland, 86 Cal. 483, 25 Pac. 1, 405. It is a matter addressed to the discretion of the court, however, and will not be interfered with except for abuse. The trial court has always a better opportunity than the appellate court to discern whether the answer was in fact given so quickly as to deprive the party of his right, and the case would have to be a flagrant one indeed to justify the appellate court in disturbing the order of the lower court upon the point.

legal reason for denying it. But all the testimony sought to be struck out was taken without objection after the witness had informed plaintiff and the court of his interest, and the motion was properly denied on the ground that the objection came too late." So in Livermore v. Stein,[7a] after a good deal of testimony had been given to show the existence of a contract, the defendant testified that the contract was not in writing, and his counsel moved to have the testimony stricken out; but the motion was denied. On appeal, Wallace, C. J., delivering the opinion, said: "The counterclaim does not purport to be a contract for the sale or delivery of chattels, but one for the performance of labor. If it had been otherwise, however, the defendant was permitted, without objection, to prove it by other evidence than that required by the statute of frauds, and an objection on that point cannot be made now. It is true that at a subsequent stage of the trial a motion was made to strike out the evidence of the contract because it was not in writing, which motion was denied by the court; but the fact that the evidence was already before the jury was sufficient answer to the motion."[8] So in People v. Long,[9] Wallace, C. J., delivering the opinion, said: "There was no error in permitting Boring, the under-sheriff, to testify as to the confession of the prisoner made to him. The evidence was not objected to when it was offered, and given upon the part of the prosecution, and for that reason its admission could not be erroneous. Had objection been made to its admission, the prosecution would doubtless have shown that the confession was voluntary, as was subsequently shown in answer to the motion of the prisoner to strike out the evidence of the confession. The practice, whether in civil or criminal cases, of deliberately permitting evidence to be given without objection in the first instance, and then moving to strike it out on grounds which might readily have been availed of to exclude it when offered, is not to be tolerated."

[7a] 43 Cal. 274.

[8] It is questionable whether this is not a misapplication of the above rule. It places the admission of parol evidence of a contract within the statute of frauds on the same footing as the admission of secondary evidence of the contents of a writing. Our statute, however, provides that contracts within the statute are *invalid* unless in writing; and it does not seem reasonable that an invalid contract can be validated by mere failure to object. See Civil Code, sec. 1624. The case of Reedy v. Smith, 42 Cal. 245, however, seems to be to the same effect. See, also, People v. Salorse, 62 Cal. 139; Sweetland v. Shattuck, 66 Cal. 31, 4 Pac. 885; Schultz v. Noble, 77 Cal. 79, 19 Pac. 182.

[9] 43 Cal. 444. To same effect, see People v. Rolfe, 61 Cal. 540.

So in People v. Samario [9a] the court said:

"It is argued, however, that part of what the deceased said did not relate to the circumstances of the killing but to prior occurrences. But there was no objection to the admission of the evidence. The defendant waited until the evidence was in, and then moved to strike it out. In such case, if the court denies the motion, its action will not be disturbed."

So in People v. Nelson: [9b]

"The defendant moved to strike out this testimony as irrelevant and incompetent and hearsay. The motion was denied, and an exception taken. The answer to this point is, that an objection to testimony cannot be taken for the first time by a motion to strike it out."

So in People v. McNamara: [9c]

"The statements made by the witness Rogers on his cross-examination, as to the reason why he had the defendant arrested, were directly responsive to the question asked by defendant's counsel. The court did not err, therefore, in refusing to strike them out."

So in other cases.[9d]

But as was intimated in some of the above cases, if the ground of objection be not disclosed until after the evidence is in, the objection may be made when it becomes apparent. Thus where it

[9a] 84 Cal. 484, 24 Pac. 283.

[9b] 85 Cal. 421, 24 Pac. 1006.

[9c] 94 Cal. 509, 29 Pac. 953.

[9d] See Wright v. Seymour, 69 Cal. 122, 10 Pac. 323; Byrne v. Reed, 75 Cal. 277, 17 Pac. 201; People v. Dixon, 94 Cal. 255, 29 Pac. 504; Wheelock v. Godfrey, 100 Cal. 578, 35 Pac. 317; In re Wax, 106 Cal. 343, 39 Pac. 624; Tate v. Fratt, 112 Cal. 613, 44 Pac. 1061; People v. Harlan, 133 Cal. 16, 65 Pac. 9; People v. Swist, 136 Cal. 520, 69 Pac. 223.

And see Napa v. Howland, 87 Cal. 84, 25 Pac. 247; Schwartz v. Wright (Cal.), 56 Pac. 608; Churchill v. More, 4 Cal. App. 219, 88 Pac. 290; Griffen v. Selma etc. Co., 5 Cal. App. 50, 89 Pac. 855; Patton v. Coen etc. Co., 3 Colo. 265; Morris v. Everly, 19 Colo. 529, 36 Pac. 150; Bennet v. N. Colorado etc. Co., 23 Colo. 470, 58 Am. St. Rep. 281, 48 Pac. 812; McMaster v. Montana etc. Co., 12 Mont. 163, 30 Pac. 268; Streeter v. Johnson, 23 Nev. 194, 44 Pac. 819; Currey v. Butcher, 37 Or. 380, 61 Pac. 631; Spiking v. Consolidated etc. Co., 33 Utah, 313, 93 Pac. 838; Holly etc. Co. v. Beyer, 48 Wash. 422, 93 Pac. 1065; Knust v. Bullock, 59 Wash. 141, 109 Pac. 329.

In some of the decisions it is said that, as in the case of failure altogether to make objection, failure to object in season is waiver of the right. See Filippini v. Trobock (Cal.), 62 Pac. 1066; Yoder v. Reynolds, 28 Mont. 183, 72 Pac. 417; Lashus v. Chamberlain, 5 Utah, 140, 13 Pac. 361.

In Garr v. Cranney, 25 Utah, 193, 70 Pac. 853, upon the above principle, it was held that an objection after cross-examination upon the direct examination complained of was too late.

The following Montana cases are cited as resting more particularly upon the cases quoted in the text: Poindexter etc. Co. v. Oregon etc. Co., 33 Mont. 338, 83 Pac. 886; Martin v. Corscadden, 34 Mont. 308, 86 Pac.

appeared on cross-examination that the evidence in chief was mere hearsay, the supreme court said: "The respondent could not know the witness' means of information until he was subjected to a cross-examination, and ought not be required to except to testimony before it appeared that such testimony was objectionable."[10] So where a witness disclosed on cross-examination that he had been testifying to the contents of a writing, it was held that the motion to strike out then made for the first time should have been granted.[11]

So where a witness answers a question to which an objection has been sustained,[11a] or volunteers incompetent evidence, not responsive to the question,[11b] a motion to strike out is in order, and, if made, it is error to deny it.[11c] No other remedy is available, and failure to make the motion would be taken as a waiver of the objection.[11d] Of course, the answer must be unresponsive. If responsive, as above shown, the motion to strike out comes too late.[11e] The objection should have been interposed when the question was asked.[11f]

The rule was thus stated in People v. Williams:[11g]

"When it is apparent from the question that the answer will contain evidence necessarily inadmissible, then a motion to strike out comes too late unless preceded by an objection to the question,

33; State v. Rhys, 40 Mont. 131, 105 Pac. 494; Frederick v. Hale, 42 Mont. 153, 112 Pac. 70.

See, also, cases cited in note 4g, *supra*. It is not always easy to ascertain from the decision whether the court intended to say that the objection was unavailing because not made in time, or because not made in the court below. The principle is the same in both cases.

[10] Parker v. Smith, 4 Cal. 105.

[11] Crary v. Campbell, 24 Cal. 634, 3 Morr. Min. Rep. 270.

[11a] See People v. Putnam, 129 Cal. 258, 61 Pac. 961.

[11b] See People v. Dixon, 94 Cal. 255, 29 Pac. 504.

[11c] See Tate v. Fratt, 112 Cal. 613, 44 Pac. 1061; People v. Swist, 136 Cal. 520, 69 Pac. 223.

See, also, Yaeger v. Southern California etc. Co. (Cal.), 51 Pac. 190; Evans etc. Co. v. Lakeside etc. Co., 13 Cal. App. 119, 108 Pac. 1027; Guthrie v. Fisher, 2 Idaho, 101 (111), 6 Pac. 111; North. Pacific etc. Co. v. Spore, 44 Or. 462, 75 Pac. 890; Elliff v. Oregon etc. Co., 53 Or. 66, 99 Pac. 76. In Johnson v. Northport etc. Co., 50 Wash. 567, 97 Pac. 746, it was held that the motion to strike out an unresponsive answer was in effect sustained by a requirement that witness answer question as asked.

But it has been well and properly said that testimony should not be stricken out merely because unresponsive, if it should be competent. See Harrington v. Butte etc. Co., 19 Mont. 411, 48 Pac. 758.

[11d] See People v. Putnam, 129 Cal. 258, 61 Pac. 961.

See cases cited in note 11c, *supra*.

[11e] See cases cited in note 9d, *supra*. Also, People v. McNamara, 94 Cal. 509, 29 Pac. 953.

[11f] See cases cited in note 9d, *supra*.

[11g] 127 Cal. 212, 59 Pac. 581; and to same effect, see People v. Scalamiero, 143 Cal. 343, 76 Pac. 1098.

but the rule is otherwise when the evidence may or may not be admissible."

If there is nothing on the face of the question to indicate that the answer will be objectionable, or if it appears that the answer may or may not be so, and no motion to strike out be made, it is the same as though no objection had been made when the evidence was offered, or the question asked. Thus in People v. Smith [11h] the court said:

"There was nothing on the face of the question to indicate that an answer to it might not be relevant, material, and competent evidence, and hence it was not improper to overrule the objection urged against the inquiry upon the only ground urged—namely, that it was irrelevant, immaterial, and incompetent. The question only appeared to be vulnerable to all these objections when the answer to it was given, and as that was the first and only time it appeared to be so, it was the duty of the defendant to move to strike the answer out, and having failed to do so, no error can be predicated on the overruling of the objection."

The motion should be made promptly, for if several questions and answers are allowed to intervene between the objectionable answer and the motion, the latter will be deemed too late.[11k]

Motions to strike out unresponsive answers are governed by the rule, hereafter considered, that objections to the introduction of evidence must be specific. So if the objection is applicable to a portion only of the evidence, that portion should be specifically pointed out.[11l]

[11h] 151 Cal. 619, 91 Pac. 511; and to same effect, see People v. Lawrence, 143 Cal. 148, 76 Pac. 893, 68 L. R. A. 193; also, Short v. Frink, 151 Cal. 83, 90 Pac. 200.

See, also, Farnum v. Kern Valley Bank, 12 Cal. App. 426, 107 Pac. 568; Stewart v. Pittsburg etc. Co., 42 Mont. 200, 111 Pac. 723; Palatine etc. Co. v. Santa Fe etc. Co., 13 N. M. 241, 82 Pac. 363; Baines v. Coos Bay etc. Co., 49 Or. 192, 89 Pac. 371; Ireland v. Ward, 51 Or. 102, 93 Pac. 932; Vuilleumier v. Oregon etc. Co., 55 Or. 129, 105 Pac. 706; Cromeenes v. San Pedro etc. Co. (Utah), 109 Pac. 10; Starck v. Washington etc. Co., 61 Wash. 213, 112 Pac. 235.

It is to be noted, however, that counsel may always offer an explanatory statement for the purpose of elucidating the purpose of the inquiry. See Farnum v. Kern Valley Bank, *supra*, and Starck v. Washington etc. Co., *supra*.

[11k] See People v. Myring, 144 Cal. 351, 77 Pac. 975.

[11l] See O'Callaghan v. Bode, 84 Cal. 489, 24 Pac. 269; People v. Craig, 152 Cal. 42, 91 Pac. 997; also, People v. Rodley, 131 Cal. 240, 63 Pac. 351; People v. Cole, 141 Cal. 88, 74 Pac. 547.

See, also, Doane v. Glenn, 1 Colo. 495; Colorado etc. Co. v. Rees, 21 Colo. 435, 42 Pac. 42; Ritchey v. People, 23 Colo. 314, 47 Pac. 272, 384; Farleigh v. Kelley, 28 Mont. 421, 72 Pac. 756, 63 L. R. A. 319; State v. Hymer, 15 Nev. 49; Radcliffe

An objection need not be interposed more than once. Where a question is asked and objected to, and the court thereupon rules what character of question may be asked in that specific connection, further questions of that character in that connection need not be objected to, and the first objection and ruling is sufficient for purposes of review of the remaining questions.[11m] Thus in People v. Mullings,[11n] where a defendant accused of murder went upon the stand and testified in his own behalf, and the district attorney persisted in a line of questions upon cross-examination which were open to objection on the ground that they were not matters "about which he was examined in chief," and for the further reason that they were privileged, the defendant's attorney, after objecting two or three times, and after his objections were overruled, desisted, and, notwithstanding the improper cross-examination was persisted in, did not object again; upon appeal, as to the sufficiency of the objections, the supreme court said: "It appears, therefore, that defendant's objection to the evidence was clear, fair, and full, and it was thoroughly understood by the court, and that it was pointedly overruled."

v. Chaves, 15 N. M. 258, 110 Pac. 699; Hawley v. Dawson, 16 Or. 344, 18 Pac. 592; Jennings v. Garner, 30 Or. 344, 48 Pac. 177; In re Young's Estate, 33 Utah, 382, 126 Am. St. Rep. 843, 94 Pac. 731, 17 L. R. A., N. S., 108, 14 Ann. Cas. 596; Spurlock v. Port Townsend etc. Co., 13 Wash. 29, 42 Pac. 520; Yake v. Pugh, 13 Wash. 78, 52 Am. St. Rep. 17, 42 Pac. 528. In Lowe v. Yolo etc. Co., 157 Cal. 503, 108 Pac. 297, the principle was held to be such that a motion to strike out an entire statement was properly denied if a part thereof was admissible. Conversely, in Denver v. Cochran, 17 Colo. App. 72, 67 Pac. 23, it was held that unless specifically objected to it is not error to admit the whole statement, the part objectionable as well as the part unobjectionable. But if the whole answer or statement is objectionable, no particular portion thereof need be specified. See Sterne v. Mariposa etc. Co., 153 Cal. 516, 97 Pac. 66.

It is said that the court is not required to segregate the good and the bad, the competent from the incompetent. See Davis etc. Co. v. Photo etc. Co., 47 Colo. 68, 104 Pac. 389; Groot v. Oregon etc. Co., 34 Utah, 152, 96 Pac. 1019. Though, in its discretion, it may do so. See Stickney v. Hughes, 12 Wyo. 397, 75 Pac. 945.

An illustration of the rule is to be found in Colorado etc. Co. v. York, 38 Colo. 239, 88 Pac. 181, where it was held that where opinion evidence is based partly upon personal knowledge and partly on statements of others, an objection to the whole will be overruled as being too broad. See, also, Spokane v. Costello, 42 Wash. 182, 84 Pac. 652; Metz v. Willitts, 14 Wyo. 517, 85 Pac. 380.

See, also, note 16k, section 105, *post*.

[11m] See Sharon v. Sharon, 79 Cal. 633, 22 Pac. 26, 131. Also, Thomas v. Carey, 26 Colo. 485, 58 Pac. 1093. And see section 107, *post*, notes 2f and 2g, as to exceptions reserved a second time.

Where testimony is admitted over repeated objections, a motion to strike out is not necessary. See Gilpin v. Gilpin, 12 Colo. 504, 21 Pac. 612.

[11n] 83 Cal. 138, 17 Am. St. Rep. 223, 23 Pac. 229.

So in Magee v. N. P. R. R. Co.,[11p] it was held that where the form or the phraseology only and not the substance of the question was changed the objecting party should have the benefit of his objection once made, throughout. It is otherwise, however, if the question is reframed to obviate the objection. In such a case the question is a new one, and a new objection must be interposed.[11q]

But an objection may be premature. Thus, in an action on a claim against an estate, it was objected at the outset that no testimony at all should be received, no demand having been presented to the executor, as the statute requires. This objection was held to have been premature, since it was made before evidence of the presentation of such demand could be received.[11r]

Objections are not required to be offered in any particular form. If sufficiently clear to be reasonably easy of comprehension, or if the objection is clearly understood, mere technicalities will be disregarded. This is particularly so in criminal cases.[11s]

Where an objection is withdrawn the effect is as though it had never been interposed. It cannot afterward be renewed, if the time when it could have been made has elapsed, any more than it could have been postponed in the first instance; and such an objection cannot be availed of on appeal any more than if it had been waived, or the admission of the evidence expressly consented to.[11t]

It is sometimes said that the objection here referred to is that specified in section 646 of the Code of Civil Procedure,[11u] which declares that "an exception is an objection upon a matter of law to a decision," etc. But this cannot be; for the exception mentioned in section 646 is to a *decision*, and therefore cannot be taken until after the decision is rendered;[12] and, as above shown, objections to the admissibility of evidence must be taken before it is admitted. Such objections are not provided for by any section of the code. The rule requiring them to be taken is one of practice, established by the decisions.

The reason of this rule, as above suggested, is that if the party does not object, his silence may well be taken as a waiver of all objections. Without such waiver the party offering the evidence

[11p] 78 Cal. 430, 12 Am. St. Rep. 69, 21 Pac. 114.

[11q] People v. Miller, 122 Cal. 84, 54 Pac. 523.

[11r] Steen v. Hendy (Cal.), 38 Pac. 718. See, also, Withers v. Kemper, 25 Mont. 432, 65 Pac. 422.

[11s] People v. Yee Fook Din, 106 Cal. 163, 39 Pac. 530.

[11t] In re Wax, 106 Cal. 343, 39 Pac. 624.

[11u] Section 188, Practice Act.

[12] See sections 107 and 128, post.

might not be willing to take the risk of an error in introducing it, and might prefer to undergo some inconvenience for the sake of obviating the objection.

Besides, it is due to the judge, in furtherance of justice, that his attention should be called to the legal principle which is claimed to be violated by the admission or rejection of the evidence. In the hurry of the trial many things may be, and are, overlooked which would readily have been rectified had attention been called to them. The law casts upon the party the duty of looking after his legal rights, and of calling the judge's attention to any infringement of them. If any other rule were to obtain, the party would, in most cases, be careful to be silent as to his objections until it would be too late to obviate them, and the result would be that few judgments would stand the test of an appeal.

For the same reason parties are required to make their objections when the evidence is offered, that is, when the question is asked, if the evidence is offered in that form, or when the deposition is offered, if the evidence be so introduced; for if parties were not required to make their objections at the time the evidence is offered, they would, in many cases, prefer to see what the evidence was, and move to strike it out if it should prove unsatisfactory, a process that would not only consume much time, and result in confusion, but would be decidedly unfair, and little less than a travesty on justice.

It is imperative, therefore, that parties should be required to make their objections in the court below, and at the time the evidence is offered.[12a]

[12a] See People v. Moan, 65 Cal. 532, 4 Pac. 545; Yik Hon v. Spring Valley Waterworks, 65 Cal. 619, 4 Pac. 666; McKay v. Riley, 65 Cal. 623, 4 Pac. 667; Bullard v. Stone, 67 Cal. 477, 8 Pac. 17; Burnett v. Lyford, 93 Cal. 114, 28 Pac. 855; Shain v. Sullivan, 106 Cal. 208, 39 Pac. 606; and see cases specially cited elsewhere in this section in support of the general principle, particularly in notes 4 to 4g, inclusive.

See, also, to like effect, Sweetland v. Shattuck, 66 Cal. 31, 4 Pac. 885; Schultz v. Noble, 77 Cal. 79, 19 Pac. 182; and Horton v. Dominguez, 68 Cal. 642, 10 Pac. 186; McDougald v. Hulet, 132 Cal. 154, 64 Pac. 278; Krasky v. Wollpert, 134 Cal. 338, 66 Pac. 309; and Poledori v. Newman, 116 Cal. 375, 48 Pac. 325; Mock v. Santa Rosa, 126 Cal. 330, 58 Pac. 826.

See section 105, *post*, as to necessity for specific objection.

See section 107, *post*, as to exceptions.

See section 280, *post*, as to general application of principles involved here.

As to waiver of objection to admission of evidence upon facts not in issue, but treated by both parties as being in issue, see generally: Horton v. Dominguez, 68 Cal. 642, 10 Pac. 186; Moore v. Campbell, 72 Cal. 251, 13 Pac. 689; Sukeforth v. Lord, 87 Cal. 399, 25 Pac. 497; Murdock v. Clarke, 90 Cal. 247, 27 Pac. 275; Klopper v. Levy, 98 Cal. 525, 33 Pac.

The rule that the evidence must be objected to at the time of the introduction thereof has relation to its admissibility and not to its effect.[13] And it does not apply to the *rejection* of evidence; for the judge may exclude improper evidence of his own motion without any objection from the party. "The duty of the court is not confined to passing upon such portions of testimony as may be excepted to, but extends to the preservation of the rights of litigants and a proper disposition of the matter in controversy."[14]

§ 104. Evidence Received Subject to Objection.—Parties cannot get rid of the rule requiring them to take objections at the trial in the court below, by letting the evidence go in "subject to objection." In Covillaud v. Tanner,[1] it does not appear that the party made any objection. The report of the case says that the testimony was admitted "subject to all legal exceptions." On appeal Murray, C. J., delivering the opinion, said: "The appellant seems to think that by consenting to admit the evidence subject to all legal exceptions, he has absolved himself from the necessity of taking any exceptions to the relevancy or sufficiency thereof, and devolved the responsibility on the court below of discovering whatever objections might exist, and that after fishing for a verdict below he may for the first time assign his objections in this court. This practice cannot be tolerated. Objections to the introduction of evidence must be taken on the trial below, and unless so taken cannot be assigned as error on appeal." So in Hess v. Bolinger,[2]

444; Burnham v. Stone, 101 Cal. 164, 35 Pac. 627; Illinois etc. Co. v. Pacific etc. Co., 115 Cal. 285, 47 Pac. 60; McDougald v. Hulet, 132 Cal. 154, 64 Pac. 278; Krasky v. Wollpert, 134 Cal. 338, 66 Pac. 309; Beardsley v. Clem, 137 Cal. 328, 70 Pac. 175; Willey v. Crocker-Woolworth, 141 Cal. 508, 75 Pac. 106; Milwaukee etc. Co. v. Warren, 150 Cal. 346, 89 Pac. 93; Peck v. Noee, 154 Cal. 351, 97 Pac. 865; and sections 115, 240, 241 and 242, *post*, as to same.

See cases cited in note 4g, *supra*.

[13] See Yates v. Smith, 40 Cal. 662; and Roberts v. Chan Tin Pen, 23 Cal. 259. In some of the earlier cases language has been used which implies that an objection may be taken to the effect of evidence. See Goodale v. West, 5 Cal. 339; Mott v. Smith, 16 Cal. 533.

[14] Parker v. Smith, 4 Cal. 105; People v. Turcott, 65 Cal. 126, 3 Pac. 461; People v. Wallace, 89 Cal. 158, 26 Pac. 650; also, Davey v. Southern Pacific Co., 116 Cal. 325, 48 Pac. 117; Boyer v. Pacific Mut. L. I. Co., 1 Cal. App. 54, 81 Pac. 671; Spotswood v. Spotswood, 4 Cal. App. 711, 89 Pac. 362. And see Bean v. Missoula etc. Co., 40 Mont. 31, 104 Pac. 869. Evidence clearly without the issues should be disregarded although not objected to. See Sun etc. Co. v. Heiderer, 44 Colo. 293, 99 Pac. 39. When proposed evidence is incompetent and inadmissible for any purpose the court may exclude it of its own motion. See Kimic v. San Jose etc. Co., 156 Cal. 379, 104 Pac. 986.

See latter part of section 105, *post*.

[1] 7 Cal. 38.

[2] 48 Cal. 349.

where the case was tried upon an agreed statement of facts, in which it was stipulated that the facts were admitted "subject to all legal exceptions," it was held that it was incumbent upon the party to take his objections at the trial, and that, not having done so, he could not afterward raise the point that some of the facts were inadmissible under the pleadings. In the foregoing cases, as will be observed, there was no objection whatever in the court below. The agreement of the parties and the permission of the court that evidence may be received subject to objection merely means that the objection need not be taken at the time, as would otherwise be required, but may be made at some subsequent stage of the trial. And according to the above cases it must be so made, and cannot be made in the supreme court for the first time.[2a]

It often happens, however, that the court avoids the necessity of ruling upon objections properly and specifically made, by taking the evidence "subject to the objection,"[3] or indicating by other language that it reserves its ruling. In some instances the language used by the court shows that it was the understanding that the party was to renew his objection at some subsequent stage of the trial. Thus in King v. Haney,[4] the court said in answer to the objection of counsel: "We will take the evidence now, and the defendant may move to strike it out"; and the supreme court held that it was incumbent upon the party to make his motion to strike out before he cross-examined the witness. So in People v. Sanford,[5] where a proffer of evidence was denied "for the present," it was held to be waived by failure to renew it.

Where, as in the cases last cited, the language of the court indicates that the objection is to be renewed in some form, and the parties, by their silence, give consent to this course, it would be manifestly unjust to permit one of them to violate the tacit understanding, by maintaining that a renewal of the objection was not required. But where an objection is properly made, and the

[2a] See section 103, *ante*, as to the general application of the principle involved.

[3] In Roper v. McFadden, 48 Cal. 346, the supreme court said that from this language it understood that the court reserved its decision upon the objection.

[4] 46 Cal. 560, 13 Am. Rep. 217; look at Crosett v. Whelan, 44 Cal. 200.

[5] 43 Cal. 29. In People v. Westlake, 62 Cal. 303, so far as can be gathered from the opinion, no action whatever was had upon the objection, but the case seems to have drifted away from it. The opinion states, upon the authority of People v. Sanford, that the failure to renew it was a waiver. But the case was before the court in bank, and only two justices concurred in the opinion. So that it cannot be regarded as authority.

ruling is reserved, without anything occurring to indicate an understanding that the objection is to be renewed, it seems an unnecessary obstruction to require counsel to renew it. When an objection is once properly made, and is taken under advisement, it is the duty of the judge to rule upon it; and to require it to be repeated is merely to require counsel to admonish the judge to do his duty. And if such admonition be required once, and the judge does not heed it, it may with equal reason be required to be made twice, or any number of times. Pushed to its logical conclusion, the rule would prevent parties from ever obtaining a ruling upon the questions of law arising at the trial. There is no case which directly decides that an objection which is properly made and taken under advisement is waived by failure to repeat it. The case of Crosett v. Whelan [6] seems at first blush to be to that effect. But in that case the objection was that the evidence was irrelevant. There was no objection on the ground of incompetency, and the evidence being of such a character that it might be made relevant by the introduction of further testimony, it would under the decisions have been proper to overrule the objection; for a party cannot be required to make his whole case at once, but may introduce his evidence in whatever order he may prefer, subject to the control of the court in the exercise of a sound discretion.[7] The party, therefore, could not complain that a ruling was not made at the time, when if it had been made it must have been adverse to him. And if at any subsequent stage of the trial the objection could have been well taken, it ought to have been then made.

The principles here stated find support in later decisions.[7a] Summed up, they may be thus set out:

1. If no objection be interposed, an agreement of the parties and permission of the court to let the evidence go in subject to objection, or subject to exception, amount merely to a permission to make the objection at some subsequent stage of the trial; and it must be so made in order to be available.

2. If an objection be interposed, and the language of the court and the conduct of the parties indicate an understanding that the objection is to be renewed in some form at a subsequent stage of the trial, it must be so renewed in order to be available.

[6] 44 Cal. 200; see City of Stockton v. Dunham, 59 Cal. 609.

[7] See section 109, *post*.

[7a] Cederberg v. Robison, 100 Cal. 93, 34 Pac. 625; People v. Durrant, 116 Cal. 179, 48 Pac. 75.

3. If an objection be properly made, and is taken under advisement, there being nothing to indicate an understanding that it is to be renewed, the party is entitled to have a ruling upon it without further action on his part.

Failure to rule upon an objection properly made is an irregularity of the court to be reviewed under the first subdivision.

This view of the subject is fully considered in an earlier section where the leading cases are collected.[3]

§ 105. Objections to the Admissibility of Evidence must be Specific Unless They Could not be Obviated if Pointed Out.—From the language of some of the decisions, it might be inferred that a general objection was in no case of any avail. Thus in People v. Apple,[1] Murray, C. J., delivering the opinion, said: "A general objection was interposed to the admission of the evidence complained of. This has repeatedly been held to be insufficient." So in Kiler v. Kimball,[2] where certain bills of sale were offered to show the interest of two of the witnesses, and a general objection was interposed, Field, J., delivering the opinion, said: "The objection to the bills of sale, introduced to show the interest of Smith and Connor, two of the plaintiffs, in the property in controversy, was properly overruled. It did not merit consideration from its generality. To entitle an objection to notice it must not only be on a material matter, affecting the substantial rights of the parties, but its point must be particularly stated. This is not only the statutory regulation, but it is the uniform rule, so far as we are aware, of all courts of record. The party, as the authorities say, must lay his finger on the point of the objection to the admission or exclusion of evidence." So in Martin v. Travers,[3] where there was a general objection only, Field, J., said: "The objection fails to specify the point upon which it rests, and did not merit consideration from its generality. To have entitled it to notice the party should have laid, as the authorities say, his finger on the point, at the time." So in Payne v. Treadwell,[4] where there was a general objection only, the same learned justice said: "The objection to his testimony was too general to be regarded. It states no ground, and we have frequently decided that to entitle

[3] See section 36, *ante*.
[1] 7 Cal. 289.
[2] 10 Cal. 267.
[3] 12 Cal. 243.
[4] 16 Cal. 248.

an objection to the admission of evidence to notice its point must be particularly stated." So in other cases.[4a]

But it is not to be inferred from the language of the above-quoted decisions that a general objection is in no case of any validity. The reason of the rule that objections must be specific is that the party might have obviated them had his attention been called to them at the trial. If the objection could not have been obviated, it is evident that the reason of the rule does not apply, and the reason ceasing, the rule itself ceases. This limitation of the rule cited was clearly stated in Nightingale v. Scannell,[5] in which case, Cope, J., delivering the opinion, said: "On the trial of the case, the plaintiff in proving damages was allowed by the court to give in evidence the retail value of the goods, the defendants objecting in general terms to the introduction of the evidence. The action of the court in that respect is assigned as error; but the plaintiff claims that if an error was committed, the defendants are not in a situation to take advantage of it. He contends that a general objection is not sufficient to support the assignment, and that in all cases a specification of the grounds of the objection is necessary to render it effectual. The defendants claim that the evidence was not admissible for any purpose, and that a statement of the grounds upon which it was objected to would have been superfluous, and was not therefore required. This view is based upon what appears to us to be the proper rule in such cases, and we see no good result to be accomplished by holding parties to a more strict and rigid practice in these matters. The Practice Act provides that where an objection is made, and an exception taken, the point of the exception shall be stated, but it does not follow that a general objection to the admission of incompetent evidence

[4a] People v. Glenn, 10 Cal. 32; Cochran v. O'Keefe, 34 Cal. 554, 3 Morr. Min. Rep. 288; People v. Manning, 48 Cal. 335; Winans v. Hassay, 48 Cal. 634, 2 Morr. Min. Rep. 284; Fabian v. Callahan, 56 Cal. 159; People v. Chee Kee, 61 Cal. 404; Yik Hon v. Spring Valley Water Works, 65 Cal. 619, 4 Pac. 666; Burke v. Koch, 75 Cal. 356, 17 Pac. 228; People v. Nelson, 85 Cal. 421, 24 Pac. 1006; Brumley v. Flint, 87 Cal. 471, 25 Pac. 683; Crocker v. Carpenter, 98 Cal. 418, 33 Pac. 271; Colton L. & W. Co. v. Swart, 99 Cal. 278, 33 Pac. 878; Le Mesnager v. Hamilton, 101 Cal. 532, 40 Am. St. Rep. 81, 35 Pac. 1054; Howland v. Oakland etc. Co., 110 Cal. 513, 42 Pac. 983; People v. Louie Foo, 112 Cal. 17, 44 Pac. 453; People v. Hickman, 113 Cal. 80, 45 Pac. 175; People v. Sehorn, 116 Cal. 503, 48 Pac. 495; Frank v. Pennie, 117 Cal. 254, 49 Pac. 208; Wise v. Wakefield, 118 Cal. 107, 50 Pac. 310; and cases in this note specially cited. See, also, Hellman v. McWilliams, 70 Cal. 449, 11 Pac. 659; People v. Eckman, 72 Cal. 582, 14 Pac. 359; People v. Frigerio, 107 Cal. 151, 40 Pac. 107.

[5] 18 Cal. 315.

is not sufficient. On the contrary, the incompetency of the evidence sufficiently indicates the grounds of the objection, and the point of the exception is as clearly perceptible as if it were expressed in words. We do not understand the provision referred to as requiring anything more than that the point of the exception shall be so stated as to be apparent to the court; and whether it be stated in express terms, or appear by necessary implication from the nature and subject matter of the objection, is immaterial. There is no doubt that a general objection to the introduction of evidence will not be available unless the evidence objected to be absolutely incompetent; but where that is the case we do not see upon what principle such an objection could be held insufficient. Nothing more is required to put the adverse party, upon notice that the competency of the evidence is called in question; if an error intervene on account of its admission, we think the generality of the objection should not be received as an answer."

So in Brumley v. Flint,[5a] where objection was interposed to a certain question as being "incompetent, irrelevant and immaterial," and the specification of error was that the evidence offered was not the proper way to prove the fact in issue, the court said:

"The general rule is, that 'a party objecting to the admission of evidence must specify the ground of his objection when the evidence is offered, and will be considered as having waived all objections not so specified.' (People v. Manning, 48 Cal. 335.)

"It is true that a general objection is sufficient, if the evidence objected to is absolutely inadmissible for any purpose. (Nightingale v. Scannell, 18 Cal. 315.) But otherwise, to entitle the objection to notice, 'the party should have laid his finger on the point at the time.' (Martin v. Travers, 12 Cal. 243; Cochran v. O'Keefe, 34 Cal. 558.)"

So in People v. Gordon,[5b] where it was contended that no sufficient objection had been made to certain evidence, the objection being that it was "incompetent, irrelevant and inadmissible," the real ground of the objection being that it was not the proper method of proof, the court said:

"The general rule undoubtedly is that to entitle an objection to notice its point must be particularly stated (Kiler v. Kimball, 10 Cal. 268; Crocker v. Carpenter, 98 Cal. 418, 33 Pac. 271); but when the evidence objected to was absolutely incompetent a gen-

[5a] 87 Cal. 471, 25 Pac. 683. [5b] 99 Cal. 227, 33 Pac. 901.

eral objection is available. (Nightingale v. Scannell, 18 Cal. 315.) Here the testimony objected to was absolutely incompetent, and the objections taken were therefore sufficient."

So in a number of other cases.[5e]

The general principle laid down in the above cases is not confined to cases where the evidence offered is incompetent. It applies equally where such evidence is irrelevant. In other words, unless evidence is objectionable as being irrelevant under every possible aspect of the case, a general objection that it is "irrelevant" will not be sufficient. Thus in Strong v. Patterson,[6] where there was an entire absence of an averment of a defense which ought to have been set up in the answer, an objection to evidence of such defense as being "irrelevant" was held sufficient, the court saying:

"While we hold that a general exception to the admission of testimony is insufficient, because the party offering it is entitled to know the ground of such objection, so that he may supply other evidence, or obviate it, we think that an objection that the testimony is irrelevant, is sufficiently explicit, as it can mean but one thing, viz., that the testimony does not fit the case, or is not proper under the issues framed."

So in Davey v. Southern Pacific Co.,[6a] where there was a similar condition as to the complaint, the court quoted with approval the above language from Strong v. Patterson, sustaining the rul-

[5e] Sneed v. Osborn, 25 Cal. 619; Swan v. Thompson, 124 Cal. 196, 56 Pac. 878; Arnold v. Producer's etc. Co., 128 Cal. 637, 61 Pac. 283; Morehouse v. Morehouse, 140 Cal. 88, 73 Pac. 738; Roche v. Llewellyn etc. Works, 140 Cal. 563, 74 Pac. 147; Short v. Fink, 151 Cal. 83, 90 Pac. 200.

See, also, Rush v. French, 1 Ariz. 99, 25 Pac. 816. The principles under consideration were perhaps more elaborately treated in the opinion in this case than in almost any other. "Effect of a general objection. A general objection is unworthy of consideration. This is stating the rule very broadly, but perhaps the only limitation it can ever require is in those exceedingly rare cases where it it is apparent on the face of the proposition that it is impossible the evidence is or can be available for any purpose. As the object of requiring a specific objection is to enable the other party to obviate it if possible, if the objection is apparent, and it is clear that the defect cannot possibly be obviated, a specific objection would not help the adverse party, and in such case a general objection would be sufficient. But, of course, such cases will be very rare, and a prudent practitioner will hardly risk any point on a general objection."

See, also, Curr v. Hundley, 3 Colo. App. 54, 31 Pac. 939; Ward v. Wilms, 16 Colo. 86, 27 Pac. 247; Lothrop v. Roberts, 16 Colo. 250, 27 Pac. 698; State v. Soule, 14 Nev. 453; Oregon etc. Co. v. Eastlack, 54 Or. 196, 102 Pac. 1011; Snowden v. Pleasant Valley Coal Co., 16 Utah, 366, 52 Pac. 599; Kimic v. San Jose etc. Co., 156 Cal. 379, 104 Pac. 986.

[6] 6 Cal. 156.

[6a] 116 Cal. 325, 48 Pac. 117.

ing of the trial court excluding the evidence which had been objected to in general as irrelevant. So also a similar ruling was made in Miller & Lux v. Kern Co. Land Co.,[6b] upon the authority of the last-cited case.

So where a demand was served upon a person who had no authority whatever to receive it, an objection that the demand was "irrelevant and immaterial" was held sufficient.[7]

If, however, the evidence is not irrelevant under every possible view, or if the objection might have been obviated if specifically pointed out, a general objection is insufficient. Thus in Owen v. Frink,[7a] a suit in ejectment, where the answer set up an assignment from the vendee of the plaintiff under a contract of purchase and sale, objection to certain documentary evidence was made on the ground of "irrelevancy" in general, and the court held such objection insufficient, the specification of error setting out that the proposed evidence showed that one part of the lot in controversy had been assigned to one of the defendants and another to the other, putting its ruling upon the ground that if the alleged variance had been specifically objected to the defendants might have been able to introduce in evidence a joint assignment. So in Steele v. Pacific Coast Ry. Co.,[7b] where acts of negligence imputed to defendant, similar to that resulting in the injury complained of, were offered in evidence, and objected to on the general ground of irrelevance and immateriality, the court held such objection insufficient as not being specific as to the only ground upon which such evidence would be wholly objectionable, viz., that the acts imputed were not of recent occurrence.

The rule, then, may be stated to be that objection to the admissibility of evidence must be specific in all cases where the objection could be obviated if pointed out, but that where it could not be obviated a general objection is sufficient.

The meaning of the rule that objections must be specific is, that the party must state the grounds of his objections; or, in other

[6b] 140 Cal. 132, 73 Pac. 836. In this as in the Davey case the evidence could, by the amending of the pleadings, have been made relevant. But until so made, the evidence could not from any view point be considered relevant, and therefore was subject to the general objection.

[7] Wilson v. S. P. R. R. Co., 53 Cal. 735.

[7a] 24 Cal. 171.

[7b] 74 Cal. 323, 15 Pac. 851. See, also, McCarthy v. Phelan, 132 Cal. 404, 64 Pac. 570, to same effect.

The principle was applied in the following cases: Yik Hon v. Spring Valley Waterworks, 65 Cal. 619, 4 Pac. 666; People v. Loui Foo, 112 Cal. 17, 44 Pac. 453.

words, that he must state (concisely and in ultimate language) the legal reasons on which it rests.[8]

The application of the rule will be found to be illustrated by the following decisions:

In People v. Frank,[9] a certain draft was inadmissible without proof to connect the defendant with it, but would have been admissible with such proof. The objection was that the draft was "irrelevant and incompetent." Held, that it was in the discretion of the judge to admit it in advance of the connecting proof, but that aside from this the objection was too general, and the court said: "We have repeatedly held that counsel must make their objections in such a manner as to leave no doubt as to the precise ground upon which it was placed." So in Satterlee v. Bliss,[10] it was held that an objection that testimony was "irrelevant and incompetent" did not raise a question as to its being a privileged communication. So in People v. Manning[11] it was held that an objection that evidence was "irrelevant" did not raise the question of its competency. So if a party desires to raise a question as to whether evidence offered is the best evidence and not secondary, he must state that as the ground of his objection.[12] So if there be not sufficient preliminary evidence upon any point, that must be specified as the ground of the objection.[13] So in Dunning v. Rankin[14] it

[8] In this respect it is different from the rule which requires that objections (or, as they are called, exceptions) to instructions must be specific. See section 128. As to exceptions to rulings on objections to evidence, see section 107.

[9] 28 Cal. 507. See, also, to same effect, People v. Louie Foo, 112 Cal. 17, 44 Pac. 453, where the court said: "The consensus of opinion, as illustrated by these cases and many others, is that where the proffered evidence is imperfect by the lack of preliminary proof which may or may not be supplied by the party offering the evidence, the objecter must specifically point out the defect by his objection, and if he fails to do so it is waived, and the general objections of 'immaterial, inadmissible, irrelevant, and incompetent,' made when the evidence is offered to the jury, are not sufficient to warrant an investigation on appeal of the insufficiency of such preliminary proof."

See, also, People v. Owens, 123 Cal. 482, 56 Pac. 251, where the same language was quoted, and the same cases cited with approval.

[10] 36 Cal. 489; look at Gardiner v. Schmaelzle, 47 Cal. 588; Dreux v. Domec, 18 Cal. 83. And see People v. Nichols, 62 Cal. 518, where the same principle was applied to objection as to certain proceedings in the trial court.

[11] 48 Cal. 338. See, also, Crossett v. Whelan, 44 Cal. 200; Burke v. Koch, 75 Cal. 356, 17 Pac. 228.

[12] Braly v. Reese, 51 Cal. 447; Eversdon v. Mayhew, 85 Cal. 1, 21 Pac. 431, 24 Pac. 382; Banister v. Campbell, 138 Cal. 460.

[13] Keeran v. Griffith, 34 Cal. 580.

[14] 19 Cal. 640, 9 Morr. Min. Rep. 455. Nor, where the offered evidence is in the shape of a deposition, will a general objection to the admissibility be sufficient to include objections to the form of the deposition. King v. Green, 7 Cal. App. 473, 94 Pac. 777.

seems to have been considered that where the form only of the question is objectionable, a general objection will not avail. So in People v. McCauley,[14a] where a witness was asked on cross-examination whether she had not been arrested for stealing, it was held that an objection that "the defendant could not be shown to be guilty of the offense charged by showing that she had been accused of another offense," did not raise the question of its not being proper cross-examination. So an objection to a deed that "it was void as a conveyance of title to such property as a ditch or water right, because it was not under seal, and because it was not acknowledged as required by law, and because no foundation was laid for its introduction in evidence as a conveyance of title from Gellup, and because the Guatemala Company, as a company, could not take by *bill of sale,* even if free from legal objection," did not go to the point that the deed was void for want of a grantee named therein, capable of taking under it.[15] So an objection to certain dying declarations, as a whole, is not good, if a portion of them be admissible;[16] the party should specify the particular portion which is inadmissible.

So in Crocker v. Carpenter,[16a] where a general objection was interposed to the introduction in evidence of certain papers, it was held insufficient upon a showing that the papers were not signed, nor verified, nor connected in any way with the defendants, the court saying: "If this specific objection had been made it is possible that it could have been removed by further evidence on the part of the plaintiffs showing such knowledge," etc.

So in Colton etc. Co. v. Swartz,[16b] where a general objection was made to the introduction of a deed, in support of which objection it was specified that the deed did "not show upon its face that the grantor was a corporation," although it appeared to have been

Objections to the form of a hypothetical question asked of an expert are waived unless specified, and such objections are not included in a general objection to this form of testimony. Perkins v. Sunset etc. Co., 155 Cal. 712, 103 Pac. 190.

[14a] 45 Cal. 146.

[15] Cochran v. O'Keefe, 34 Cal. 554, 3 Morr. Min. Rep. 288.

[16] People v. Glenn, 10 Cal. 32. See, also, People v. Owens, 123 Cal. 482, 56 Pac. 251, where an objection that preliminary proof of belief in impending death was not made was held not included in general objection.

[16a] 98 Cal. 418, 33 Pac. 271.

[16b] 99 Cal. 278, 33 Pac. 878. See, also, Long-Bell etc. Co. v. Martin, 11 Okl. 192, 66 Pac. 328, where the general objection to the admission of a deed was held to be insufficient to raise the point that the attorney in fact who executed it was not authorized so to do.

signed and sealed with the corporation seal, the court held the objection insufficient, saying:

"This objection to the introduction of the deed was not taken at the trial, the only objection being that it was incompetent, irrelevant and immaterial, and it is well settled that under this general objection a party cannot upon appeal urge an objection which is merely formal or special," etc.

So in People v. Baird,[16c] where certain other forged notes were introduced in evidence in support of extrajudicial confessions of the defendant in proof of the *corpus delicti* on an indictment for forgery, it was held that a failure to specify the objection that the notes so offered were not first proved to have been forged when the same were offered was a waiver of such objection, and that it was not included in a general objection to the competency, etc., of the evidence. So in People v. Conkling,[16d] an objection to the introduction of the clothes of the deceased, worn at the time of the homicide, on the ground that "the proper predicate had not been laid," was not specific enough to raise the objection that the clothes were not shown to be in the same condition as at the homicide. So an objection to the introduction of an assessment-roll as evidence of the value of the property was held not to have been covered by a general objection that the roll was incompetent, etc.[16e] So where a mortgage was admissible as to one defendant but not as to the other, an objection in general terms to the competency, etc., of the same, was held to be insufficient to raise the special objection.[16f]

16c 105 Cal. 126, 38 Pac. 633.

16d 111 Cal. 616, 44 Pac. 314. And see People v. O'Brien, 78 Cal. 41, 20 Pac. 359, for a similar ruling upon a similar objection.

16e Woolridge v. Boardman, 115 Cal. 74, 46 Pac. 868. The assessment-roll was not admissible upon the question of value under the rule of San Jose v. Mayne, 83 Cal. 566, 23 Pac. 522, and would have been excluded, no doubt, if the objection had been sufficiently specific.

See, also, Faylor v. Faylor, 136 Cal. 92, 68 Pac. 482, where it was held that an objection that the witness was acting "in the capacity of attorney to client" and was incapacitated under the provisions of section 1881, subdivision 2, California Code of Civil Procedure, was not sufficient.

That a paper is a copy, and therefore secondary evidence and incompetent, is not sufficient, where there is no objection on the ground that a foundation has not been laid; for, if a foundation was properly laid, it was competent, and, in the absence of a showing to the contrary, and in the absence of a proper objection on that ground it is to be inferred that a proper foundation was laid. See Liebenthal v. Price, 8 Wash. 206, 35 Pac. 1078.

16f Lee v. Murphy, 119 Cal. 364, 51 Pac. 549, 955.

So the principle has been applied in a considerable number of other cases.[16g]

[16g] See McCormick v. Bailey, 10 Cal. 230; Leet v. Wilson, 24 Cal. 398; Carroll v. Benicia, 40 Cal. 386; Winans v. Hassey, 48 Cal. 634, 2 Morr. Min. Rep. 284; People v. Morine, 54 Cal. 575; People v. Chee Kee, 61 Cal. 404; People v. Nelson, 85 Cal. 421, 24 Pac. 1006; and see cases cited in note 5d, *supra*.

The above principles are sustained by the decisions in other states as well as those of California cited in the text. Thus, in Coleman v. Montgomery, 19 Wash. 610, 53 Pac. 1102, an objection to evidence was disregarded as not sufficiently definite to meet the requirements of the rule. In Hindry v. McPhee, 11 Colo. App. 398, 53 Pac. 389, and Colorado City v. Smith, 17 Colo. App. 172, 67 Pac. 909, it was pointed out that no reasons had been given for the objections a review of which was sought, and they were therefore disregarded. In Oakes v. Miller, 11 Colo. App. 374, 55 Pac. 193, it was said that a bare objection to evidence was futile. So in Enid etc. Co. v. Wiley, 14 Okl. 310, 78 Pac. 96, speaking to the same point, the court said: "An objection that evidence offered is incompetent, without specifically stating the grounds upon which the objection is founded, is too indefinite to present any question, and will be disregarded." Also, Collin v. Farmers' Alliance, 18 Colo. App. 170, 70 Pac. 698. So in Maddox v. Tague, 18 Mont. 512, 46 Pac. 535, it was held that an objection to the introduction of certain evidence was properly overruled, because the grounds upon which the objection was based were not sufficiently pointed out. And the same decision was rendered in Territory v. McAndrews, 3 Mont. 158; Helena v. Albertose, 8 Mont. 499, 20 Pac. 817; Territory v. Bryson, 9 Mont. 32, 22 Pac. 147; State v. Black, 15 Mont. 143, 38 Pac. 674. The Montana cases of Herman v. Jeffries, 4 Mont. 513, 1 Pac. 11, and Tucker v. Jones, 8 Mont. 225, 19 Pac. 571, are sometimes cited in this connection, but they refer more particularly to the necessity of specifications in bills of exceptions. The principle is, of course, the same, the necessity being based upon the same ground. And the same may be said of State etc. Co. v. Dubois, 7 Colo. App. 214, 44 Pac. 756.

See, also, Olson v. Oregon etc. Co., 24 Utah, 460, 68 Pac. 148; Snowden v. Coal Co., 16 Utah, 366, 52 Pac. 599; Culmer v. Clifft, 14 Utah, 286, 47 Pac. 85; Noyes v. Clifford 37 Mont. 138, 94 Pac. 842.

The rule was thus expressed in Conklin v. Yates, 16 Okl. 266, 83 Pac. 910: ". . . . The precise grounds of objections must be stated," and "the general objection will not raise the question as to the admissibility of evidence which might be objectionable on some specific ground, and that an objection on one ground will not raise other grounds of objection." Thus, in O'Flynn v. Butte, 36 Mont. 493, 93 Pac. 643. it was held that an objection to evidence on the ground that it was incompetent, etc., because too remote in time, was not sufficient to raise the point as to its incompetence, etc., on general grounds, and for all purposes. So in Dillard v. Olalla etc. Co., 52 Or. 126, 94 Pac. 966, 96 Pac. 678, it was held that a general objection would not raise the point that it was hearsay. See, also, the following, holding similarly: McElroy v. Williams, 14 Wash. 627, 45 Pac. 306; Bennett v. Green, 74 Cal. 425, 16 Pac. 231; United Oil Co. v. Roseberry, 30 Colo. 177, 69 Pac. 588; Wilson v. Harnette, 32 Colo. 172, 75 Pac. 395; Rice v. Williams, 18 Colo. App. 330, 71 Pac. 433; Dorais v. Doll, 33 Mont. 314, 83 Pac. 884; Hildebrand v. United Artisans, 50 Or. 159, 91 Pac. 542; Ft. Collins etc. Co. v. France, 41 Colo. 512, 92 Pac. 953; Clayton v. Clayton, 4 Colo. 410; Price v. Scott, 13 Wash. 574, 43 Pac. 634; Northern Pacific Co. v. Lowenberg, 11 Or. 286, 3 Pac. 683; Phoenix etc. Co. v. Landis (Ariz.), 108 Pac. 247; Sargent v. Union etc. Co. (Utah), 108 Pac. 928; Urquhart v. Coss (Mont.), 110 Pac. 1001; Dornsife v. Ralston, 55 Or. 254, 97 Pac. 713, 106 Pac. 13.

But in Swan v. Thompson, 124 Cal. 193, 56 Pac. 878, it was pointed out

Failure to specify objections sufficiently within the rules here advanced is described in some of the cases as a waiver of the objections themselves, and this is also the case where general instead of specific objections are interposed.[16h]

An objection to a mass of evidence, some of which is admissible, is insufficient where the objectionable evidence is not specifically pointed out.[16k]

It has been said that the rule that objections must be specific applies only in cases where the evidence is admitted, and not where it is excluded. In other words, if the objection be not sufficiently specific, but is nevertheless sustained, the party who made it is at liberty to advance any ground which may exist to sustain the ruling. This doctrine may be said to spring from the rule, so fre-

that unless the vice was latent, a general objection would be held sufficiently specific. And in Iverson v. McDonnell, 36 Wash. 73, 78 Pac. 202, it was said that "the testimony and the objection must be considered together to properly determine this question," that is, whether the objection was sufficiently specific to put the adverse party on notice as to the real vice of the offered evidence.

In Evans v. Oregon etc. Co. (Utah), 108 Pac. 638, it was held that a general objection did not include a specific one, and that after basing an objection upon general grounds of insufficiency, etc., the party could not afterward raise a specific ground.

16h Brumley v. Flint, 87 Cal. 471, 25 Pac. 683; Crocker v. Carpenter, 98 Cal. 418, 33 Pac. 271; Colton etc. Co. v. Swartz, 99 Cal. 278, 33 Pac. 878; People v. Baird, 105 Cal. 126, 38 Pac. 633; Estate of Scott, 128 Cal. 57, 60 Pac. 527. And see People v. Owens, 123 Cal. 482, 56 Pac. 251. The rule in Montana, as elsewhere, as expressed in O'Keefe v. Dyer, 20 Mont. 477, 52 Pac. 196, is that an objection on one ground alone, several existing, is to be deemed a waiver of all others.

16k Hellman v. McWilliams, 70 Cal. 449, 11 Pac. 659; People v. Eckman, 72 Cal. 582, 14 Pac. 359; Powley v. Swensen, 146 Cal. 471, 80 Pac. 722. See, also, People v. Rodley, 131 Cal. 240, 63 Pac. 351; also Biddick v. Kobler, 110 Cal. 191, 42 Pac. 578; and see section 110, *post*, as to offer to prove facts, in general.

In Murray v. Silver City etc. Co., 3 N. M. 337, 9 Pac. 369, the decision of the court was directed rather to the necessity of an objection to the admission of improper evidence at the time of its offer, but it also covered the point under consideration. A mass of evidence had been introduced without comment. At its conclusion a motion was made to exclude all evidence bearing upon a certain point on the ground that it was outside the issues. Commenting upon the situation thus brought about, the supreme court said: "The practice of waiting until the evidence is all before the court without objecting is one which we disapprove. It tends to confusion and delay. The better rule, and the one this court will require, unless in exceptional cases, is that the party shall object when improper evidence is offered, and clearly state the ground of his objection. If a motion to exclude is made, it should set out in substance the objectionable evidence, so the motion on its face will contain the portion to which exception is taken. Such a rule would impose no hardship, and tend to that certainty so important in matters of practice."

In Davis v. Hopkins, 18 Colo. 153, 32 Pac. 70, it was held that the motion should be confined to the objectionable part. See, also, Webber v. Emmerson, 3 Colo. 248.

See section 103, note 111.

quently announced in the appellate courts, that a right decision will not be overturned merely because a wrong reason is given for it, provided a sufficient reason exists upon which it may rest; and upon that other rule which calls into action every possible intendment in support of the ruling of a court while holding him who would overthrow it strictly to the specific grounds upon which he has elected to rely.[16m]

It is doubtful if this is the correct application of the rule. It has the unqualified support of but a single case.[17] The other cases which announce the doctrine associate therewith certain qualifications which render them utterly valueless as authority.[17a] If the

[16m] See section 284, *post*.

[17] Clarke v. Huber, 25 Cal. 593. In this case the defendant offered to prove certain facts which, if proved, would have constituted an estoppel upon the plaintiff. The latter interposed a general objection, which was sustained. This ruling was upheld in the supreme court, where Shafter, J., delivering the opinion, said:

"It is further insisted for the appellant that inasmuch as the objection taken by the respondent to the introduction of the evidence was a general one, he ought not now to be permitted to justify the ruling that the equitable right was not specially pleaded. The reasoning pushed to its consequences would preclude the respondent from submitting any argument in favor of the ruling. It is unnecessary, however, to consider the question upon principle, for it is well settled that the burden of showing error is upon the party who alleges it. The error alleged here is the exclusion of the defendant's testimony. The respondent is at liberty to suggest any ground that he may choose to show that the ruling was right, whether advanced in the discussions below or not. If the testimony had been admitted and Clarke had appealed, he would have been required to confine himself to objections specifically taken at the trial and stated in the record. The distinction is between the case of a party seeking to reverse a judgment, and that of a party resisting the attempt."

See Chezum v. Parker, 19 Wash. 645, 54 Pac. 22.

[17a] Miller v. Van Tassel, 24 Cal. 459; Spottiswood v. Weir, 80 Cal. 448, 22 Pac. 289; People v. Bidleman, 104 Cal. 608, 38 Pac. 502. In the first of these cases, which was an action by a vendee of personal property against the vendor for the purchase money on the ground of failure of title, the defendant offered to prove that at the time of the sale he had offered to give a warranty, and that the offer was declined, the plaintiff stating that he would take at his own risk. This offer of proof was objected to on the ground that defendant could not contradict his own bill of sale by parol, and the objection was sustained. The court said:

"The ruling of the court will be sustained in excluding the testimony, if its introduction was improper, without regard to the grounds of objection stated by counsel, *if the true objections could not have been obviated on being stated.* The true ground of the exclusion of the testimony was because it did not tend to disprove any of the allegations of the complaint, nor to prove any allegation of the answer that amounted to a defense of the cause of action. In other words, the testimony was irrelevant to the issues in the case."

In Spottiswood v. Weir, where a certain question was objected to generally, the court said:

"It is claimed by the appellant that the objection to the question was not sufficiently definite. But if the exclusion was proper on any ground, the cause will not be reversed, no matter what was the actual objection

court excludes evidence on its own motion, as it may do,[17b] whether it give a reason for its action or not, or if it exclude evidence on the motion of one of the parties, upon a general objection, the respondent may, on appeal, advance any reason at all in the first case, and any reason within the purview of the general objection interposed, in the second; but it is very doubtful if a respondent may offer a general objection to evidence, and then, in support of its exclusion, advance a reason in the appellate court, not suggested by the general objection referred to, which, had it been advanced in the trial court in the place of such general objection, could, and perhaps would, have been obviated.

As suggested, the doctrine referred to has the unqualified support of but one of the five decisions wherein it was mooted. In three of the other four it is stated with the qualification as to obviating the objection advanced. In the fifth case, the earliest of all, the proposition is sufficiently limited to suggest possible exceptions. Perhaps a better statement of the rule would be, that where evidence is excluded upon a general objection, the respondent is at liberty to advance any possible ground for such exclusion, except one which might have been obviated if it had been advanced instead of the general objection.

The rule as to the necessity of specific objections applies to motions to strike out evidence.[18] But it has to do only with the

made, *unless the objection not urged might have been obviated.* People v. Graham, 21 Cal. 261; Miller v. Van Tassel, 24 Cal. 459. It is quite obvious that the objection to this evidence could not have been obviated."

In People v. Bidleman, the court said: "The court very properly refused to permit the question to be answered, though the district attorney did not state the grounds of his objection. What the witness thought could not change the relation which in fact existed, nor would the statement of the objection have enabled the defendant *to show that it might have been obviated.* (Spottiswood v. Weir, 80 Cal. 448, 32 Pac. 289, and cases there cited.)"

It will be observed that in all these cases the exclusion was sustained, and that the determination of the appellate court seemed to rest upon the fact that the objection could not have been obviated.

The only other case ever referred to in this connection, cited in Spottiswood v. Weir, People v. Graham, 21 Cal. 261, contains the following language:

"If the court decides correctly in rejecting the testimony, it is not important whether the best objection was made, or whether any objection was made. If the court decides erroneously, for some reason not brought to its attention, such error, *as a general rule,* will not cause a reversal."

It is true that in this case the qualification as to the obviating of the objection is not stated, but it is also true that the ruling is qualified by the phrase "as a general rule," which may well be accepted as covering possible exceptions.

[17b] See note 14, last section.

[18] Sill v. Reese, 47 Cal. 294; Henry v. Southern Pacific R. R. Co., 50 Cal. 176; Chester v. Bower, 55 Cal. 46; People v. Eckman, 72 Cal. 582, 14 Pac. 359.

admissibility of the evidence, and has no bearing upon questions as to its effect.[19]

§ 106. Evidence Which is Admissible for Any Purpose must be Received—If Inadmissible for Other Purposes, Its Effect may be Limited by an Instruction.—This has several times been decided. Thus where there were several defendants it was held that evidence which was admissible as against one but not against another was rightly admitted.[1] So where several persons were concerned in a robbery, evidence of the flight of one was considered inadmissible as a badge of the guilt of another who did not fly, but was admissible to show an opportunity of disposing of the stolen property, which was not found on any of them, and it was therefore held to have been properly admitted, and the supreme court said: "If the court in admitting the evidence omitted to limit it to this purpose, it was the duty of counsel to call attention to the fact, and to request a proper charge from the court on the point. Not having done so, and the evidence being competent for the purpose indicated, he cannot complain that it was inadmissible for some other purpose."[2] So where in an action on a policy of insurance the preliminary proofs were received in evidence against objection, the supreme court held that they were admissible for the purpose of showing a compliance with the terms of the policy as to preliminary proofs, and were therefore rightly admitted, although they were inadmissible as evidence of the amount of the loss, and Ross, J., delivering the opinion of the department, said: "It is the established rule in this state that when testimony offered is admissible for one purpose but is incompetent for another, it is the duty of the objecting party to ask an instruction limiting the evidence to the purpose for which it is competent, and if he fails to do so he cannot afterward complain. People v. Collins, 48 Cal. 277; People v. Estrada, 49 Cal. 171. No such instruction was asked by defendant in the present case. Unless requested to do so, the court is not bound to give any instructions to the jury."[3]

[19] See note 12 to section 103, *ante*.

[1] Voorman v. Voight, 46 Cal. 392. See, also, Lee v. Murphy, 119 Cal. 364, 51 Pac. 549, 955. But where there are several defendants, the consequences of an erroneous ruling made at the request of one will attach to all unless the ruling was restricted either expressly or by necessary implication to the party making the request. Judson v. Malloy, 40 Cal. 299.

[2] People v. Collins, 48 Cal. 277. See, also, People v. Ah Yute, 53 Cal. 613.

[3] Williams v. Hartford Ins. Co., 54 Cal. 442, 35 Am. Rep. 77; and look

So in San Luis Obispo v. White,[3a] where a copy of a special election proclamation was admitted over objection that the original had not been sufficiently accounted for, the court sustained the ruling of the trial court in the following language:

"This objection, as far as it went, was well founded, because there was no showing of any attempt to recover the original proclamation from the printer, to whom it had been sent for publication, nor was it shown that it had been lost or destroyed. But as the printed copy, with the affidavit of its publication annexed thereto, was relevant and competent to prove the publication of the proclamation (Code of Civil Procedure, sec. 2010), and as the court was not requested to limit the evidence to the purpose for which it was admissible, the objection was overruled."

So in Liebrandt v. Sorg,[3b] where certain evidence was admitted notwithstanding well-founded objections when considered with respect to certain purposes, the court, sustaining the ruling of the trial court, said:

"The evidence under consideration being admissible for certain particular purposes, the rulings of the court in admitting it were correct, and no exception taken to those rulings can avail defendant here. It is insisted that the court should have limited the effect of the evidence before the jury. This is true, but it was the duty of the defendant, if he desired the limitation to be placed upon the evidence, to ask the court for an instruction to that effect. This he failed to do, and it is now too late to make complaint for the first time."

It is not only not error to admit evidence without limitation, if it is admissible for any purpose, and the court is not asked to limit its application, but if admitted it is entitled to be considered for any purpose to which it is applicable within the issues.[3c] But evidence is not entitled to be considered for a purpose outside the issues, and an instruction authorizing such consideration is error and ground for reversal.[3d]

As a matter of course, the rule above stated applies whether specific objections were taken to the admissibility of the evidence or

at Thompson v. Thornton, 50 Cal. 142; Dreux v. Domec, 18 Cal. 83.

As to duty of judge to give and parties to ask instructions, see section 120, *post*.

[3a] 91 Cal. 432, 24 Pac. 864, 27 Pac. 756.

[3b] 133 Cal. 571, 65 Pac. 1098.

[3c] See Fox v. Harvester etc. Works, 83 Cal. 333, 23 Pac. 295.

[3d] White v. Merrill, 82 Cal. 14, 22 Pac. 1129.

not. The specific pointing out of the purpose for which the evidence is inadmissible does not alter the fact that it is admissible for another purpose, and can serve only to direct the attention of the court to the point upon which an instruction may be given. It often happens that counsel will recognize the fact that evidence offered by them is inadmissible for certain purposes and will agree that its effect be restricted at the time it is offered. And in such case if the evidence be admitted for a certain purpose only, it will be confined to that purpose.[4] But the mere fact that counsel declares that he offers evidence for a certain purpose is usually to be taken as the statement of a reason why the evidence should be admitted and not as a limitation of the effect of the evidence. In this regard McKinstry, J., delivering the opinion in Sill v. Reese,[5] said: "We are not prepared to say that counsel is bound by the declaration of a limited purpose, so as to be estopped, after the introduction of evidence, from drawing from it other deductions than that suggested by the terms of the offer. Certainly he should not be, unless injustice has been done to the opposite party by permitting such new inferences; and this cannot be made out by mere assumption or conjecture, unsupported by any fact appearing in the record. Indeed, counsel has no power to limit the effect of evidence; it would hardly be contended that the opposite party cannot use it in any legitimate manner before the jury. The statement of a 'purpose' is only a reason addressed to the court why the particular evidence should be admitted; the effect of the evidence is to be limited in proper cases in the charge to the jury."

In the absence of an agreement between counsel and the court limiting evidence to a particular matter, it will be considered, as above suggested, for any purpose for which it is competent and relevant; and, once admitted, it is not necessary to readmit it upon the theory that a second or further presentation is necessary for its application to other purposes.[5a]

Where evidence is admissible only for certain purposes, and is limited to such purposes by the court at the time it is introduced, it will be error if the court afterward loses sight of the limitation, and assumes in its charge that the evidence is in for other purposes.[6]

[4] Henry v. Everts, 29 Cal. 610, 5 Morr. Min. Rep. 603, and see Roff v. Duane, 27 Cal. 565.

[5] 47 Cal. 294; also Sears v. Starbird, 78 Cal. 225, 20 Pac. 547.

[5a] Fox v. Harvester etc. Works, 83 Cal. 333, 23 Pac. 295; also Sears v. Starbird, 78 Cal. 225, 20 Pac. 547.

[6] Alexander v. Denaveaux, 59 Cal. 476.

§ 107. Exceptions to Rulings upon the Admissibility of Evidence.—By the amendment of March 20, 1909, to section 647 of the Code of Civil Procedure,[1] rulings of the trial court "sustaining or overruling an objection to evidence," and orders on "a motion to strike out evidence or testimony," were added to the list of orders and rulings "deemed to have been excepted to." Prior to the enactment of this provision of the code, if a party made an objection to his adversary's evidence and his objection was overruled, or if he made an offer of evidence, and such offer was, upon motion of his adversary, rejected, he could not have the ruling reviewed unless he reserved an exception thereto. This was well settled.

In Turner v. Tuolumne Water Co.,[2] the party made his objection but failed to take an exception. On appeal, the supreme court said: "This evidence was objected to by counsel for the appellant, and the objection was overruled by the court; but it nowhere appears in the record that counsel took an exception to the ruling of the court. Such being the case, he is presumed to have acquiesced therein." So in Russell v. Dennison,[2a] the court said: "We cannot consider the propriety of the questions which were addressed to the witness Melinda Russell and the plaintiff, and were objected to by the defendants. After the objections were overruled it does not appear that any exceptions were reserved."

So in Austin v. Andrews, [2b] where there was an objection to certain evidence, but no exception, the court said:

"The defendant offered in evidence several tax receipts, showing that he had paid taxes on all the west half of the section referred to, except the lands in the town of Farmington. The plaintiff objected to these receipts being received in evidence, and his objections were overruled, but he took no exceptions to the rulings. and therefore cannot now be heard to complain of them as erroneous."

So in Dickerson v. Dickerson,[2c] where the first assignment of error in the bill of exceptions settled and filed after hearing of the petition was to a ruling sustaining an objection by respondent to a certain question put to a witness by the appellant, the court said: "No exception was taken to the alleged erroneous ruling, and it will therefore not be considered here." (Citing cases.)

[1] See Stats. 1909, c. 355.

[2] 25 Cal. 397, 1 Morr. Min. Rep. 107.

[2a] 45 Cal. 337.

[2b] 71 Cal. 98, 16 Pac. 546.

[2c] 108 Cal. 351, 41 Pac. 475.

So in United States Oil & Land Co. v. Bell,[2d] the appellate court declined to review a ruling of the trial court sustaining an objection to evidence on the ground that the record failed to show that an exception thereto had been reserved. So in other cases the principle has been approved and followed.[2e]

The requirement of an exception to a ruling on matters of evidence was based upon the fact that, by subdivision 7 of section 657, Code of Civil Procedure, one of the grounds for the granting of a new trial was "error in law, occurring at the trial *and excepted to* by the party making the application." It would seem to be clear, but the point has not been expressly passed upon by the appellate courts, that the effect of the amendment of 1909 to section 647, above referred to, is to dispense with the necessity of an exception expressly and formally taken.[2f] Under the law as it stood before the amendment the exception must be taken by the party aggrieved by the ruling, and who assigned the error as prejudicial on appeal. An appellant could not take advantage of exceptions reserved by others who did not appeal.[2g]

The exception need not, in any event, be taken more than once.[2h] Thus, in Green v. Southern Pacific Co.,[2k] the court said:

"Where a party has once formally taken exception to a certain line of character of evidence, he is not required to renew the objection at each recurrence thereafter of the objectionable mat-

[2d] 153 Cal. 781, 96 Pac. 901.

[2e] See Pearson v. Snodgrass, 5 Cal. 478; McCartney v. Fitz Henry, 16 Cal. 184; Keeran v. Griffith, 34 Cal. 580; Thiele v. Koster, 63 Cal. 241; Lucas v. Richardson, 68 Cal. 618, 10 Pac. 183; Austin v. Andrews, 71 Cal. 98, 16 Pac. 546; People v. Morino, 85 Cal. 515, 24 Pac. 892; Emeric v. Alvarado, 90 Cal. 444, 27 Pac. 356; Lee v. Murphy, 119 Cal. 364, 51 Pac. 549, 955; Randall v. Freed, 154 Cal. 299, 97 Pac. 669. And see Sharon v. Sharon, 79 Cal. 633, 22 Pac. 26, 131; Magee v. N. P. Co., 78 Cal. 430, 12 Am. St. Rep. 69, 21 Pac. 114; People v. Mullings, 83 Cal. 138, 17 Am. St. Rep. 223, 23 Pac. 229; People v. Miller, 122 Cal. 84, 54 Pac. 523; People v. Castro, 125 Cal. 521, 58 Pac. 133; Green v. S. P. Co., 122 Cal. 563, 55 Pac. 577.

As to the necessity for objections in general, see sections 103 and 104, *ante;* and as to specific objections, section 105, *ante.*

As to method of setting out exceptions in the bill of exceptions, see section 258, *post;* and as to specifications of errors and of particulars, see sections 149 and 150, *post.*

[2f] For the probable effect of the amendment, see Randall v. Freed, 154 Cal. 299, 97 Pac. 669.

[2g] See Emeric v. Alvarado, 90 Cal. 444, 27 Pac. 356.

[2h] See section 103, *ante,* notes 11m to 11q, inclusive, as to repetition of objections, and last group of cases cited in note 2d, *ante.* See section 110, *post,* as to rulings upon offer to prove facts.

[2k] 122 Cal. 565. See People v. Castro, 125 Cal. 522, to same effect, as to exclusion of evidence.

ter arising at each examination of other witnesses; and his silence will not debar him from having the exception reviewed."

An exception is defined by statute as follows: "An exception is an objection upon a matter of law to a decision made either before or after judgment by a court, tribunal, judge, or other judicial officer in an action or proceeding. The exception must be taken at the time the decision is made, except as provided in section 647."[3] "No particular form of exception is required."[4] The simple statement that the party excepts, or takes, or reserves an exception, or equivalent language, is sufficient. It is not necessary to state the grounds or reasons of the exception, for that is done in the objection made before the ruling;[5] nor is it necessary to specify as in the case of exceptions to a charge to the jury,[6] the particular ruling or portion excepted to; for rulings upon the admissibility of evidence are made one at a time, and the exception must follow the ruling immediately and before any other matter is proceeded with. Consequently there is no room for the application of the exception to any other ruling than the one to which it is taken; nor is it necessary or proper in taking the exception to state any of the evidence or other matter in its support;[7] for if it were necessary to state any of the evidence or matter material to the exception it would be equally so to state all of it, which would be to rehearse an entire bill of exceptions every time counsel had occasion to except to a ruling. The exception is in substance a formal protest against a ruling,[8] and serves as notice that the party intends to rely upon it as error.

§ 108. **Error in Ruling upon the Admissibility of Evidence may be Cured by Subsequent Proceedings.**—A ruling which is right when made cannot be rendered erroneous by subsequent proceedings;[1] but an erroneous ruling may be cured by proceedings afterward had. This rule is applied, even in criminal cases. In People v. Anderson,[2] Sanderson, C. J., delivering the opinion, laid down the rule as follows: "Where error has clearly intervened,

[3] Sections 647 and 648 California Code of Civil Procedure speak of exceptions to verdicts, which, of course, are decisions of *fact* and not "upon a matter of law." These sections introduce a new kind of exception. See Will of Bowen, 34 Cal. 682.

[4] See section 648, *post*.

[5] See in this connection note 19 to section 256, *post*.

[6] See section 128, *post*.

[7] See section 258, *post*. Such matter, however, must be stated in the bill of exceptions.

[8] People v. Torres, 38 Cal. 141.

[1] Depuy v. Williams, 26 Cal. 309, 5 Morr. Min. Rep. 251; Satterlee v. Bliss, 36 Cal. 489.

[2] 26 Cal. 129.

the general rule is that the judgment must be reversed and a new trial ordered; but such is not the case if during the subsequent proceedings the foundation of the error is overthrown and another substituted which supports the ruling of the court, for the previous wrong, so to speak, is thereby made right, and the complaining party can no longer say that he has been injured." There are many different ways in which errors in rulings upon the admissibility of evidence may be cured. If testimony be erroneously admitted, the error may be cured by striking it out and instructing the jury to disregard it,[3] or by simply instructing the jury to disregard it.[4] And if the party against whose objection the evidence is introduced himself introduces evidence which establishes the fact sought to be proved by the erroneous evidence, the error is cured.[5] So if irrelevant evidence be admitted against objection, and the party who introduced the evidence asks leave to withdraw it, which is refused at the instance of the other party, the error is cured, or rather waived.[6] So error in admitting immaterial evidence against objection may be cured by an amendment during the trial so as to make such evidence material.[6a] Error in excluding the testimony of a witness is cured by afterward permitting the witness to testify as to the matter,[7] and sometimes by allowing other witnesses to testify as to the point.[8] So if the court errs in striking out a denial of the existence of a corporation, but subsequently allows proof of its existence, the error is cured.[9] And if the court admits a deed in evidence against objection without sufficient proof of its execution, the error is cured if a witness subsequently proves the execution.[10] And where a circular was admitted erroneously, because not shown to have been received and acted upon, the error was cured by subsequent introduction of the missing evidence.[10a]

[3] Ward v. Preston, 23 Cal. 468; People v. Hoy Yen, 34 Cal. 176; People v. French, 69 Cal. 169, 10 Pac. 378.

[4] Union Water Co. v. Crary, 25 Cal. 504, 85 Am. Dec. 145, 1 Morr. Min. Rep. 146; Henry v. S. P. R. R., 50 Cal. 176.

[5] Turner v. McIlhaney, 8 Cal. 575; People v. Montgomery, 53 Cal. 576. See, also, People v. Ketchum, 73 Cal. 635, 15 Pac. 353.

[6] Mitchell v. Davis, 23 Cal. 381.

[6a] Curtiss v. Aetna L. I. Co., 90 Cal. 245, 25 Am. St. Rep. 114, 27 Pac. 211.

[7] Branson v. Caruthers, 49 Cal. 374; People v. Woody, 48 Cal. 80; Real Del Monte G. & S. M. Co. v. Thompson, 22 Cal. 542; Montgomery v. Hunt, 5 Cal. 366.

[8] Byrne v. Jansen, 50 Cal. 624; Wing Chung v. Los Angeles, 47 Cal. 531.

[9] People v. Hagar, 52 Cal. 170.

[10] Ellis v. Jeans, 7 Cal. 409.

[10a] Robinson v. Nevada Bank, 81 Cal. 106, 22 Pac. 478.

So upon the admission of certain letters on the testimony of prosecutrix that they were in defendant's handwriting, the refusal of the court to allow defendant to examine the prosecutrix as to her knowledge of defendant's handwriting, if erroneous, was held to have been cured by the admission of subsequent competent evidence, without conflict, that the letters were in defendant's handwriting.[10b] And if the court erroneously excludes evidence, but finds the fact which the evidence tended to prove, the error is cured, or rather is immaterial.[11] And if there be error in allowing a person whom the evidence shows to be the wife of the prisoner to testify against him, the error is cured by subsequent proof completely disproving the relation.[12] And if an improper question is allowed against objection, but the witness does not answer it but gives some irresponsive answer, the error is harmless.[13]

§ 109. The Order in Which Evidence shall be Introduced Rests in the Discretion of the Court.—There are ordinarily many links in the chain of proof. Evidence which goes to any link is relevant. As was said by Baldwin, J., delivering the opinion in a case where the party had introduced his evidence out of its order,[1] "he was not bound to make his whole case complete by any one item of proof. A case consists frequently of various facts, neither one of which makes it out, and to hold that a party is not entitled to introduce any part until he establishes the whole is to require an impossibility. All that the court can ask is that the particular evidence offered conduces to establish any one proposition involved in the issue. It is time enough to pass upon the sufficiency of the proofs after they are all in the cause. There must be a starting place somewhere, and the court should never reject evidence merely because, unaided by other testimony, it is insufficient, if it tend legally to prove any part of the case." And it seems that if the evidence offered has no tendency, taken by itself, to establish any one fact in the case, an objection that it is irrelevant is properly overruled if the evidence may be connected with the case by other testimony which the party promises to introduce.[2]

[10b] People v. Goodwin, 132 Cal. 368, 64 Pac. 561.

[11] Garwood v. Wood, 34 Cal. 248. See Reynolds v. Jourdan, 6 Cal. 108.

[12] People v. Anderson, 26 Cal. 129.

[13] Treat v. Reilly, 35 Cal. 129; People v. Williams, 45 Cal. 25.

See generally Verzan v. McGregor, 23 Cal. 339, 2 Morr. Min. Rep. 165.

[1] Palmer v. McCafferty, 15 Cal. 334.

[2] Crossett v. Whelan, 44 Cal. 200; People v. Frank, 28 Cal. 507.

Evidence admitted which would otherwise be incompetent, upon the promise that later on the party will lay the proper foundation, or connect it with the issues by establishing its competency, relevancy, or materiality, should be stricken out if the promised evidence is not in fact introduced, and a motion to so strike out should be granted, and it is error to deny the same.[2a] If it does not appear from the question as asked whether the answer to it will be material evidence or not, the party seeking to introduce the evidence must make an offer of what he proposes to prove, and, in the absence of such an offer, the appellate court will not reverse a ruling sustaining an objection to the question.[2b] In making out the various facts involved in the case, however, there is usually a natural and logical order in which the evidence should be introduced. But a party is not confined to such order. It is always within the discretion of the court which tries the cause whether testimony shall be admitted out of its proper order, and except in cases of a manifest abuse of discretion, the supreme court will not disturb the ruling of the lower court in that respect.[3] Usually the court below allows the party to introduce his evidence in any order that is most convenient to him, subject to certain general rules; and language is sometimes used which implies that the party has a right to do so. Thus in Palmer v. McCafferty herein quoted, Baldwin, J., said: "The plaintiff was entitled to introduce his proofs in his own order." But this is not strictly true even of the

[2a] People v. Powell, 87 Cal. 348, 25 Pac. 481, 11 L. R. A. 75.

[2b] Marshall v. Hancock, 80 Cal. 82, 22 Pac. 61, and Houghton v. Clarke, 80 Cal. 417, 22 Pac. 288.

[3] Lick v. Diaz, 37 Cal. 437; Gordon v. Searing, 8 Cal. 49; People v. Brotherton, 47 Cal. 388; People v. Shainwold, 51 Cal. 468; Crossett v. Whelan, 44 Cal. 200; People v. Fehrenbach, 102 Cal. 394, 36 Pac. 678; Bates v. Tower, 103 Cal. 404, 37 Pac. 385; People v. Daniels, 105 Cal. 262, 38 Pac. 720; People v. Rodley, 131 Cal. 240, 63 Pac. 351; and see People v. Gordon, 103 Cal. 568, 37 Pac. 534; People v. Van Horn, 119 Cal. 323, 51 Pac. 538; People v. Compton, 123 Cal. 403, 56 Pac. 44; People v. Donnolly, 143 Cal. 394, 77 Pac. 177.

See section 1870, California Code of Civil Procedure, as to facts to be proved, and incidentally the order of proof, in civil cases; and see section 1093, California Penal Code, as to order of trial and proof in criminal actions.

Section 1870, California Code of Civil Procedure, is not mandatory. The order of proof suggested in subdivision 6 thereof merely presents the logical sequence, and while it should not be disregarded except in cases where it is difficult to present the proof in the order there prescribed, the court is authorized in its discretion to depart therefrom in exceptional cases, and such departure is not error. People v. Compton, 123 Cal. 403, 56 Pac. 44; People v. Donnolly, 143 Cal. 394, 77 Pac. 177. The same can be said of subdivision 5 of the section.

As to section 1093, Penal Code, see People v. Gordan, 103 Cal. 568, 37 Pac. 534.

different parts of one branch of the case, as the decisions above cited show. The matter rests within the discretion of the court, and a case is often shortened if the court holds the party down to the point where the strain of the case comes, and does not permit him to wander round it. And there are certain general rules as to how the different branches of a case shall be presented which courts usually follow. Thus it is usual to require the plaintiff to introduce all of his evidence in chief before he rests.[4] And if the plaintiff keeps back any of his evidence properly belonging to his opening case, the court may and usually would refuse to permit him to introduce it by way of rebuttal, unless he pleads inadvertence or mistake, and appeals to the discretion of the court.[5] Thus in Young v. Brady,[5a] which was an action for debt for money had and received, it was held that evidence of admissions should have been introduced as part of plaintiff's case in chief, and that it was not error to reject the same when offered in rebuttal, plaintiff not having pleaded inadvertence, and applied to the discretion of the court to be excused. So where the plaintiff does not confine his opening to his own case, but chooses to anticipate and try to disprove a defense, and the defendant simply introduces contradictory evidence, the court may refuse to permit the plaintiff to introduce further evidence on the question.[6] So the court may refuse to permit the plaintiff to repeat in rebuttal the evidence given in his opening case.[7] So in general the defendant should not open his case by cross-examination of the plaintiff's witnesses, but the application of this rule rests very much in the court's discretion;[8] and it has been held that where a part of a conversation is given in the examination in chief, the defendant may, upon cross-examination, get the rest before the jury, notwithstanding the fact that it may refer solely to matters of his main defense.[8a] This rule was upheld in People v. Lee Chuck,[8b] where the court said: "It is no objection to such evidence that it would tend to prove some fact material to the defense, if it were also under the rules

[4] Valentine v. Mahoney, 37 Cal. 389; and see sections 2042, 2045, California Code of Civil Procedure.

[5] Kohler v. Wells, Fargo & Co., 26 Cal. 606; and see section 2050, California Code of Civil Procedure.

[5a] 94 Cal. 128, 29 Pac. 489.

[6] Casey v. Leroy, 38 Cal. 697. Compare Wade v. Thayer, 40 Cal. 578.

[7] Phelps v. McGloan, 42 Cal. 298.

[8] Thornton v. Hook, 36 Cal. 223; Aitken v. Mendenhall, 25 Cal. 212; Thornburgh v. Hand, 7 Cal. 554; Roche v. Baldwin, 143 Cal. 186, 76 Pac. 956. See, also, Harrington v. Butte etc. Co., 19 Mont. 411, 48 Pac. 758, and note 8a, below.

[8a] Watrous v. Cunningham, 71 Cal. 30, 11 Pac. 811.

[8b] 74 Cal. 30, 15 Pac. 322.

legitimate cross-examination." In such a case the defense could not properly be compelled to make the witness his own in order to get the remainder of the evidence before the jury.

So it is said that a party should finish with a witness while he is on the stand, and the court may properly refuse to allow a witness to be re-examined as to matters already gone over,[9] and may refuse to allow a witness to be recalled for cross-examination.[10]

But all such matters rest very much in the sound discretion of the court. This discretion is very broad, and its exercise will be disturbed only for abuse.[10a] Thus the court may permit the plaintiff to introduce further evidence in chief after the defendants have closed their case.[11] So it may permit the defendant to introduce further evidence,[12] such as that of an expert,[12a] after resting; or to testify in person after the plaintiff has closed in rebuttal.[12b] So permission may be given to recall a witness after he has been examined,[13] even after continuance for argument,[13a] and such permission is seldom refused; but it has been held not to be an abuse of discretion for the trial court to refuse to reopen the case for the introduction of additional evidence after the cause had been continued several days for argument solely.[13b]

The court has power to open a case for further evidence after it has been submitted for decision.[14] This action is usually founded

[9] Brummagim v. Bradshaw, 39 Cal. 24; People v. Moan, 65 Cal. 532, 4 Pac. 545; Rea v. Wood, 105 Cal. 314, 38 Pac. 899; section 2050, Code of Civil Procedure; and may limit cross-examination. Reed v. Clark, 47 Cal. 194.

[10] People v. Keith, 50 Cal. 137.

[10a] See cases cited in note 3, *supra;* and see McGrath v. Wallace, 85 Cal. 627; Rea v. Wood, 105 Cal. 314, 38 Pac. 899; Estate of Walker, 148 Cal. 162, 82 Pac. 770; also Bank v. P. C. S. S. Co., 95 Cal. 1, 29 Am. St. Rep. 85, 30 Pac. 96; S. F. Breweries v. Schurtz, 104 Cal. 420, 38 Pac. 92.

[11] Priest v. Union Canal Co., 6 Cal. 170, 4 Morr. Min. Rep. 515; Fairchild v. California Stage Co., 13 Cal. 599; Foote v. Richmond, 42 Cal. 439; Cousins v. Partridge, 79 Cal. 224, 21 Pac. 745.

[12] Barry v. Bennett, 45 Cal. 80.

[12a] National Bank v. Wolff, 79 Cal. 69, 21 Pac. 551, 748.

[12b] Barkly v. Copeland, 74 Cal. 1, 5 Am. St. Rep. 413, 15 Pac. 307; and see People v. Christensen, 85 Cal. 568, 24 Pac. 888, where permission to testify in person after the close of the testimony and while the judge was charging the jury was refused, and the refusal sustained on appeal.

[13] Tyler v. Healy, 51 Cal. 191.

[13a] Briswalter v. Palomares, 66 Cal. 259, 5 Pac. 226; Cons. Nat. Bank v. P. C. S. S. Co., 95 Cal. 1, 29 Am. St. Rep. 85, 30 Pac. 96; and see San Francisco Breweries v. Schurtz, 104 Cal. 420, 38 Pac. 92; Estate of Walker, 148 Cal. 162, 82 Pac. 770.

[13b] See Consolidated National Bank v. Pacific Coast S. S. Co., 95 Cal. 1, 29 Am. St. Rep. 85, 30 Pac. 96.

[14] Mowry v. Starbuck, 4 Cal. 274; Pinkham v. McFarland, 5 Cal. 137; Foote v. Richmond, 42 Cal. 439; Keys v. Warner, 45 Cal. 60.

Or may refuse to do so. See Preston v. Sonora Lodge, 39 Cal. 116; Miller v. Sharp, 49 Cal. 233.

The rule has been applied to criminal cases, and in People v. Benc, 130 Cal. 159, 62 Pac. 404, the district at-

upon a showing of inadvertence,[14a] and is sometimes accompanied by an amendment of the pleading so as to render the proposed new evidence material and relevant,[14b] but not necessarily so. In Clavey v. Lord,[14c] a suit in equity, the submission was set aside, along with a special verdict, three months after the rendition of the latter, and new evidence allowed to be introduced, without a showing of inadvertence. And in one case the supreme court held that it was proper under the circumstances of the case for the court below to continue the case for further evidence, after having announced its decision, it not having been entered in the minutes.[15]

Whenever a matter rests in the discretion of the court, its action will be disturbed only for abuse of discretion.[16] In such cases there is no "error in law";[17] and therefore the motion for new trial should be made under the first subdivision, as for an abuse of discretion. The matter has been considered in this connection because it is connected with the subject.[18]

torney was permitted to reopen the case for the introduction of further testimony; and see People v. Majoine, 144 Cal. 303, 77 Pac. 952.

[14a] See McGrath v. Wallace, 85 Cal. 622, 24 Pac. 793; Young v. Brady, 94 Cal. 128, 29 Pac. 489; Haines v. Young, 132 Cal. 512, 64 Pac. 1079.

[14b] Andrus v. Smith, 133 Cal. 78, 65 Pac. 320.

[14c] 87 Cal. 413, 25 Pac. 493.

[15] Hastings v. Hastings, 31 Cal. 95.

[16] See section 289, *post*. For instances of abuse of discretion with respect to evidence, see Barry v. Bennett, 45 Cal. 80; Wade v. Thayer, 40 Cal. 578; Barkly v. Copeland, 74 Cal. 1, 5 Am. St. Rep. 413, 15 Pac. 307; National Bank v. Wolff, 79 Cal. 69, 21 Pac. 551, 748.

[17] See section 100, *ante*.

[18] Without attempting to classify them, as in the text, the following cases are cited as sustaining the principle that the order in which the parties are allowed to introduce their testimony, whether in chief, rebuttal, or otherwise, rests within the discretion of the trial court, and is subject to the well-settled rule as to abuse:

California: In re Walker's Estate, 148 Cal. 162, 82 Pac. 770; San Pedro etc. Co. v. Schroeter, 156 Cal. 158, 103 Pac. 888; California etc. Co. v. Commercial etc. Co. (Cal.), 112 Pac. 858; Moody v. Peirano, 4 Cal. App. 411, 88 Pac. 380; O'Brien v. Big Casino etc. Co., 9 Cal. App. 283, 99 Pac. 209.

Colorado: Browne v. Steck, 2 Colo. 70; Seller v. Clelland, 2 Colo. 532; Huston v. Plato, 3 Colo. 402; Layton v. Kirkendall, 20 Colo. 236, 38 Pac. 55; San Miguel etc. Co. v. Bonner, 33 Colo. 207, 79 Pac. 1025; French v. Guyot, 30 Colo. 222, 70 Pac. 683; Sheridan v. Patterson, 34 Colo. 267, 82 Pac. 539; Prudential Ins. Co. v. Hummer, 36 Colo. 208, 84 Pac. 61; Lewis v. Helm, 40 Colo. 17, 90 Pac. 97; McCreery v. Morrison (Colo.), 105 Pac. 876; Allen v. Shires, 47 Colo. 433, 107 Pac. 1070; Beach v. Schroeder (Colo.), 107 Pac. 271; Herr v. Hansen, 8 Colo. App. 169, 45 Pac. 236.

Montana: Starr v. Gregory, 6 Mont. 485, 13 Pac. 195; Bardwell v. Anderson, 13 Mont. 87, 32 Pac. 285; Tague v. John Caplice Co., 28 Mont. 51, 72 Pac. 297; Schilling v. Curran, 30 Mont. 370, 76 Pac. 998; Butte etc. Co. v. Barker, 35 Mont. 327, 89 Pac. 302, 90 Pac. 177; Stephens v. Elliott, 36 Mont. 92, 92 Pac. 45; Noyes v. Clifford, 37 Mont. 138, 94 Pac. 842.

§ 110. Ruling upon an Offer to Prove Facts.—As a general rule, testimony must be elicited by questions and answers. But where a party has a witness on the stand, and there is a question as to the admissibility of the testimony, it is often a convenient way of raising the question to offer to prove the facts, and take the ruling of the court upon the offer.[1] This course saves time and trouble, and with the permission of the court it may be adopted.[2] In such case the offer is equivalent to the actual questioning of the witness, and if the facts stated in the offer are proper to be shown, and an objection to it be sustained, it is ground for a new trial. For, as stated in Hackett v. Manlove,[3] it must be assumed that the party could have proved the facts had he been permitted to do so.

Where an offer to prove facts is made, and some of the facts are admissible, and the others are inadmissible, the rule requiring objections to evidence to be specific[4] requires that the objection should point out the inadmissible portion. If it does not do this, but goes to the whole offer, it is error to sustain it. This was held by the majority of the court in bank in the Board of Education v.

Nevada: Gibson v. Hjul (Nev.), 108 Pac. 759.

New Mexico: Richardson v. Pierce, 14 N. M. 334, 93 Pac. 715.

Oklahoma: Higgins v. Street, 19 Okl. 42, 92 Pac. 155.

Oregon: Jones v. Peterson, 44 Or. 161, 74 Pac. 661; Bank v. McCullough, 50 Or. 508, 126 Am. St. Rep. 758, 93 Pac. 366, 17 L. R. A., N. S., 1105; Bade v. Hibberd, 50 Or. 501, 93 Pac. 364; Crosby v. Portland etc. Co., 53 Or. 496, 100 Pac. 300, 101 Pac. 204; Stowell v. Hall (Or.), 108 Pac. 182.

Utah: Neilson v. Nebo etc. Co., 25 Utah, 37, 69 Pac. 289; English v. Openshaw, 28 Utah, 241, 78 Pac. 476; Stephens v. Union etc. Co., 16 Utah, 22, 67 Am. St. Rep. 595, 50 Pac. 626; In re Miller's Estate, 36 Utah, 228, 102 Pac. 996.

Washington: Thorne v. Joy, 15 Wash. 83, 45 Pac. 642; Carmack v. Drum, 27 Wash. 382, 67 Pac. 808; Jones v. Western etc. Co., 32 Wash. 375, 73 Pac. 359; Bergman v. London etc. Co., 34 Wash. 398, 75 Pac. 989; Kane v. Kane, 35 Wash. 517, 77 Pac. 842; Seattle etc. Co. v. Roeder, 30 Wash. 244, 94 Am. St. Rep. 864, 70 Pac. 498; Knapp v. Order of Pendo, 36 Wash. 601, 79 Pac. 209; Richardson v. Agnew, 46 Wash. 117, 89 Pac. 404; Reiff v. Coulter, 47 Wash. 678, 92 Pac. 436; Lueders v. Tenino, 49 Wash. 521, 95 Pac. 1089; Bellingham v. Linck, 52 Wash. 208, 101 Pac. 843; Van Horn v. New Western etc. Co., 54 Wash. 117, 103 Pac. 42; Anderson v. Globe etc. Co., 57 Wash. 502, 107 Pac. 376.

In the following abuse of discretion was shown: Gray v. Sharp, 17 Colo. App. 139, 67 Pac. 351; Maloney v. King, 30 Mont. 158, 76 Pac. 4.

[1] This is analogous to a motion for nonsuit on an opening statement; as to which see note 26 to section 115, *post*.

[2] Ordinarily, the consent of the court is a matter of course, and to be assumed in the lower and appellate courts. But the court may require the regular course to be followed. For otherwise the process of offering to prove facts could be made a means of instructing a witness what to say.

[3] 14 Cal. 85.

[4] See section 105, *ante*.

Keenan.[5] In that case the judgment was reversed for the rejection of an offer to prove certain facts, a portion of which were admissible, and McKee, J., delivering the opinion, said:

"But it is urged that if that part of the testimony was admissible, the offer as an entirety is bad, because it was an offer good in part, and bad in part, and there was no error committed in sustaining the objection to it as an entirety. We have been referred to several decisions of courts where that seems to be the rule. Upon the subject there is unquestionably a conflict of opinion. In New York and Pennsylvania it has been held that if an offer contains any matter not admissible as evidence, the whole may be rejected. (Hosley v. Black, 28 N. Y. 444; Gardner v. Barden, 34 N. Y. 438; Beebe v. Bull, 12 Wend. 504, 27 Am. Dec. 150; Wharton v. Douglass, 76 Pa. 273.) But in Alabama and Maryland, and in the supreme court of the United States, the contrary is held to be the more correct rule. [The court here discussed the authorities in the latter courts and continued.] We think these cases establish the correct rule on the subject. No injustice can be done by working under such a rule, for the trial court has it within its power to decide upon the admissibility of any part of the testimony included within an offer, when the witnesses are called upon to testify; or if any admitted part of it should be objectionable, it has the power to strike it out upon motion."

A similar *result* was reached in the case of Lick v. Diaz,[6] upon what seems a better rule. In that case the judgment was reversed, because of the rejection of an offer to prove facts, a part of which were admissible, and Crockett, J., delivering the opinion, said: "Nor does it clearly appear that the offer was intended to be to prove all the facts included in the offer as a whole, and not each fact *seriatim*. Unless it distinctly appeared that the offer was to prove all the facts as a whole, or none of them, we should construe the offer liberally, and hold it to be an offer to prove each fact *seriatim;* and we so construe the offer in this case."

This case does not appear to have been cited to the court in the Board of Education v. Keenan. The two cases agree in this, that where it does not appear that the offer was to prove the facts as a whole, and some of them are admissible, its rejection as a whole is error. The case of the Board of Education does not seem to take into consideration cases where it affirmatively appears that the

[5] 55 Cal. 642. [6] 37 Cal. 437.

offer was to prove a series of facts as a whole and not separately, some of the facts being inadmissible. Such cases are not likely to occur frequently. But, where they do, it would seem unreasonable to apply the rule laid down in that case. For a party has certainly the right to say what evidence he will offer and what he will not; and where it affirmatively appears that the offer was to prove the series of facts as a whole, and not separately, the ruling is simply that the facts, as a whole, cannot be admitted; there is no offer to prove a portion of the facts; and to reverse because a portion was admissible is to reverse because of a ruling which was not made, or in other words, because of an error which was not committed.

In Shatto v. Crocker,[6a] where a number of documents attached together were offered in evidence as a whole, the court followed the decision in Board of Education v. Keenan, *supra,* saying:

"The papers were attached together, and were objected to as a whole. They included a certified copy of the entries in the docket. Such copy is made *prima facie* evidence of the facts stated by the provisions of section 92, Code of Civil Procedure. As some of the evidence offered as a whole was admissible, and as appellant failed to specify any particular portion to which he addressed his objection, there was no error in the ruling of the court."

In Harris v. Zanone,[6b] the principle was again followed with approval, Harrison, J., delivering the opinion of the court in bank:

"The evidence of the plaintiff respecting the threats of the defendant to ruin her reputation was admissible for the purpose of establishing malice. When this testimony was offered, the counsel for the defendant admitted the relevancy of a portion of it, but declined to point out the portion to which he objected as irrelevant, notwithstanding the offer of the court to rule thereon and reject such as was inadmissible. The court, therefore, did not err in admitting the evidence offered."

Against the above-cited authorities, the supreme court in a department decision in Swafford v. Board of Education,[6c] Cooper, C., delivering the opinion, said:

[6a] 87 Cal. 629, 25 Pac. 921.

[6b] 93 Cal. 59, 28 Pac. 845.

[6c] 127 Cal. 484, 59 Pac. 900. The following language of the decision is quoted in illustration of the point raised in the text:

"The record illustrates the position in which counsel are often placed by offering to prove certain facts in order to save exceptions instead of asking the questions and taking a ruling upon the questions so asked. In this case it appears that after the close of defendant's evidence the plaintiff was called in rebuttal. After some discussion as to whether

"The offer included many different propositions grouped together, and, if the proof of any one proposition was incompetent, irrelevant, or immaterial, the ruling should be sustained."

No reference is made to the above, or any authorities whatever, and it does not appear upon what particular ground the decision was reached. In the absence of such a reference, or some argument in support of the court's conclusion, it cannot be said that there was a purpose to overturn the well-established doctrine of the court, announced in more than one bank decision, by a department decision, however well supported in other respects it may be. The matter has not been cleared up, and in the face of the conflicting authorities here cited, it must still be regarded as an open one.

With the above qualification, the rule is well settled that an offer of proof must be of proof or evidence of an admissible character. Thus in Bostwick v. Mahoney,[64] where there was an offer to prove, by the parol evidence of a certain witness, facts which could be proved only by record or documentary evidence, such offer was held to have been properly refused.

the offered evidence was in rebuttal, the court, in the exercise of its discretion, allowed the plaintiff's attorney to offer it as part of his evidence in chief. The offer covers some five folios of the transcript, and it is not necessary to give it here in full. Among other things, counsel for plaintiff 'offered to prove' that on the thirtieth day of June, 1890, I. S. Crawford was principal of the Petaluma High School and continued as such until the twenty-ninth day of June, 1891. That by resolution passed on the thirtieth day of June, 1890, the salary of the principal of said school was fixed at one hundred and sixty-five dollars per month. That Professor Crawford continued to teach until June 29, 1891, when his resignation was received and, on motion, accepted. That the board then proceeded to ballot for his successor. That the names of several candidates were proposed, and, upon ballot taken, plaintiff was elected as successor of said Crawford. That plaintiff thereupon entered upon his duties as teacher and continued to teach up to the sixteenth day of February, 1895, receiving one hundred and sixty-five dollars per month during all that time. That the salary of plaintiff was paid by warrants drawn by the board of education upon the treasurer of the city of Petaluma.

"Counsel for plaintiff offered to prove all the above facts 'by the minutes of the board of education and other testimony.' The offer was objected to as being incompetent, irrelevant, and immaterial. The objection was sustained, and plaintiff's counsel excepted. We think the ruling correct.

[Here follows quotation in text.]

"It certainly does not appear to us that the evidence as to one Crawford being principal of the high school in June, 1890, that he continued to teach until June, 1891, and then resigned, that the resignation was accepted, that several candidates were proposed to fill the vacancy, that the salary of the plaintiff was paid by warrants drawn on the treasury, would have been material or relevant to any issue before the court."

[64] 73 Cal. 238, 14 Pac. 832.

So if it does not appear on the face of the offer whether the proposed evidence is admissible, it is the duty of counsel to explain clearly what is expected to be proved, with whatever showing may be required to establish the admissibility of the offered evidence; and in the absence of such a statement a rejection will not be deemed prejudicial on appeal.[6e]

An offer should be specific in its terms. If it be so vague that it cannot be ascertained from it what was intended to be shown, its rejection is not error.[7] Thus, in Biddick v. Kobler,[8] upon this point the supreme court said:

"A mere general 'offer' to prove a variety of things, without producing the witnesses or evidence whereby they are to be proved, or segregating the different items, is an improper method of presenting offered evidence, and should not be allowed except by consent of the parties."

So in Havens v. Donohue,[9] the court held that it was not error to refuse an offer of evidence which was too vague, general and indefinite to give the court light upon the issue to which it is proposed to address it.

Similar in character is the rule requiring that an offer of proof must be directed to some specific material fact, and unless the offer is so directed, it will be denied on account of vagueness.[10] And if evidence is offered which is competent for a special though not a general purpose, its purpose should be specifically pointed out.[11]

§ 111. Miscellaneous Matters of Practice in Relation to Evidence.—The admission of a fact by counsel is to be treated as evidence.[1] Evidence given by plaintiff's witness on cross-examination is part of the plaintiff's evidence.[2] A judgment will not be reversed for the allowance or disallowance of leading questions, as

[6e] See Havens v. Donohue, 111 Cal. 297, 43 Pac. 962; and see Schroeder v. Schmidt, 74 Cal. 459, 16 Pac. 243; People v. Totman, 135 Cal. 133, 67 Pac. 51, where the court held that the failure of counsel to specify that the evidence was offered for the purpose of contradicting an adversary witness rendered the offered evidence insufficient, and it was not error to reject it.

[7] Smith v. East Branch Co., 54 Cal. 164.

[8] 110 Cal. 191, 42 Pac. 578.

[9] 111 Cal. 297, 43 Pac. 962. And see People v. Totman, 135 Cal. 133, 67 Pac. 51.

[10] Schroeder v. Schmidt, 74 Cal. 459, 16 Pac. 243.

[11] See Byrne v. Byrne, 113 Cal. 294, 45 Pac. 536; and see Stevens v. San Francisco etc. R. Co., 100 Cal. 554, 35 Pac. 165.

[1] Lorenzana v. Camarillo, 41 Cal. 467; and look at People v. Garcia, 25 Cal. 531.

[2] Masten v. Griffing, 33 Cal. 111.

this is within the discretion of the trial court.[3] Counsel have a right to inspect all papers admitted in evidence, and if they are withheld by the party who introduced them, a motion to strike them out should be granted;[4] and it seems that the right extends to papers identified by a witness, but not introduced in evidence.[5] Papers on file in one case cannot be regarded as on file and evidence in another case, although both cases relate to the same subject matter, and the papers themselves are referred to and commented upon in both cases.[5a] Excluded evidence will not be considered by the appellate court in reviewing the sufficiency of the evidence to support the findings.[5b] Where, in ejectment, there are several defendants occupying different portions of the tract sued for, the consequences of an erroneous ruling, made at the request of one of them, will attach to all alike, unless its operation was restricted either expressly or by necessary implication.[6] If counsel states to the court that he desires to have a paper go in evidence in order that the court may inspect it, and the opposing counsel states that he, too, desires to have the paper go in evidence, and nothing more is said or done, the paper is in evidence for every legitimate purpose.[7] If a pleading state no cause of action, the opposite party may object to the introduction of any evidence under it, and so bring up the question of the sufficiency of the pleading.[8] An objection that a deed does not include the premises in controversy should be overruled unless the deed shows on its face that it does not include the premises.[9]

[3] Moran v. Abbey, 63 Cal. 57; People v. Ah Fook, 64 Cal. 380, 1 Pac. 347; People v. Fong Ah Sing, 70 Cal. 8, 11 Pac. 323; People v. Clary, 72 Cal. 59, 13 Pac. 77; People v. Goldenson, 76 Cal. 328, 19 Pac. 161; Smithers v. Fitch, 82 Cal. 153, 22 Pac. 935; White v. White, 82 Cal. 427, 23 Pac. 276, 7 L. R. A. 799; Kyle v. Craig, 125 Cal. 107, 57 Pac. 791; Casey v. Leggett, 125 Cal. 664, 58 Pac. 264; People v. Brown, 130 Cal. 591, 62 Pac. 1072; People v. Harlan, 133 Cal. 16, 65 Pac. 9; People v. Nunley, 142 Cal. 441, 76 Pac. 45; People v. Weber, 149 Cal. 325, 86 Pac. 671.

Objections to the admission of evidence go to its relevancy, admissibility, etc., and not to its weight or sufficiency, and the rules outlined in this chapter are applicable to trials to the court and jury alike. Metz v. Willitts, 14 Wyo. 511, 85 Pac. 330.

Although evidence may not be competent, it will be considered if admitted without objection. Weidenhoft v. Primm, 16 Wyo. 340, 94 Pac. 453.

[4] Pope v. Dalton, 40 Cal. 638.

[5] People v. Stevens, 52 Cal. 457.

[5a] Estate of Moore, 83 Cal. 583, 23 Pac. 794.

[5b] Shepherd v. Turner, 129 Cal. 530, 62 Pac. 106.

[6] Judson v. Malloy, 40 Cal. 299.

[7] Pearson v. Pearson, 46 Cal. 609. See, also, Landers v. Bolton, 26 Cal. 393; Wright v. Roseberry, 81 Cal. 87, 22 Pac. 336; O'Callaghan v. Bode, 84 Cal. 489, 24 Pac. 269.

[8] Wangenheim v. Graham, 39 Cal. 169.

[9] Cutter v. Caruthers, 48 Cal. 178; Walbridge v. Ellsworth, 44 Cal. 353.

CHAPTER XVII.

GROUNDS OF THE MOTION—ERROR IN LAW OCCURRING AT THE TRIAL—NONSUIT.

§ 112. An erroneous ruling upon a motion for a nonsuit is an error in law.
§ 113. Voluntary nonsuit—Dismissal by the parties.
§ 114. Compulsory nonsuit.
§ 115. Grounds upon which a motion for nonsuit may be made—Variance.
§ 116. The party moving for nonsuit must specify the grounds of his motion.
§ 117. Effect to be given plaintiff's evidence on motion for nonsuit.
§ 118. Defects in plaintiff's case may be cured after motion for nonsuit.
§ 119. Exceptions to rulings on motion for nonsuit.
§ 119a. Effect of an order granting a nonsuit, under subdivision 5, section 581, California Code of Civil Procedure.
§ 119b. Nonsuit in criminal actions.
§ 119c. Miscellaneous.

§ 112. An Erroneous Ruling on a Motion for a Nonsuit is an Error in Law.—As has been shown, it was the rule before the code that the question of the sufficiency of the evidence to support the verdict or findings of fact could be examined only on motion for new trial. In the case of Cravens v. Dewey,[1] it was argued that this rule applied to decisions on motions for nonsuit, upon the ground that such decisions are upon matters of fact. But the court held that such decisions were upon matters of law merely, and that therefore the rule referred to did not apply; and Baldwin, J., delivering the opinion, said: "A preliminary objection is taken that no motion for new trial was made. Nor is any necessary, the granting of a nonsuit on the facts being a pure question of law, which is properly raised on the record for review by exceptions taken." The doctrine of this case was followed in subsequent ones.[2] And upon the same principle it was held in Donahue v. Gallavan,[3] that an error in granting a nonsuit was to be specified as an error

[1] 13 Cal. 40.

[2] Darst v. Rush, 14 Cal. 81; Sullivan v. Cary, 17 Cal. 80. There was no appeal from nonsuit at common law, the judgment being with plaintiff's consent. See Corning etc. Co. v. Pell, 4 Colo. 184. The supreme court of the same state held in Daniels v. Denver, 2 Colo. 595, that writ of error would lie from a judgment that defendant go without day; but in Timerman v. South Denver etc. Co., 20 Colo. 147, 36 Pac. 901, construing the scope of the act of 1891 (page 118), as to courts of review, held that the writ would lie for a nonsuit, no matter what the amount involved.

[3] 43 Cal. 573.

in law. The specification in that case was as follows: "The court erred in granting defendant's motion for a nonsuit and in granting the nonsuit." This was held to be sufficient, the court saying: "The question presented on motion for nonsuit is a question of law, and in a statement on motion for new trial should be specified as an error of law."

This principle is well settled, and the doctrine of the above cases followed and approved in a long line of decisions. Thus in Schroeder v. Schmidt[3a] the court said:

"An error in granting a nonsuit is an error in law, and should be excepted to and specified as such. (Donahue v. Gallivan, 43 Cal. 573; Cravens v. Dewey, 13 Cal. 40.) It cannot be reviewed on the ground that the evidence is insufficient to sustain the decision. This is a ground for the review of questions of fact, not of law."

So in Hammond v. Wallace,[3b] the court said:

" Respondents contend that the question whether or not the granting of the motion for nonsuit was sustained by the evidence cannot be considered, because there is no specification of the particular in which the evidence was insufficient; but it seems to have been settled that an error, if any, in granting a nonsuit is an error of law, and if excepted to and specified as such, as was done in the case at bar, may be reviewed without any specification of the evidence. (Schroeder v. Schmidt, 74 Cal. 459, 16 Pac. 243; Donahue v. Gallavan, 43 Cal. 573; Cravens v. Dewey, 13 Cal. 40.)"

So in Malone v. Beardsley,[3c] the court said:

" The law must now be regarded as settled in this state, that an error in granting a nonsuit is an error in law, and must be excepted to, or will not be reviewed on appeal, and that it cannot be reviewed on the ground that the evidence is insufficient to sustain the decision. (Schroeder v. Schmidt, 74 Cal. 459, 16 Pac. 243; Flashner v. Waldron, 86 Cal. 211, 24 Pac. 1063; Warner v. Darrow, 91 Cal. 309, 27 Pac. 737.)"

So in other cases.[3d]

It is to be noted that the court held in Malone v. Beardsley that the ruling must be excepted to. This has been the uniform rule, not only for purposes of review on appeal from the judgment, but

[3a] 74 Cal. 459, 16 Pac. 243.

[3b] 85 Cal. 522, 20 Am. St. Rep. 239, 24 Pac. 837.

[3c] 92 Cal. 150, 28 Pac. 218.

[3d] Warner v. Darrow, 91 Cal. 309, 27 Pac. 737; Fogel v. Schmalz, 92 Cal. 412, 28 Pac. 444; Craig v. Hesperia L. & W. Co., 107 Cal. 675, 40 Pac. 1057; Hanna v. De Garmo, 140 Cal. 172, 73 Pac. 830; Estate of Kasson, 141 Cal. 33, 74 Pac. 436; Non-Refillable Bottle Co. v. Robertson, 8 Cal.

also by proceedings for new trial.[36] The requirement resulted from the plain provision of the subdivision of section 657, Code of Civil Procedure, under consideration, and if there is any departure therefrom, it is by reason of the effect of the amendment of 1909,[37] whereby rulings upon motions for nonsuit are added to the list of rulings and orders deemed excepted to. The question may still be said to be an open one, in the sense that there has been no determination by the higher courts as to the effect of the amendment, but it is believed that no question can be made, and that, as in the case of rulings upon the admission of evidence,[38] no exception need be reserved in order to secure a review by new trial any more than by appeal from the judgment.

App. 103, 96 Pac. 324; Archibald Estate v. Matteson, 5 Cal. App. 441, 90 Pac. 723.

See, also, Witkowski v. Hern, 82 Cal. 604, 23 Pac. 132; Flashner v. Waldron, 86 Cal. 211, 24 Pac. 1063; Miller v. Wade, 87 Cal. 410, 25 Pac. 487; Gerlach v. Turner, 89 Cal. 446, 26 Pac. 870; Toulouse v. Pare, 103 Cal. 251, 37 Pac. 146; Converse v. Scott, 137 Cal. 239, 70 Pac. 13; Green v. Duvergey, 146 Cal. 379, 80 Pac. 234; Martin v. Southern Pacific Co., 150 Cal. 124, 88 Pac. 701; Johnson v. Southern Pacific Co., 11 Cal. App. 278, 104 Pac. 713.

[36] Schroeder v. Schmidt, 74 Cal. 459, 16 Pac. 243; Witkowski v. Hern, 82 Cal. 604, 23 Pac. 132; Flashner v. Waldron, 86 Cal. 211, 24 Pac. 1063; Warner v. Darrow, 91 Cal. 309, 27 Pac. 737; Craig v. Hesperia L. & W. Co., 107 Cal. 675, 40 Pac. 1057; Hanna v. De Garmo, 140 Cal. 172, 73 Pac. 830; Estate of Kasson, 141 Cal. 33, 74 Pac. 436; Martin v. Southern Pacific Co., 150 Cal. 124, 88 Pac. 701.

A nonsuit being, in effect, a demurrer to the evidence (see note 1, section 117, post), and properly granted only when there are no issues of fact (see note 8, section 117, *post*), it is obvious that the determination of the question presented on a motion for nonsuit is essentially one of law, and an error therein, an error of law. The courts of other states unite in this view, but seldom give expression to the point in the exact language used in California cases. See Creagh v. Equitable etc. Society, 19 Wash. 108, 52 Pac. 526; Dunkle v. Spokane etc. Co., 20 Wash. 254, 55 Pac. 51; Cain v. Gold Mountain etc. Co., 27 Mont. 529, 71 Pac. 1004; Swinehart v. Pocatella etc. Co., 8 Idaho, 710, 70 Pac. 1054; Brophy v. Idaho etc. Co., 31 Mont. 279, 78 Pac. 493; McCabe v. Montana etc. Co., 30 Mont. 323, 76 Pac. 701; Farmers' etc. Bank v. Spencer, 12 Okl. 597, 73 Pac. 297; Morris v. Warwick, 42 Wash. 480, 85 Pac. 42, 7 Ann. Cas. 687; Later v. Haywood, 12 Idaho, 78, 85 Pac. 494; Buffington v. Sussex etc. Co., 48 Colo. 1, 108 Pac. 970; Robinson v. Salt Lake City (Utah), 109 Pac. 817; Kleinschmidt v. McAndrews, 4 Mont. 8, 2 Pac. 286; S. C., 4 Mont. 223, 5 Pac. 281. The court must accept the plaintiff's evidence as true. The jury alone may question its truth or falsity. See Meyers v. Highland etc. Co., 28 Utah, 96, 77 Pac. 347.

See, also, Gerlach v. Turner, 89 Cal. 446, 26 Pac. 870; Toulouse v. Pare, 103 Cal. 251, 37 Pac. 146; Converse v. Scott, 137 Cal. 239, 70 Pac. 13; Green v. Duvergey, 146 Cal. 379, 80 Pac. 234.

And see cases cited in notes 3h and 3k, below.

[37] Stats. 1909, c. 355. In effect May 20, 1909.

As a matter of course, this remark applies only to the California procedure. See section 113, *post*.

[38] See section 107, *ante*.

But though exceptions need no longer be expressly reserved, and though specifications of the particulars in which the evidence is insufficient were never required,[3h] it is still essential, as always, that the ruling should be specified as an error of law, and so set out in the statement on motion for new trial, or the bill of exceptions, as the case may be, and failure in this respect will be in effect a waiver of the alleged error, which cannot be reviewed.[3k] The bill or statement must show affirmatively that the ruling assigned as error actually took place, and such ruling must appear therein as a specification of error;[3l] and such specification of error must appear in the substantive or stating part of the bill or statement, and it is not sufficient that it be referred to in the assignment of errors relied on, which are sometimes annexed to such papers.[3m]

Error in admitting evidence cannot be reviewed on motion for nonsuit.[3n] Once admitted, evidence must be considered in determining whether the cause of action alleged in the complaint is sustained, if relevant, although it might have been rejected if properly objected to.[3p]

The ruling on motion for nonsuit may be reviewed either on motion for a new trial or on appeal from the judgment.[4]

§ 113. Voluntary Nonsuit—Dismissal by the Parties.—A nonsuit is in effect a dismissal of the action.[1] But, as ordinarily used, the term "nonsuit" is not coextensive with the term "dismissal," but designates a dismissal by the court after hearing plaintiff's evidence or opening statement.[2] In this respect the phraseology

[3h] Warner v. Darrow, 91 Cal. 309, 27 Pac. 737.

[3k] See Donahue v. Gallavan, 43 Cal. 573; Miller v. Wade, 87 Cal. 410, 25 Pac. 487; Gerlach v. Turner, 89 Cal. 446, 26 Pac. 870; Warner v. Darrow, 91 Cal. 309, 27 Pac. 737; Fogel v. Schmalz, 92 Cal. 412, 28 Pac. 444; Toulouse v. Pare, 103 Cal. 251, 37 Pac. 146; Craig v. Hesperia L. & W. Co., 107 Cal. 675, 40 Pac. 1075; Converse v. Scott, 137 Cal. 239, 70 Pac. 13; Hanna v. De Garmo, 140 Cal. 172, 73 Pac. 830.

[3l] Craig v. Hesperia L. & W. Co., 107 Cal. 675, 40 Pac. 1075; and see Toulouse v. Pare, 103 Cal. 251, 37 Pac. 146; Converse v. Scott, 137 Cal. 239, 70 Pac. 13; Hanna v. De Garmo, 140 Cal. 172, 73 Pac. 830.

[3m] Craig v. Hesperia etc. Co., 107 Cal. 675, 40 Pac. 1057; and see section 149, *post*.

[3n] O'Conner v. Hooper, 102 Cal. 528, 36 Pac. 939.

[3p] See latter part of section 105, *ante*.

[4] Levy v. Getleson, 27 Cal. 685; and cases above cited; compare cases cited in note 10 to section 100, *ante*.

[1] See section 119, *post*, as to the effect of order of nonsuit.

[2] The California statute seems to use the terms "nonsuit" and "dismissal" as equivalents. Thus, it says: "An action may be dismissed or a judgment of nonsuit entered in the following cases," etc. Section 581, Code of Civil Procedure. But the ordinary usage by courts and lawyers is as

has suffered a reversal of application. Formerly a nonsuit was, in effect, a voluntary dismissal of the action by the plaintiff, or was a dismissal with consent. On the other hand, a dismissal implied compulsion, and was an adversary exercise of the power of the court.

The cases in which an action may be dismissed or a judgment of nonsuit entered are specified in section 581, California Code of Civil Procedure.[8] Under the provisions of that section the subject is appropriately considered under two general heads, viz.:

stated in the text. For a discussion of the point see the Oakland Water Front Case, 118 Cal. 160, 50 Pac. 277.

In Alpers v. Hunt, 86 Cal. 84, 21 Am. St. Rep. 17, 24 Pac. 846, 9 L. R. A. 483, the court seems to hold that there may be such a thing as a compulsory nonsuit where the complaint is defective by reason of stating a cause of action obnoxious to public policy. In other words, that there may be other kinds of nonsuit besides those set out in section 581. This is believed to be a loose form of expression rather than a new ground for nonsuit. The thing that really happens in such a case is the rejection of all evidence offered in support of such a cause of action; hence, there being no evidence in support of the cause of action set out in the complaint, a nonsuit is proper under subdivision 5.

[8] Section 581, Code of Civil Procedure, corresponds to section 148 of the Practice Act (Laws 1851, p. 73). It was incorporated in the code at the adoption of the latter (March 11, 1872); was amended in 1877 (Stats. 1877–78, p. 100); in 1885 (Stats. 1885, p. 76); in 1889 (Stats. 1889, p. 398); in 1897 (Stats. 1897, p. 98); and in 1907 (Stats. 1907, p. 711). In its present form it is as follows:

"Sec. 581. An action may be dismissed, or a judgment of nonsuit entered, in the following cases:

"1. By the plaintiff himself, by written request to the clerk, filed with the papers in the case, at any time before the trial, upon payment of his costs; provided, a counterclaim has not been set up, or affirmative relief sought by the cross-complaint or answer of the defendant. If a provisional remedy has been allowed, the undertaking must thereupon be delivered by the clerk to the defendant who may have his action thereon;

"2. By either party, upon the written consent of the other;

"3. By the court, when either party fails to appear on the trial, and the other party appears and asks for the dismissal;

"4. By the court, when, upon the trial and before the final submission of the case, the plaintiff abandons it;

"5. By the court, upon motion of the defendant, when upon the trial the plaintiff fails to prove a sufficient case for the jury.

"The dismissals mentioned in subdivisions one and two hereof are made by entry in the clerk's register. The dismissals mentioned in subdivisions three, four, and five of this section must be made by orders of the court entered upon the minutes thereof, and are effective for all purposes when so entered, but the clerk of the court must note such orders in his register of actions in the case."

Until the amendment of 1907 (Stats. 1907, p. 711) the section contained two additional subdivisions—the sixth and seventh. They were repealed by the legislature of that year, the sixth permanently. The seventh with some slight changes became section 581a, Code of Civil Procedure. Subdivision 6 provided for the dismissal of actions after verdict or final submission where the party neglected to ask for the entry of judgment for six months. Changes in section 664 of the same code at the same time

1. Voluntary nonsuit; or dismissal by the parties; and

2. Involuntary nonsuit; or compulsory dismissal by the court.

As to the first, it is provided that an action may be dismissed,—

"1. By the plaintiff himself, by written request to the clerk, filed with the papers in the case, at any time before the trial, upon payment of his costs; provided, a counterclaim has not been set up, or affirmative relief sought by the cross-complaint or answer of the defendant.

"2. By either party, upon the written consent of the other."

Dismissal by Plaintiff.—In order to avail himself of the right conferred by this provision, and dismiss an action he has once brought, the following statutory requirements are noted:

(a) A request that the action be dismissed may be made in writing,

(b) Directed to the clerk of the court in which the action was brought, or is pending, and

(c) Accompanied by the prescribed fee.

(d) Such request must be made before trial;

(e) It cannot be made if a counterclaim has been set up, or

(f) Affirmative relief sought by cross-complaint or answer.

(g) Finally, the request must be filed with the papers in the case, and

(h) A proper entry be made in the "register of actions."

These eight requirements will be considered in order.

(a) *The Request must be in Writing.*—Were the code silent upon this point, it is nevertheless believed that the requirement would stand. The courts have always been disposed to look askance at

rendered the retention of this subdivision useless. See the following cases: Waters v. Dumas, 75 Cal. 563, 17 Pac. 685; Gardner v. Tatum, 77 Cal. 458, 19 Pac. 879; Marshall v. Taylor, 97 Cal. 422, 32 Pac. 515; In re Blythe, 110 Cal. 226, 42 Pac. 641; San Jose Co. v. San Jose Co., 126 Cal. 322, 58 Pac. 824.

Subdivision 7 had reference to actions where there was no issue or service of summons within certain times in specified cases.

The codes of other states contain sections almost identical, in most cases, with the California provision as it was prior to the amendment of 1907. They are as follows: Section 166, Mills' Annotated Code of Colorado; section 4354, Revised Codes of Idaho; section 6714, Revised Codes of Montana (section 1004, Code of Civil Procedure; section 3246, Cutting's Compiled Laws of Nevada (section 151, Civil Practice); section 6998, Revised Codes of North Dakota (containing eight subdivisions); sections 5918 and 5919, Compiled Laws of Oklahoma; section 182, Lord's Oregon Laws; section 3181, Compiled Laws of Utah; section 408, Rem. & Bal. Code of Washington (section 5085, Bal. Code, eight subdivisions); section 4610, Compiled Statutes of Wyoming.

oral notices, and have always regarded written notices as more or less essential to the adequate protection of the rights of parties to actions.[4] Moreover, if the request referred to is to be regarded as a notice to the clerk, as it doubtless must be, it would come within the requirement of section 1010, Code of Civil Procedure, which prescribes that all notices must be in writing. Actions have been dismissed on plaintiff's motion, made in open court,[4a] but it is to be distinctly understood that the proceeding was not under subdivision 1, but subdivision 4. The motion was merely the method adopted by the plaintiff of abandoning his action, and the dismissal was an exercise of the power of the court to dismiss an action under such a condition. The order was evidenced in the same manner as though it had been made under subdivision 1, that is, by entry in the register of actions, as required, but there the similarity ceased.

(b) *The Request is Directed to the Clerk.*—As first enacted this subdivision did not include the clause, "by written request to the clerk, filed with the papers in the case." It was added subsequently, by amendment, as was said, for the purpose of making the procedure more certain. As originally framed section 581 contained the provision, "judgment may thereon be entered accordingly," following the provision as to entry in the clerk's register. This phraseology was the foundation for the rule of construction, announced in a number of decisions,[4b] that actual entry of judgment was essential to render the dismissal effective. Inasmuch as entry of judgment was a ministerial duty of the clerk, under the exclusive control of the court, governed by the express order or direction of the latter, which order or direction, in its turn, depended upon some form of motion and notice, the procedure had the effect of depriving the privilege conferred by the statute of the voluntary character which was clearly the intention of the legis-

[4] See Plateau v. Lubeck, 24 Cal. 364.

[4a] Richards v. Bradley, 129 Cal. 670, 62 Pac. 316; McDonald v. California Timber Co., 2 Cal. App. 165, 83 Pac. 172. It is not clear whether the court intended to say in these cases that the dismissals were under subdivision 1, and that the filing of the request with the clerk was not mandatory, or that the method provided by subdivision 1 was not the only method by which plaintiff could dismiss the action, but the latter is believed to be the proper construction.

[4b] See Page v. Superior Court, 76 Cal. 372, 18 Pac. 385; Page v. Page, 77 Cal. 83, 19 Pac. 183; Acock v. Halsey, 90 Cal. 215, 27 Pac. 193; Brady v. Times-Mirror Co., 106 Cal. 56, 39 Pac. 209; Rochat v. Gee, 91 Cal. 355, 27 Pac. 670; Barnes v. Barnes, 95 Cal. 171, 30 Pac. 298, 16 L. R. A. 660; Evans v. Johnston, 115 Cal. 180, 46 Pac. 906; and see Wolters v. Rossi, 126 Cal. 644, 59 Pac. 143; Ferris v. Baker, 127 Cal. 520, 59 Pac. 937.

lature to give it. The phrase, "judgment may thereon be entered accordingly," was therefore stricken out, and the provision relative to written request to the clerk filed with the papers was added. In construing the amended statute the court held that the judicial control of the court had been eliminated, and that the entry in the register of actions, instead of the entry of judgment, as formerly, was the act which rendered the dismissal effective. There is therefore, no longer any necessity for an application to the court. The request to the clerk is sufficient, provided the other requirements are met.[40]

(c) *Accompanied by the Prescribed Fee.*—The language of the statute is, "upon payment of his costs." This does not mean that the plaintiff must tender the costs before his request can be complied with, or the dismissal become effective. The effect of the dismissal is to subject him to the liability for costs, and if any undertaking has been entered into, pending the action, or upon bringing the same, provision is made in the same subdivision for turning the undertaking over to the defendant for the purpose of enforcing his rights in this and other respects.[41] If no such undertaking has been entered into, the defendant may nevertheless have judgment as in other cases for his costs. But this right to have his costs arises only after dismissal. This was first determined in Hancock Ditch Co. v. Bradford,[42] and in the later case of Hopkins v. Superior Court,[43] after quoting from the first-named case, the court made use of the following language in approval thereof:

"So here, whatever may be the rights of the defendant to recover his costs upon plaintiff's dismissal of the action, that right arises only after dismissal, and the payment of defendant's costs, under all the decisions, is not a prerequisite to the exercise of plaintiff's right. The clerk is not charged with the judicial functions of taxing costs and settling a cost bill. He cannot say what costs of the defendant the plaintiff is under obligation to pay. The utmost of defendant's right, under the circumstances, is to present his cost bill in due time after dismissal, to have it settled, and take judgment for his costs against plaintiff accordingly."

The only costs the plaintiff is required to pay upon presenting his request is the cost, or the fee, for dismissal. This was clearly

[40] See paragraph (h), as to entry in register.

[41] "If a provisional remedy has been allowed, the undertaking must thereupon be delivered by the clerk to the defendant, who may have his action thereon."

[42] 13 Cal. 637.

[43] 136 Cal. 552, 69 Pac. 299.

decided in the case of Todhunter v. Klemmer,[4g] and the rule has been consistently adhered to.

Nor is the actual payment of the fee essential to give validity to the dismissal. The clerk may refuse to make the proper entry in the absence of tender or payment in advance, but if the entry is actually made, the dismissal cannot be questioned on the ground that the fee was not paid.[4h]

(d) *The Request must be Made Before Trial.*—This was one of the original provisions of the section, and appeared in the Practice Act prior to the adoption of the code. It received construction in Hancock Ditch Co. v. Bradford, above cited, where the judgment of the trial court was reversed because that court "refused to permit the plaintiff to take a nonsuit after the testimony for plaintiffs and defendants was closed." The supreme court held that the clause of the statute referred to did not change the common-law rule, and that by such rule the plaintiff could take a nonsuit at any time before the jury retired. The court, however, defined the word "trial" as used in the subdivision to mean "the determination or finding in the case." It is obvious that this definition is in conflict with the common-law rule as stated by the court, for under the definition the plaintiff would have the right to take a nonsuit after the jury had retired and before they had rendered their verdict. This was pressed upon the court in the argument of the subsequent case of Brown v. Harter,[5] in which the jury after retiring came in for further instructions, and the plaintiff asked leave to take a nonsuit before they retired a second time. The court held that the application was too late, and Baldwin, J., delivering the opinion, said: "Some obscurity possibly exists in the opinion in Hancock Ditch Co. v. Bradford, 13 Cal. 637, in the definition of the word

[4g] 134 Cal. 60, 66 Pac. 75.

[4h] Todhunter v. Klemmer, 134 Cal. 60, 66 Pac. 75. See, also, Chicago etc. Co. v. Trueman, 18 Idaho, 687, 112 Pac. 210.

It is sometimes said that it is the duty of the court in cases of dismissal of this character to see that the fees and disbursements of its officers are paid. Mitchell v. Downing, 23 Or. 448, 32 Pac. 394.

In People v. Montez, 48 Colo. 436, 110 Pac. 639, the rule as to payment of costs was applied in a *mandamus* case.

[5] 18 Cal. 76. And see Westbay v. Gray, 116 Cal. 660, 48 Pac. 800; Goldtree v. Spreckels, 135 Cal. 666, 67 Pac. 1091; and see Heinlen v. Castro, 22 Cal. 100.

The same principle controls the practice in Colorado, where it was held that the plaintiff could not dismiss after appeal from the circuit court. Denver etc. Co. v. Paonia etc. Co. (Colo.), 112 Pac. 692. See, also, State v. Court, 32 Mont. 37, 79 Pac. 546.

'trial' as used in the one hundred and forty-eighth section of the Practice Act; but the expressions used are explained in the subsequent portions of the opinion. The Practice Act does not give an arbitrary right to become nonsuit after the case has been finally submitted to the jury, though it exists at any time before such final submission and their retirement." This construction of the statute does not seem to have been since questioned, and the subsequent practice has been in accordance therewith.

(e) *Before Counterclaim;* and (f) *Affirmative Relief.*—By the old Practice Act the plaintiff was given a right to a dismissal or nonsuit only "if a counterclaim has not been made," and this language was adopted by the Code of Civil Procedure as first enacted. Under this provision it was held the plaintiff could take a nonsuit, although the answer contained new matter upon which affirmative relief was sought, provided the new matter did not amount to a counterclaim.[6] And subsequently it was held that the right to a dismissal existed, although the answer contained a cross-complaint.[6a] After these decisions the proviso was amended so as to read as follows: "Provided a counterclaim has not been made or affirmative relief sought by cross-complaint or answer of the defendant." Afterward the word "made" was changed to "set up," and the provision now reads, "Provided, a counterclaim has not been set up, or affirmative relief sought by cross-complaint or answer of the defendant."

Under this provision, somewhat duplex in character, the courts have been called upon to determine what, in each particular case, was a counterclaim, and what amounted to the affirmative relief contemplated by the code. The following illustrate the principles which govern:

In Clark v. Hundley,[6b] which was an action for an accounting as to loans made by defendant to plaintiff's intestate, and for the recovery of certain real estate alleged to have been conveyed to defendant by said intestate as security for such loans, defendant answered, setting up loans beyond those of the complaint, and claiming a balance due on the same as well as those averred in the complaint. The court held that the answer set up ground for affirmative relief, and that plaintiff could not dismiss.

[6] Moyle v. Porter, 51 Cal. 639.
[6a] James v. Center, 53 Cal. 31.
[6b] 65 Cal. 96, 3 Pac. 131.

In Robinson v. P. & S. R. Co.,[6c] which was an action by a bondholder against the trustees of the deed of trust given to secure the bonds, alleging failure to discharge the duties of the trust, and asking relief, it was held that an answer setting up that the bonds held by plaintiff had been "paid, satisfied, and discharged," and praying that the same be ordered delivered up and canceled, asked for affirmative relief within the meaning of the statute, and that, therefore, plaintiff could not dismiss.

In Mott v. Mott,[6d] which was an action for divorce, the supreme court reversed an order of the lower court allowing plaintiff to dismiss his action, holding that where, in such an action, defendant set up a cause of action by way of cross-complaint and asked for a decree, together with alimony and counsel fees, affirmative relief was asked within the meaning of the subdivision under consideration.

In Islais etc. Co. v. Allen,[6e] which was an action to quiet title, the defendant set up ownership in fee, possession, and that plaintiff's title was adverse, but without right, and prayed that he be "ordered, adjudged and decreed" to be the owner in fee of the real property described, and that plaintiff be forever enjoined from asserting any claim or title to any part thereof. The court held that the answer called for affirmative relief, and that the plaintiff could not dismiss.

So in other cases.[6f]

The right of plaintiff to dismiss the action cannot be rendered ineffective by the filing of a cross-complaint or answer calling for affirmative relief after notice of motion to dismiss.[6g] This was a rule adopted when entry of judgment was essential. Defendant sought by means of a fictitious cross-complaint or answer calling for affirmative relief to defeat the dismissal, notice of which had been given. Such a case could not now arise, inasmuch as entry of dismissal in the register of actions is the only notice required to be given the defendant.

[6c] 65 Cal. 263, 3 Pac. 878.

[6d] 82 Cal. 413, 22 Pac. 1140, 1142.

[6e] 132 Cal. 432, 64 Pac. 713. But see Wood v. Jordan, 125 Cal. 263, 57 Pac. 998; and see Moyle v. Porter, *supra*.

[6f] See Acock v. Halsey, 90 Cal. 215, 27 Pac. 193; Hinkel v. Donohue, 90 Cal. 389, 27 Pac. 301; Clune v. Quitzow, 125 Cal. 213, 57 Pac. 886; Henry v. Vineland Dist., 140 Cal. 376, 73 Pac. 1061; and see Page v. Page, 77 Cal. 83, 19 Pac. 183. Also Curry v. Wilson, 57 Wash. 509, 107 Pac. 367.

[6g] Hinkel v. Donohue, 90 Cal. 389, 27 Pac. 301.

The right to dismiss depends upon the state of the pleadings at the time the request is made. Thus, it has been held that an action may be dismissed after reversal of the judgment for erroneous overruling of demurrer to complaint, when upon receipt of the *remittitur* the demurrer is sustained, with leave to amend, and after amending, plaintiff files his request for a dismissal before answer.[6h] So, after default set aside with leave to answer, and before answer filed, the cause stands on the complaint alone, and plaintiff may dismiss.[7] So if a cross-complaint or answer asking affirmative relief be stricken out, leaving only matter of defense, the action may be dismissed.[7a]

The right to dismiss is not affected by a stipulation for judgment in a fixed sum in favor of plaintiff upon conditions which neither have occurred nor can occur.[7b] Nor is the right impaired by a previous void dismissal.[7c]

The affirmative relief contemplated here must relate to matters arising out of the transaction dealt with in the complaint.[7d]

The rule applies to cases where there is an intervention. If the intervener does not ask affirmative relief, but merely contests the action, plaintiff may dismiss.[7e] So the rule applies in the case of the cross-complaint itself, which the defendant may not dismiss after plaintiff answers setting up ground for affirmative relief.[7f]

(g) *Request to be Filed With Papers.*—No reason has been suggested with respect to the necessity of filing the request other than that which attaches to the filing of other papers in the case. The filing may be said to complete the delivery of the request to the official whose duty it is to receive it, and, together with the entry in the register of actions, to constitute the requisite notice

[6h] Richards v. Bradley, 129 Cal. 670, 62 Pac. 316; and see Alpers v. Bliss, 145 Cal. 565, 79 Pac. 171.

[7] See Hibernia Soc. v. Portener, 139 Cal. 90, 72 Pac. 716.

[7a] See Thompson v. Spraig, 66 Cal. 350, 5 Pac. 506.

[7b] So. Water Co. v. Cameron, 141 Cal. 283, 74 Pac. 838.

[7c] Kaufman v. Superior Court, 115 Cal. 152, 46 Pac. 904.

[7d] Carpenter v. Hewel, 67 Cal. 589, 8 Pac. 314.

[7e] Henry v. Vineland Co., 140 Cal. 376, 73 Pac. 1061.

But if the intervention takes place prior to the dismissal, interveners have the same rights that original parties have with respect thereto. Hence, in Elliott v. Ivers, 6 Nev. 287, where certain interveners put in their appearance as lien claimants in an action upon a mechanic's lien, it was held that a subsequent motion to dismiss by plaintiff could not affect their rights, and that they had a right to an adjudication as between themselves and the defendants.

[7f] Rodgers v. Parker, 136 Cal. 313, 68 Pac. 975.

to the defendant, and all the world. The filing and service of papers usually comprises two different and distinct acts, but in the present case, because of the fact that the request is to be filed by the person upon whom service is required to be made, both filing and service, so far as the party is concerned, are performed by one act. If the filing of the request in the present instance has any particular significance, it has not thus far developed in the cases.

(h) *Entry in Register of Actions.*—As above shown, the provision as to entry in the register read, "the dismissal is made by entry in the clerk's register; judgment may thereon be entered accordingly." Under this provision it was held that both entry in the register and entry of judgment was required to render the dismissal effective. The legislature amended the section, however, by striking out the latter clause, and at the same time inserting in subdivision 1 the provision for a written request to the clerk, filed in the papers in the case.

The effect of this amendment was to remove the procedure from the control of the court, and to make the clerk's entry in the register of actions effective as a final disposition of the litigation. It has therefore been held that the court could not interfere with the entry referred to, except to order it to be made. In Hopkins v. Superior Court,[8] the court attempted to prevent the entry of the dismissal in the register by the clerk until the plaintiff had paid the costs taxed in favor of the defendant. In granting an application for a writ of prohibition, the supreme court said:

"It appears, therefore, that plaintiff has done everything that the statute required, and stood entitled, as an absolute right, to have her order of dismissal entered. In this she was prevented by the order of the court directing the clerk to refuse to enter the order until plaintiff had complied with an illegal condition. As is said in Page v. Superior Court, above quoted, in a proper case, if his fee is paid, the clerk will, on motion, be compelled by the court to enter a judgment of dismissal or nonsuit, and the court will not require the party interested to resort to *mandamus*. Here the plaintiff applied to the court, in furtherance of her right, thus clearly pointed out, and the court not only refused her the right, but imposed upon her an illegal condition as the price of her order of dismissal. This the court had no right to do. Its sole jurisdic-

[8] 136 Cal. 552, 69 Pac. 299.

tion under the circumstances indicated was to have ordered the proper entry of dismissal in the register. Its refusal to do this, and its subsequent order setting the case for trial, were unwarranted, and in excess of its jurisdiction."

Without stopping to inquire whether the writ of prohibition was the appropriate remedy for the *refusal of the trial court to order the clerk to make the proper entry of dismissal in the register,* as the court seems to say, or as to whether the case of Page v. Superior Court,[8a] which was decided under the code provision requiring entry of judgment in addition to entry in the register to render the dismissal effective, and referred to entry of judgment and *not to entry in the register,* was appropriate as an authority, with respect to entry in the register, after the provision as to entry of judgment had been repealed, it is perhaps sufficient to call attention to the fact that nowhere in the statute is jurisdiction to do anything in connection with the dismissal of an action under this subdivision conferred upon the court. It was to eliminate from the procedure the necessity of appealing to the court that the statute was amended, as above set forth. If the court has jurisdiction to order the clerk to make the entry referred to, it must also, of necessity, have jurisdiction to order him not to make it unless the statute expressly prohibits it from so doing. Moreover, to say that the clerk may be compelled by *mandamus* to do something that the court may order him to do, is to turn one's back upon the fundamental rule that *mandamus* will not lie where there is a plain, speedy and adequate remedy in the ordinary course of law. If the clerk may be compelled to make the entry by the court upon motion, is not this the ordinary course of procedure, and would it not be necessary to ask for a writ of mandate to compel the court to do its duty?

The two cases above cited have been recently quoted with approval, however, in Boca etc. R. R. Co. v. Superior Court,[8b] where the court said:

"It may be conceded for the purposes of this proceeding that, if the above-quoted provision of law was complied with by the plaintiff in the injunction action, the position of plaintiff here is

[8a] 76 Cal. 372, 18 Pac. 385. The practice is the same in Idaho, where it was held that dismissal under subdivision 1 (section 4354, Revised Codes of Idaho) is made by entry in the clerk's register, thus following the California rule. Chicago etc. Co. v. Truman, 18 Idaho, 687, 112 Pac. 210.

[8b] 150 Cal. 153, 88 Pac. 718.

sustained by the decision of this court in Hopkins v. Superior Court, 136 Cal. 552, 69 Pac. 299."

That is, the court was devested of "jurisdiction to make any further order in the case other than one requiring the clerk," etc.

In none of the cases cited, however, was the conclusion that the court might direct the clerk to make the entry necessary to the determination of the case, and in the last two cases it was clearly *dictum*, and cannot be accepted as good law upon so frail an authority.

A nonsuit upon plaintiff's motion is an order with his consent and hence not revisable on his appeal.[9]

Dismissal by Consent.—The second subdivision prescribes that an action may be dismissed or a judgment of nonsuit entered "by either party upon the written consent of the other." There has been no change in this subdivision since the adoption of the Practice Act.[10] Such dismissal as is here provided has been construed to amount to a *retraxit*.[11] This particular form of dismissal belongs to the common-law practice, and has no place in the code by name.

It is essential that this form of dismissal should be accompanied by the written consent of the adverse party, and it would seem to be necessarily made in open court. A *retraxit* at common law was a renunciation in open court of his action by the plaintiff himself. Under our system, however, it must be made by the attorney.[12]

The result of such dismissal is that the right of action is forever gone.[13] A voluntary dismissal without the formality of the written consent of the adverse party, in other words, such a dismissal as is contemplated by subdivision 1 of this section, does not oper-

[9] See section 282, *post*. So it would seem that a plaintiff could not prosecute an appeal from a dismissal of this description, although the defendant might. But it has been held that if when plaintiff takes the nonsuit he obtains leave to set it aside the rule as to consent orders does not apply and he may afterward move for a new trial. Natoma Water etc. Co. v. Clarkin, 14 Cal. 544. But such leave amounts to nothing more than a suspension of the rule as to consent orders, and it is incumbent on the plaintiff to comply with all the statutory provisions relative to new trials. Whipley v. Dewey, 17 Cal. 314.

[10] See section 148, Practice Act, adopted in 1851.

[11] See Merritt v. Campbell, 47 Cal. 542; Stoughtenborough v. Board of Education, 104 Cal. 664, 38 Pac. 449.

[12] See Merritt v. Campbell, 47 Cal. 542, and Boca etc. Co. v. Superior Court, 150 Cal. 153, 88 Pac. 718; and see section 208, *post*.

[13] Merritt v. Campbell, 47 Cal. 542; Crossman v. Davis, 79 Cal. 603, 21 Pac. 963; Westbay v. Gray, 116 Cal. 660, 48 Pac. 800; Hibernia etc. Soc. v. Portener, 139 Cal. 90, 72 Pac. 716.

ate as a *retraxit*.[14] Indeed, the dismissal under subdivision 2 is the only dismissal contemplated by this section which is always, and under all circumstances, available as a plea in bar of a subsequent action upon the same subject matter.[15]

§ 114. Compulsory Nonsuit.—The Practice Act of 1850 contained no provision authorizing the court to nonsuit a plaintiff or dismiss the action. In Ringold v. Haven,[1] however, it was held that the power to grant a nonsuit resulted from the authority of the court to pass upon the law of the case. The Practice Act of 1851 expressly conferred the power on the court by a section, which in so far as it related to compulsory nonsuits was as follows:

"Sec. 148. An action may be dismissed, or a judgment of nonsuit entered, in the following cases:

" Third. By the court when the plaintiff fails to appear on the trial, and the defendant appears and asks for the dismissal.

"Fourth. By the court when upon the trial, and before the final submission of the case, the plaintiff abandons it.

"Fifth. By the court upon motion of the defendant when upon the trial the plaintiff fails to prove a sufficient case for the jury."

Subdivisions 4 and 5 remain in the above form in the code. Subdivision 3 was amended in 1907,[2] so as to read:

"3. By the court, when either party fails to appear on the trial, and the other party appears and asks for the dismissal."

Prior to this amendment the subdivision was held to empower the court to dismiss actions for want of prosecution.[3] The object of the legislature in making the change is not apparent, inasmuch as it merely adds authority to dismiss on plaintiff's motion, which was already ample under subdivision 1, by voluntary dismissal, and subdivision 4, by order of court. No change is made as to the power of the court to dismiss upon defendant's motion for want of prosecution. This power exists not only under the provisions of this subdivision, but rests within the inherent discretion

[14] Parks v. Dunlap, 86 Cal. 189, 25 Pac. 916; Westbay v. Gray, 116 Cal. 660, 48 Pac. 800; Hibernia Savings etc. Soc. v. Portener, 139 Cal. 90, 72 Pac. 716.

[15] See Merritt v. Campbell, 47 Cal. 512; and Pyle v. Piercy, 122 Cal. 383, 55 Pac. 141.

[1] 1 Cal. 108.

[2] See Stats. 1907, p. 711.

[3] See Pardy v. Montgomery, 77 Cal. 326, 19 Pac. 530. And see Pyle v. Piercy, 122 Cal. 383, 55 Pac. 141; Clune v. Quitzow, 125 Cal. 213, 57 Pac. 886.

of the court; and it has often been held in this state that such dismissal may be ordered by the court without regard to the provisions of section 581.[4] Such exercise of discretion is reviewable as any other.[5]

Subdivision 3 contemplates that the dismissal shall be ordered only when the adverse party fails to appear *on the trial.* It would seem, therefore, that the cause must first be set for trial before dismissal can be asked under the provisions of this subdivision.

Subdivision 4 provides merely for the abandonment of his action by the plaintiff. It may be made upon motion in open court,[6] but is not complete unless the abandonment is supplemented by an order of the court.[7] This form of dismissal is not a *retraxit.*[8]

[4] See Grigsby v. Napa County, 36 Cal. 585, 95 Am. Dec. 213; Chipman v. Hibbard, 47 Cal. 638; Lander v. Flemming, 47 Cal. 614; Simmons v. Keller, 50 Cal. 38; Kornahrens v. His Creditors, 64 Cal. 492, 3 Pac. 126; Cowell v. Stuart, 69 Cal. 525, 11 Pac. 57; Saville v. Frisbie, 70 Cal. 87, 11 Pac. 502; Kubli v. Hawkett, 89 Cal. 638, 27 Pac. 57; Hassey v. South S. F. Homestead etc. Assn., 102 Cal. 611, 36 Pac. 945; First Nat. Bank v. Nason, 115 Cal. 626, 47 Pac. 595 (and cases cited); McLaughlin v. Clausen, 116 Cal. 487, 48 Pac. 487; People v. Jefferds, 126 Cal. 296, 58 Pac. 704.

It would seem that the above array of authorities must be regarded as removing the question from all doubt, but the second district court of appeals in the recent case of Townsend v. Driver, 5 Cal. App. 581, 90 Pac. 1071, seems to have held that section 582, Code of Civil Procedure, must be construed as limiting the power of dismissal strictly to the power conferred by section 581. Section 582, Code of Civil Procedure, provides that judgment must be rendered on the merits in all other cases except those mentioned in the preceding section. But see section 583, Code of Civil Procedure, as to dismissal for want of prosecution on defendant's motion in certain cases, and see section 594, as to the right of the defendant to a dismissal of the action in certain cases.

The supreme court of Washington, in the cases of McDaniel v. Pressler, 3 Wash. 636, 29 Pac. 209, and Harrington v. Miller, 4 Wash. 808, 31 Pac. 325, held that a court could not nonsuit on its own motion otherwise than under the authority of and for the reasons set forth in the section under consideration. This doctrine is followed in practically all other states, and citations might be multiplied beyond the space available here. Thus, in Allison v. Bryan, 26 Okl. 520, 138 Am. St. Rep. 988, 109 Pac. 934, it was held that a petition could not be dismissed on the ground of a mistake of the clerk in docketing. These provisions are not applicable to suits in equity, which, technically, are subject to the common-law rule permitting dismissal by plaintiff at any time prior to submission, upon payment of costs; but treated as motion to dismiss, it may be entertained. Scoland v. Scoland, 4 Wash. 118, 29 Pac. 930. But see Waite v. Wingate, 4 Wash. 324, 30 Pac. 81; Washington etc. Assn. v. Saunders, 24 Wash. 321, 64 Pac. 546.

[5] See People v. Jefferds, 126 Cal. 296, 58 Pac. 704.

[6] See Richards v. Bradley, 129 Cal. 670, 62 Pac. 316; McDonald v. California Timber Co., 2 Cal. App. 165, 83 Pac. 172.

[7] See Rochat v. Gee, 91 Cal. 355, 27 Pac. 670.

[8] See previous section as to *retraxit.*

Compulsory, or involuntary, nonsuit is not recognized by the Arizona practice. Section 2586, Compiled Laws of 1877, authorized a nonsuit to be granted, (1) "By the plaintiff himself

The compulsory nonsuit contemplated by subdivision 5 of the section under consideration is the commonest form of nonsuit known to the practice. It is the nonsuit of special interest in the present connection, inasmuch as it is oftenest made use of as ground for new trial under subdivision 7 of section 657, Code of Civil Procedure.

The time within which a compulsory nonsuit may be taken is not specified in section 581, Code of Civil Procedure, otherwise than by the phrase, "upon the trial," which appears in each of the last three subdivisions—3, 4 and 5. This indefiniteness is not unexpected, since such nonsuits as these subdivisions prescribe depend upon the happening of some specific event or condition precedent. Under subdivision 5 the right to a nonsuit depends upon the failure of plaintiff to prove a sufficient case for the jury, and it would seem that the proper time for defendant's motion would be at the conclusion of plaintiff's testimony, and this is in fact the time when the motion is usually made. There is a line of decisions, however, which hold that nonsuit is proper at the conclusion of the evidence for both sides in cases where a verdict for plaintiff would have to be set aside and a new trial granted for insufficiency of the evidence.[9] This doctrine is exceedingly doubtful, as is hereinafter suggested, although no particular objection

at any time before trial, on the payment of costs; (5) by the court upon motion of the defendant, when upon trial the plaintiff fails to prove a sufficient case for the jury." Section 764 of the Revised Statutes of 1887, taking the place of the first cited section, provided, "At any time before the jury have retired, the plaintiff may take a nonsuit, but he shall not thereby prejudice the right of an adverse party to be heard on his own claim for affirmative relief." Clause (5) was omitted, and the supreme court, in Bryan v. Pinney, 3 Ariz. 34, 21 Pac. 332, held that such omission must be deemed *ex industria*. It is to be noted, however, that an exception is made in cases where the defendant asks affirmative relief, in which event the latter is entitled to pursue whatever remedy lies open. See, also, Roberts v. Smith, 5 Ariz. 368, 52 Pac. 1120; Santa Fe etc. Co. v. Ford, 10 Ariz. 201, 85 Pac. 1072; and see section 1396, Revised Statutes of 1901.

The Wyoming code (section 4610, Compiled Statutes of 1910) contains no provision corresponding with subdivision 5 of section 581 of the California code, and no other provision from which the authority is to be derived to order a nonsuit on defendant's motion for failure of plaintiff's proof.

It may be noted in this connection that compulsory nonsuit was unknown to the common law, which recognized nonsuit as a proceeding with plaintiff's consent. In other words, statutory nonsuit corresponds to common-law dismissal of the action, and *vice versa*.

[9] See Geary v. Simmons, 39 Cal. 224; Vanderford v. Foster, 65 Cal. 49, 2 Pac. 736; Fox v. Southern Pacific Co., 95 Cal. 234, 30 Pac. 384; Toulouse v. Pare, 103 Cal. 251, 37 Pac. 146; Estate of Morey, 147 Cal. 495, 82 Pac. 57. Section 117, *post*.

can be raised to the exercise of the court's discretion in a proper case. The very nature of a nonsuit, such as is defined in subdivision 5, is violated when the defendant is permitted to introduce evidence in support of his motion therefor; and while the matter may be said to be properly addressed to the discretion of the court to entertain the motion at any time prior to retirement of the jury, even after defendant's evidence has been introduced, yet that evidence should never be permitted to enter into the consideration of the motion, which should rest entirely upon plaintiff's failure to prove his case.[10]

Compulsory nonsuit is not a bar to another action.[11]

§ 115. Grounds upon Which a Motion for Nonsuit may be Made—Variance.—As already shown, the statute provides that an action may be dismissed and a nonsuit granted "by the court upon motion of the defendant when upon the trial the plaintiff fails to prove a sufficient case for the jury."[1] There is, of course, an infinite variety of ways in which a failure of proof may occur. If the plaintiff fail in any one link in the chain of proof required by the case made by his complaint, his whole case falls to the ground. It is unnecessary to say anything concerning this kind of failure of proof. But it often happens that a plaintiff will show by his evidence a case calling for some relief, but not the relief called for by the facts stated in his complaint. In such case there is said to

[10] In Vanderford v. Foster, 65 Cal. 49, 2 Pac. 736, the court, while sustaining the position outlined in the text, said that the practice of granting a nonsuit after defendant has introduced his evidence should rarely be resorted to. And see Ferrera v. Parke, 19 Or. 141, 23 Pac. 883, where the supreme court of that state in overruling the California decisions upon the point, said that the very nature of a nonsuit is violated where defendant is permitted to introduce evidence in its support. See section 117, *post*.

The language of section 6998, Revised Codes of North Dakota, differs from that of the California and other codes, with respect to the time when the motion may be made. Subdivision 3 of that section is as follows: "By the court, when upon the trial *and before the final submission* of the case, the plaintiff abandons it, or fails to substantiate or establish his claim or cause of action, or right to recover." Under the authority of this provision it is obvious that nonsuit may be asked at any time prior to final submission, and to this extent, at least, the criticism of the practice of allowing the motion to be made after the defendant introduces his evidence is without foundation.

It would seem that the time to move for nonsuit may be affected by the shifting of the burden of proof. See Davis v. Holbrook, 25 Colo. 493, 55 Pac. 730.

[11] Guthiel v. Gilmer, 27 Utah, 496, 76 Pac. 628.

See section 119a, *post*.

[1] Laws 1851, p. 73, sec. 148, subdivision 5; section 581, subdivision 5, California Code of Civil Procedure.

be a variance. By the act of 1851 it was provided that "the court shall in every stage of the case disregard any error or defect in the pleadings which shall not affect the substantial rights of the parties; and no judgment shall be reversed or affected by reason of such error or defect";[2] and this provision has always been in the statute. It mitigates the strictness of the common-law rules as to variance, but does not do away with them entirely. As remarked by Rhodes, J., in Stout v. Coffin,[3] "the rule that the *allegata* must correspond with the *probata* is not abrogated by the Practice Act. The consequences of a variance between the averments of a pleading and the proofs are the same under our system of practice as at common law, except that they may be to a great extent obviated by amendments to the pleadings which are allowed with great liberality." Accordingly, it has always been the rule that the plaintiff must prove in substance the cause of action set forth in his complaint, or fail. Thus in Cotes v. Campbell,[4] where the plaintiff declared on a note alleged to have been made by one McKinley and one Campbell, but introduced in evidence a note signed by H. B. McKinley and C. Campbell & Co., the supreme court held that the defendant's objection to the admissibility of the note in evidence should have been sustained, and said: "No principle is better settled than that the allegations and proof must correspond. In this case the variance was in important and substantial particulars, and is therefore fatal." So where the plaintiff declared upon a several contract, it was held that evidence of a joint contract was properly excluded.[5] So where a contract to pay a definite sum absolutely is alleged, proof of a contract to pay a sum contingent was held to be a fatal variance.[5a]

[2] Laws 1851, p. 61, sec. 71; section 475, California Code of Civil Procedure; and, as to variance in general, see sections 469, 470 and 471, California Code of Civil Procedure. See, also, latter part of this section. And see, as to mitigation of doctrine of variance by these last-cited sections, Higgins v. Graham, 143 Cal. 131, 76 Pac. 898.

[3] 28 Cal. 65.

[4] 3 Cal. 191. Plaintiff cannot allege one cause of action and prove another. Seebach v. Kuhn, 9 Cal. App. 485, 99 Pac. 723; Forsell v. Pittsburgh etc. Co., 38 Mont. 403, 100 Pac. 218. A variance will always be fatal unless it is within one of the recognized exceptions. Loucks v. Davies, 43 Colo. 490, 96 Pac. 191.

That the *allegata* and *probata* must correspond was enunciated in the following Colorado cases: Rosenfeld v. Rosenfeld, 21 Colo. 16, 40 Pac. 49; Denver etc. Co. v. Simpson, 21 Colo. 371, 41 Pac. 499; Rustin v. M. & M. Co., 23 Colo. 351, 47 Pac. 300; Durkee v. Jones, 27 Colo. 159, 60 Pac. 618; Cairnes v. Cairnes, 29 Colo. 260, 93 Am. St. Rep. 55, 68 Pac. 233; Fischer v. Hanna, 8 Colo. App. 471, 47 Pac. 303.

[5] Stearns v. Martin, 4 Cal. 227. See, also, Farmer v. Cram, 7 Cal. 135.

[5a] Owen v. Meade, 104 Cal. 179, 37 Pac. 923. See, also, Brown v. Min-

So where the complaint was uncertain as to whether the allegation was of a partnership or of an individual contract, and the evidence showed a partnership contract, and in order to avoid the objection that no certificate of partnership had been published by the plaintiffs, as required by the Civil Code, the plaintiff's counsel contended that the complaint could be construed as alleging an individual and not a partnership demand, the supreme court said: "We are inclined to agree with him; but how can proof of a partnership contract sustain allegations of an individual contract? There is no principle better established than that allegations and proofs offered under them must correspond. The contract proved does not sustain the allegations of the plaintiff's complaint—a partnership transaction is not the transaction of the individual copartners. Under no rule of proceedings, says Chief Justice Marshall, could the interest of a copartner be given in evidence on an averment of individual interest. (Graves v. Boston Insurance Co., 2 Cranch, 419 [2 L. ed. 324]; see, also, Cotes v. Campbell, 3 Cal. 191; Morrison v. Bradley & Co., 5 Cal. 503; Green v. Covillaud, 10 Cal. 322 [70 Am. Dec. 725].)"[6] So in Tomlinson v. Monroe,[7] it was held that the plaintiffs must prove a contract the same in its essential features as the one declared on, and that an allegation of a contract is not sustained by proof of a tort. So in Johnson v. Moss,[8] where the plaintiff alleged that the defendant agreed that he would remove his ferry and fixtures from a certain landing place, and would not again establish or maintain, or permit anyone to establish or maintain, a ferry at the place, it was held that proof that the agreement was that the defendant should give a written guaranty "that there should be no more ferry there," which written guaranty was never given, did not sustain the complaint, and that the motion for a nonsuit should have been granted. So in Christian College v. Hendley,[9] where the plaintiff, which was

ing Co., 150 Cal. 376, 89 Pac. 86, where the principle was expressed in the *dictum* of the court, but it was held to be without application to the case at bar because of the fact that the averment of unconditional payment was merely an erroneous conclusion from the probative facts alleged, which in themselves properly set up a case within the proof.

[6] McCord v. Seale, 56 Cal. 262; Weinreich v. Johnson, 78 Cal. 254, 20 Pac. 556. But see Wise v. Williams, 72 Cal. 544, 14 Pac. 204; and see Williams v. Southern Pac. Co., 110 Cal. 457, 42 Pac. 974; and Elmore v. Elmore, 114 Cal. 516, 46 Pac. 458, as to manner of raising the objection.

[7] 41 Cal. 94. See, also, Stout v. Coffin, 28 Cal. 65.

[8] 45 Cal. 515.

[9] 49 Cal. 347.

a corporation, declared upon a promise to pay to it (the plaintiff) the amount of a certain subscription, and the proof was of a promise to pay to the "finance committee to be elected hereafter by the Christian Church of Santa Rosa," it was held that there was a fatal variance, and that if it were true, as contended by the plaintiff, that all the property vested by operation of law in the plaintiff, such fact should have been alleged in the complaint. So in Hasshagen v. Hasshagen,[9a] which was a suit to declare an express trust, evidence of a verbal understanding was held to be insufficient to sustain an allegation that there was a written declaration of the trust, and the supreme court held that nonsuit should have been granted for the variance. So in Reed v. Norton,[9b] an action to enforce a mechanic's lien, where the complaint was drawn upon the theory that there was no valid contract, and that the plaintiffs dealt directly with the owner of the building, who was charged with liability for the whole of the claims, a judgment based upon findings that there was a valid contract was reversed, the court saying:

"The *allegata* and *probata* as shown by the findings do not agree. In an action to enforce the lien of a mechanic or materialman, the complaint must show, either that the building was constructed under a valid statutory contract, or that it was not, and a complaint upon the one theory will not warrant a judgment upon the other."

So in Chetwood v. California National Bank,[9c] where the complaint charged joint negligence of members of the executive committee of a bank, proof of negligence of one of the members only, as president of the bank, was held a fatal variance. So in Elmore v. Elmore,[9d] which was a suit to enforce a trust in favor of plain-

[9a] 80 Cal. 514, 22 Pac. 294.

[9b] 99 Cal. 617, 34 Pac. 333. And see the following mechanic's lien cases where the variance was held fatal: Cox v. McLaughlin, 63 Cal. 196; Malone v. Big Flat etc. Co., 76 Cal. 578, 18 Pac. 772; Eaton v. Malatesta, 92 Cal. 75, 28 Pac. 54; Wagner v. Hansen, 103 Cal. 104, 37 Pac. 195; Palmer v. Lavigne, 104 Cal. 30, 37 Pac. 775; Wilson v. Nugent, 125 Cal. 280, 57 Pac. 1008; and see Santa Monica etc. Co. v. Hege, 119 Cal. 376, 51 Pac. 555. In the following cases (mechanics' liens) the variance was held immaterial: Davies-Henderson Lumber Co. v. Gottschalk, 81 Cal. 641, 22 Pac. 860; Star etc. Co. v. Porter, 4 Cal. App. 470, 88 Pac. 497; Lucas v. Rea, 10 Cal. App. 641, 102 Pac. 822.

See Hendy etc. Works v. Pacific etc. Co., 24 Or. 152, 33 Pac. 403; Bardwell v. Anderson, 13 Mont. 87, 32 Pac. 285.

A study of these cases discloses that because of the peculiar nature of the proceeding the application of the principle of variance is somewhat more rigid than in ordinary actions.

[9c] 113 Cal. 414, 45 Pac. 704.

[9d] 114 Cal. 516, 46 Pac. 458.

tiff and against defendant in respect of real property alleged to have been purchased with money of the former given the latter for that purpose, findings and a judgment for the money itself were held a fatal variance in the *allegata* and *probata*, and the judgment was reversed. So in Ogden v. Davis,[9e] which was an action upon a stay bond in a foreclosure suit, for waste committed on the mortgaged premises, proof of waste committed on premises other than those described in the mortgage was held to be a fatal variance, notwithstanding the fact that the premises described in the mortgage and bond had no existence in fact, and that the description was erroneous. Proof as to the mistake and the identity of the mortgaged premises was properly excluded. So in Davey v. Southern Pacific Co.,[9f] evidence as to injuries incurred by falling into an excavation left by defendant in an exposed and unprotected situation on its right of way, its private property, was held to constitute a material variance in proof, where the complaint alleged that the excavation was in the public street, notwithstanding it was at a point on the private right of way over which the public had a right to pass. As an instance of a variance that was not a variance look at the case of Chalmers v. Chalmers,[9g] where proof of a partnership between two was held to sustain an allegation of a partnership between those two thus specified and another.

Where the proof established a contract to do certain work, "alarm-bell and battery not included," it was held that there was no variance where the complaint set up the same contract without referring to the alarm-bell and battery.[9h]

In an action for slander, it is said that the rule that the *allegata* and *probata* must correspond is eminently applicable. "The plaintiff is not entitled to a recovery upon proof of words not set forth in his complaint, or upon a failure to prove the slanderous words which he has alleged. It is unavailing that the evidence is such as would authorize a jury to find that the defendant intended to charge the plaintiff with the crime; their function is to determine whether he spoke the words alleged in the complaint."[9k]

In most of the foregoing cases, objection on account of the variance was taken in the court below, either by objecting to the admissibility of the evidence or by motion for nonsuit. A variance may

[9e] 116 Cal. 32, 47 Pac. 772.

[9f] 116 Cal. 325, 48 Pac. 117.

[9g] 81 Cal. 84.

[9h] Georges v. Kessler, 131 Cal. 183, 66 Pac. 466.

[9k] Haub v. Friermuth, 1 Cal. App. 556, 82 Pac. 571.

be taken advantage of in either of these modes,[9l] and the defendant is not precluded from moving for a nonsuit on the ground of variance by reason of his failure to object to the admissibility of the evidence.[9m] Evidence wholly outside of the issues must be disregarded, whether objection was made to it or not;[9n] and if the courts find the facts shown by such evidence the findings are nugatory. This has been frequently decided. Thus in Lewis v. Myers[10] the action was upon a promissory note; the finding was that no note had been given, but that the defendant was indebted

[9l] See Farmer v. Cram, 7 Cal. 135; Eversdon v. Mayhew, 85 Cal. 1, 21 Pac. 431, 24 Pac. 382. See, also, Elmore v. Elmore, 114 Cal. 516, 46 Pac. 458, and other cases cited in note 6, above. And see Kutcher v. Love, 19 Colo. 542, 36 Pac. 152.

[9m] Johnson v. Moss, 45 Cal. 515. Also Bailey v. Brown, 4 Cal. App. 515, 88 Pac. 518. This case was declared by the court not to be in conflict with Marshall v. Ferguson, 23 Cal. 65. Probably the court meant that the *decisions* in the two cases were not in conflict. The *dictum* in Marshall v. Ferguson is certainly incorrect. For the court seemed to be of opinion that the motion for nonsuit was properly denied because the objection was not made "at the proper time, which was when the evidence was introduced"; although "the proof differs from the averments of the complaint in almost every essential particular." The real ground of the decision seems to have been that the denial of the nonsuit was not specified in the statement.

An objection to the introduction of evidence on the ground of failure to allege a cause of action is always timely. Buckman v. Hatch, 139 Cal. 53, 72 Pac. 445; Bell v. Thompson, 147 Cal. 689, 82 Pac. 327; Carpenter v. Sibley, 153 Cal. 215, 126 Am. St. Rep. 77, 94 Pac. 879, 15 L. R. A., N. S., 1143, 15 Ann. Cas. 484; Hall v. Linn, 8 Colo. 264, 5 Pac. 641. But unless there is a total failure, the objection is not properly raised at the time the evidence is introduced, and defendant must perforce wait until the evidence is all in, and move for a nonsuit on the ground of variance. Bank v. Cochran, 17 Okl. 538, 87 Pac. 855; and see Kelly v. Northern Pacific Co., 35 Mont. 243, 88 Pac. 1009; Marshall v. Homier, 13 Okl. 264, 74 Pac. 368; Hogan v. Bailey, 27 Okl. 15, 110 Pac. 890.

[9n] In Horton v. Dominguez, 68 Cal. 642, 10 Pac. 186, very often cited in support of this doctrine, the court said: "It should not be permitted that the plaintiff should allow the cause to be tried as if issues are regularly joined, and when the result is a judgment adverse to his claims, urge in this court that no such issue was made in the court below." This language is broad enough to include a class of cases, cited below, where it was held that objections to the introduction of evidence wholly outside the issues, or inconsistent therewith, need not be made in the trial court. There are, perhaps, other cases where the language used would justify the same conclusion. If so, they must all be regarded as distinguished, and as applicable solely to the doctrine outlined in the text hereafter, and supported by cases cited in note 17 et seq. If the evidence offered is wholly outside of the issues joined, an objection is not necessary; but if the pleadings are defective merely, and no objection is made by demurrer or to the evidence when it is offered, and the issues are treated as sufficiently joined, an objection is essential, and unless there is an objection the point cannot be raised on appeal.

See Schirmer v. Drexler, 134 Cal. 134, 66 Pac. 180; Hildreth v. Montecito Co., 139 Cal. 22, 72 Pac. 395; Kredo v. Phelps, 145 Cal. 526, 78 Pac. 1044.

[10] 3 Cal. 475.

to the plaintiff for goods sold; and judgment was given for the price. The supreme court reversed this judgment, saying:

"There is no plainer principle than that the *allegata* and *probata* must correspond."

So where the plaintiff alleged that the defendant contracted to pay plaintiff for labor, it was held that proof that another party had contracted to pay plaintiff did not sustain the complaint, although defendant had received the benefit of the labor.[11] So in Tryon v. Sutton,[12] which was an action for the foreclosure of a mortgage, the plantiff alleged that the note and mortgage were made to one Anestine Schroeder, and by her assigned to him. It was proved, however, that Anestine Schroeder was a married woman, and that the note and mortgage were community property. Upon this proof the assignment alleged was stricken out as invalid. But the evidence showed that there was an assignment by the husband as well as the wife. The supreme court held, however, that the husband's assignment could not be considered because not alleged, and Baldwin, J., delivering the opinion, said: "Upon the pleadings the same case is not made as in the proofs. In a chancery case a party has a right to insist that the legal conclusion to be deduced from the pleadings, whatever may be the proofs, shall be applied." So in Gregory v. Haworth,[13] where the court below allowed the plaintiff to recover upon evidence showing a state of facts negatived by the allegations of the complaint, the supreme court reversed the judgment, and Sanderson, C. J., delivering the opinion, said: "The case seems to have been tried upon the theory that a pledge was averred, and the plaintiff allowed to recover a judgment upon a finding which at the outset he declared to be pretended and false. This cannot be allowed without a gross violation of the rule which requires that the allegations of the complaint, the evidence, and the findings should correspond in legal intent. The averment, the proof, and the finding should harmonize and proceed upon the same theory, each pointing with logical distinctness to the same result. A recovery, if had, must be *secundum allegata*, and must be grounded upon the facts which are averred in the complaint, and not upon those which are denied." So in Mondran v. Goux,[14] which was an action

[11] Morrison v. Bradley etc. Co., 5 Cal. 503.

[12] 13 Cal. 490.

[13] 25 Cal. 653.

[14] 51 Cal. 151. And see Burke v. Levy, 68 Cal. 32, 8 Pac. 527.

to establish a trust as to an undivided half of a piece of land, the plaintiff alleged that the trust resulted from the payment by him of half of the purchase money; the finding was that the parties "were partners in the purchase," and "were equally interested therein as owners." The supreme court reversed the judgment, saying: "The cause of action, if any, established by the findings is wholly different from that averred in the complaint, and is foreign to any issue raised by the pleadings. The rule is well settled that the plaintiff must recover, if at all, upon the cause of action set out in his complaint, and not upon some other which may be developed by the proofs."[15] Upon the same principle, where a complaint is radically defective it is unavailing that evidence be introduced, and a finding and judgment made thereon. Thus in Hicks v. Murray,[16] which was an action to foreclose a mechanic's

[15] See, also, Hopkins v. Orcutt, 51 Cal. 537; Capuro v. Builder's Ins. Co., 39 Cal. 123; Anderson v. Taylor, 56 Cal. 131, 38 Am. Rep. 52; Lake v. Tebbets, 56 Cal. 481. So it will not avail a party that he introduce evidence in support of an affirmative defense, if the defense be not set up in the answer. See Smith v. Owens, 21 Cal. 11; Cassacia v. Phœnix Ins. Co., 28 Cal. 628.

[16] 43 Cal. 515. See, also, Barron v. Frink, 30 Cal. 489; Choynski v. Cohen, 39 Cal. 501, 2 Am. Rep. 476; Bachman v. Sepulveda, 39 Cal. 688; Collins v. Bartlett, 44 Cal. 371; Welch v. Smith, 45 Cal. 230; Sacramento v. National Bank of D. O. Mills, 51 Cal. 504; Rogers v. Shannon, 52 Cal. 99; Sigourney v. Zellerbach, 55 Cal. 431; Burke v. Levy, 68 Cal. 32, 8 Pac. 527; Harrison v. McCormick, 69 Cal. 616, 11 Pac. 456; Heinlen v. Heilbron, 71 Cal. 557, 12 Pac. 673; Bryan v. Tormey, 84 Cal. 126, 24 Pac. 319; Reed v. Norton, 99 Cal. 617, 34 Pac. 333; Elmore v. Elmore, 114 Cal. 516, 46 Pac. 458; Ogden v. Davis, 116 Cal. 32, 47 Pac. 772; Davis v. Pacific Tel. etc. Co., 127 Cal. 312, 57 Pac. 764, 59 Pac. 698; Schrimer v. Drexler, 134 Cal. 134, 66 Pac. 180; Nichols v. Randall, 136 Cal. 426, 69 Pac. 26; Hildreth v. Montecito Co., 139 Cal. 22, 72 Pac. 395; Kredo v. Phelps, 145 Cal. 526, 78 Pac. 1044; see, also, Owen v. Meade, 104 Cal. 179, 37 Pac. 923; Riverside Water Co. v. Gage, 108 Cal. 240, 41 Pac. 299; Chetwood v. California National Bank, 113 Cal. 414, 45 Pac. 704; Davy v. Southern Pacific Co., 116 Cal. 325, 48 Pac. 117; Rogers v. Kimball, 121 Cal. 247, 53 Pac. 648; Wallace v. Farmers' Ditch Co., 130 Cal. 578, 62 Pac. 1078.

Also, Buddress v. Schafer, 12 Wash. 310, 41 Pac. 43; Gilmore v. Baker, 12 Wash. 468, 41 Pac. 124; Thomas v. Mackey, 3 Colo. 390; Gilpin v. Ebert, 2 Colo. 23; Gargan v. School District, 4 Colo. 53; Hammer v. Downing, 39 Or. 504, 64 Pac. 651, 65 Pac. 17, 65 Pac. 990, 67 Pac. 30; Hall v. Woolery, 20 Wash. 440, 55 Pac. 562; Goldwater v. Burnside, 22 Wash. 215, 60 Pac. 409; Brown v. Baruch, 24 Wash. 572, 64 Pac. 789; Bank v. Killgore, 10 Colo. App. 536, 51 Pac. 1023; Hannah v. Greenfield, 36 Or. 97, 58 Pac. 888; Cederson v. Oregon etc. Co., 38 Or. 343, 62 Pac. 637, 63 Pac. 763; Faulkner v. Seattle etc. Co., 19 Wash. 320, 53 Pac. 365; Kennedy v. School District, 20 Wash. 399, 55 Pac. 567; Hamill v. Copeland, 26 Colo. 178, 56 Pac. 901; Kutcher v. Love, 19 Colo. 542, 36 Pac. 152; Newell v. Nicholson, 17 Mont. 389, 43 Pac. 180; Peay v. Salt Lake City, 11 Utah, 331, 40 Pac. 206; Bottom v. Barton, 12 Colo. App. 53, 54 Pac. 1031; Bank v. Hunter, 35 Or. 188, 57 Pac. 424; Whitney v. Richards, 17 Utah, 226, 53 Pac. 1122; Mellott v. Downing, 39 Or. 218, 64

lien, the complaint did not aver that the claim of lien filed in the recorder's office contained a statement of the name of the owner or reputed owner of the premises. The claim itself introduced in evidence contained the requisite statement. But the supreme court reversed the judgment, and Wallace, C. J., delivering the opinion, said: "It has so often been determined that unless the facts essential to the support of a case be alleged upon the record, evidence upon such omitted facts cannot be heard or considered, that a citation of authorities upon the point is unnecessary. Evidence of facts or stipulations as to the facts of a case cannot make the case broader than it appears by allegation, nor can a party by mere force of facts admitted or proven become entitled to relief, to which he would not have been entitled had his case been resisted only by general demurrer interposed to the pleadings upon which he relies."

But while the rule above stated is well settled, it must be borne in mind that if the allegation be defective merely, and the case be tried in the court below upon the theory that it is sufficient, the party will not be allowed to raise an objection in the supreme court for the first time. Thus in King v. Davis,[17] the pleading contained a general allegation of fraud, without any statement of the facts constituting the fraud; but the case being tried upon the merits upon this point without objection, it was held that it could not be contended in the supreme court that there was no issue of fraud.

So in Re Doyle,[17a] issues framed by petition and contest for probate of will, where the case was tried upon the assumption of all the parties that the material allegations of contestant's pleading were denied, were held sufficient, and that the question of insufficiency could not be raised for the first time on appeal. So in Hughes v. Wheeler,[17b] where a plea of estoppel set up by defendant by way of amendment to his answer was treated as properly made and sufficient at the trial, it was held too late to object to its sufficiency for the first time on appeal. So objections to a cross-complaint which was treated at the trial as sufficient were

Pac. 393; Soden v. Murphy, 42 Colo. 352, 94 Pac. 353; Mosier v. Kershow, 16 Colo. App. 453, 66 Pac. 449; Haines v. Cadwell, 40 Or. 229, 66 Pac. 910; Nunn v. Jordan, 31 Wash. 506, 72 Pac. 124.

[17] 34 Cal. 100. Unless advantage of the variance is taken in the trial court it is deemed to have been waived. Duncan v. Holder, 15 N. M. 323, 107 Pac. 685. See, also, Aulbach v. Dahler, 4 Idaho, 654, 43 Pac. 322.

[17a] 73 Cal. 564, 15 Pac. 125.

[17b] 76 Cal. 230, 18 Pac. 386.

refused consideration when raised for the first time on appeal.[17c] So in Murdock v. Clarke,[17d] where a question of agency was treated by both parties at the trial as an issue, and evidence thereon offered by both parties without objection, it was held too late for plaintiff to urge on appeal for the first time that no such issue was raised. So in Klopper v. Levy,[17e] it was held that where an answer is defective, but the case is tried as though an issue was properly raised, and no objection, either by demurrer or to evidence, is raised in the trial court, plaintiff cannot object for the first time on appeal that the issue was not raised. So where the answer of a member of a constable's posse did not formally plead the writ and justification, though other members did, and such answer was treated as though the plea had been actually made, it is too late to raise the objection, after appeal, that the issue was not so made.[17f] So where evidence was admitted and instructions given as though the consent of stockholders had been pleaded on foreclosure of mortgage to secure bonds, it will be assumed that the plea was sufficiently made, and an objection that it was not so made, raised for the first time on appeal, will be disregarded.[17g] So where the trial was had on the theory that the value of defendant's land was in issue, and evidence was adduced by both parties upon the point, it is too late to raise the objection for the first time on appeal.[17h] So in many other cases.[17k]

17c Kirsch v. Kirsch, 88 Cal. 633, 23 Pac. 1083.

17d 90 Cal. 427, 27 Pac. 275.

17e 98 Cal. 525, 33 Pac. 444.

17f Burnham v. Stone, 101 Cal. 164, 35 Pac. 627.

17g Illinois T. & S. Bank v. Pac. Ry. Co., 115 Cal. 285, 47 Pac. 60.

17h Barbour v. Flick, 126 Cal. 628, 59 Pac. 122.

17k Hutchings v. Castle, 48 Cal. 152, but see, also, Capuro v. Builders' Ins. Co., 39 Cal. 123; so it is held that allegations not denied are admitted, and evidence and findings contrary to admission in the answer are to be disregarded. Hall v. Polack, 42 Cal. 218; Tevis v. Hicks, 41 Cal. 123; Bradbury v. Cronise, 46 Cal. 289. But if the record shows that the case was tried in the court below upon the theory that the denials were sufficient, the party will not be allowed to object to them for the first time in the supreme court. Spiers v. Duane, 54 Cal. 176; Pacific Bridge Co. v. Kirkham, 54 Cal. 558; Cave v. Crafts, 53 Cal. 135; Tully v. Tranor, 53 Cal. 274; Green v. L. S. & P. F. Co., 46 Cal. 408; Tevis v. Hicks, 41 Cal. 123; Raccouillat v. Rene, 32 Cal. 450; Kalkman v. Baylis, 23 Cal. 303, 305. And in one case it was held that if a case had been tried upon the theory that the denials are sufficient, it is too late to present the question of their insufficiency by requesting an instruction that the allegations are to be taken as true. See Tynan v. Walker, 35 Cal. 634, 95 Am. Dec. 152; look at Donner v. Palmer, 51 Cal. 629. In addition to the cases above cited, see Crowley v. City R. R. Co., 60 Cal. 628; Hiatt v. Board of Trustees, 65 Cal. 481, 4 Pac. 464; Horton v. Dominguez, 68 Cal. 642, 10 Pac. 186; Alhambra etc. Water Co. v. Richardson, 72 Cal. 598, 14 Pac. 379; White v. White, 86 Cal. 219, 24 Pac. 996; Sukeforth v. Lord, 87 Cal. 399, 25

The reason of the rule rests upon the well-known principle of equitable estoppel whereby a party will not be permitted to take advantage of conduct of his adversary resulting from his own act or neglect with respect to the same thing. The court thus expressed the doctrine in McDougal v. Hulet:[171]

" Plaintiff, by bringing the defendant Boggs into court, and asking the court to find the amount due, and by allowing the court to pass upon the issue as though properly made, is estopped now from claiming that the matter was not the subject of a counterclaim. He will not be thus allowed to lull his adversary into repose until his claim is barred by the statute, and then raise a point which is lethal."

As in the case of objections to evidence, a party will not be allowed to treat a merely defective pleading as sufficient, introduce evidence thereon, and thus mislead his adversary until such time as he may raise an objection thereto which cannot be obviated, although had it been made at the proper time it might have been obviated.[17m] Thus in Milwaukee etc. Co. v. Warren,[17n] the court said:

"The defendants having permitted the trial to proceed and the case to be submitted upon this theory are bound by it and cannot

Pac. 497; Diefendorff v. Hopkins, 95 Cal. 343, 28 Pac. 265, 30 Pac. 549; and see, also, Moore v. Campbell, 72 Cal. 251, 13 Pac. 689; Stockton etc. Works v. Glens etc. Co., 121 Cal. 167, 53 Pac. 565; Barrell v. Lake View Co., 122 Cal. 129, 54 Pac. 594; Sprigg v. Barber, 122 Cal. 573, 55 Pac. 419; Flinn v. Ferry, 127 Cal. 648, 60 Pac. 434; Weidenmueller v. Stearns Co., 128 Cal. 623, 61 Pac. 374; Parke etc. Co. v. S. F. Bridge Co., 145 Cal. 534, 78 Pac. 1065, 79 Pac. 71; Kimball v. Richardson-Kimball Co., 111 Cal. 386, 43 Pac. 1111.

See, also, Colfax etc. Co. v. Southern Pacific Co., 118 Cal. 648, 50 Pac. 775, 40 L. R. A. 78; Baxter v. Hart, 104 Cal. 344, 37 Pac. 941; Delafield v. San Francisco etc. Co. (Cal.), 40 Pac. 958; Colorado etc. Co. v. Rees, 21 Colo. 435, 42 Pac. 42; Percy etc. Min. Co. v. Hallum, 22 Colo. 233, 44 Pac. 509; Denver etc. Co. v. Rosuck, 7 Colo. App. 288, 43 Pac. 456; Schmidt v. Bank, 10 Colo. App. 261, 50 Pac. 733; Tew v. Powar, 37 Colo. 292, 86 Pac. 342; Cunningham v. Bostwick, 7 Colo. App. 169, 43 Pac. 151; Berdell v. Bissell, 6 Colo. 162; Florence etc. Co. v. Jensen, 48 Colo. 28, 108 Pac. 974; Lawlor v. Kempner, 20 Mont. 13, 49 Pac. 398; Coulter v. Laundry Co., 34 Mont. 590, 87 Pac. 973; Kalispell etc. Co. v. McGovern, 33 Mont. 394, 84 Pac. 709; Westland etc. Co. v. Royal, 36 Wash. 399, 78 Pac. 1096; St. Paul etc. Co. v. Mountain etc. Co., 23 Okl. 79, 99 Pac. 647; Blair v. Wilkerson etc. Co., 54 Wash. 334, 103 Pac. 18; Allison v. Bryan, 26 Okl. 520, 138 Am. St. Rep. 988, 109 Pac. 934; Bank v. Hastings, 7 Colo. App. 129, 42 Pac. 691.

[171] 132 Cal. 154, 64 Pac. 278. See, also, Casey v. Leggett, 125 Cal. 664, 58 Pac. 264. As to waiver of defects, see Cushing v. Pires, 124 Cal. 663, 57 Pac. 572.

[17m] See Baxter v. Hart, 104 Cal. 344, 37 Pac. 941.

[17n] 150 Cal. 346, 89 Pac. 93. And see to same effect, Carroll v. Briggs, 138 Cal. 452, 71 Pac. 501.

be permitted for the first time to raise an objection which could have been obviated if it had been made in the court below."

The party against whom this form of estoppel is invoked must have participated or acquiesced in the trial and have acted as though the issue had in fact been made by the pleadings, or acted in such a manner as may have induced his adversary to believe that the issue had been properly made; or diverted his attention from the fact that it was not so made.[17p] As above suggested, this principle of equitable estoppel cannot be held applicable to cases where the evidence is wholly outside the issues.[17q]

Mere defects in the proof which do not mislead are to be disregarded. This is the result of the provision above quoted, that "the court shall in every stage of an action disregard any error or defect in the pleadings or proceedings which shall not affect the substantial rights of the parties; and no judgment shall be reversed or affected by reason of such error or defect." Under this provision it was held that a mistake of a day in alleging the date of a libelous publication is immaterial, the court saying: "The defendants were not misled by it; at least they do not pretend they were misled. If they were prejudiced by it they should have shown to the court in what respect, to entitle the objection to consideration."[18] So in an action of forcible entry the designation of a tract as the northeasterly instead of the northwesterly corner is immaterial, if the other and more definite marks of description sufficiently indicated and identified the premises trespassed upon.[19] So in Peters v. Foss,[20] the plaintiff in alleging the conditions to be performed by the defendants alleged several distinct promises, but the evidence showed one promise only; the supreme court held that the court below erred in nonsuiting the plaintiff, and Cope, J., delivering the opinion, said: "Greenleaf in his work on Evidence says that in such a case the promises are descriptive of the contract and must be proved as alleged; and this view appears to be in accord with the authorities cited. (See Greenleaf on Evidence, secs. 66, 67, 68.) The seventy-first section of the Practice Act

[17p] Ortega v. Cordero, 88 Cal. 221, 26 Pac. 80; Rudel v. Los Angeles Co., 118 Cal. 281, 50 Pac. 400.

[17q] Riverside Water Co. v. Gage, 108 Cal. 240, 41 Pac. 299; and see as to findings outside the issues, Bane v. Peerman, 125 Cal. 220, 57 Pac. 885; and cases cited in notes 9n and 16a herein.

[18] Thrall v. Smiley, 9 Cal. 529.

[19] Paul v. Silver, 16 Cal. 73. See, also, Began v. O'Reilly, 32 Cal. 11.

[20] 20 Cal. 591; see, also, Waugenheim v. Graham, 39 Cal. 169.

. . . . is sufficiently broad to cover the objection taken, and we think it should be applied to errors of description as well as to errors in other respects. The defendants were neither surprised nor prejudiced by the failure of proof, and the error in stating the agreement, if there be any, is an error which the court should have disregarded." So in an action against common carriers to recover the value of a draft lost by them, the allegation was that the draft was signed "John Q. Jackson"; but the proof was that it was signed "John Q. Jackson, agent." The supreme court held the variances to be immaterial, Shafter, J., saying: "We cannot consider the absence of that particle in the allegations, and its presence in the proof could have affected any substantial rights of the defendants. (Practice Act, sec. 71.)"[21] So in Began v. O'Reilly,[22] which was an action for the foreclosure of a mortgage, the complaint alleged that the mortgage contained a covenant for an attorney's fee of ten per cent in the event of foreclosure. The mortgage offered in evidence contained no such provision; but the court below disregarded the variance and gave judgment for the plaintiffs without, of course, allowing any attorney's fee. This judgment was affirmed on appeal, Shafter, J., delivering the opinion, saying: " Conceding that the discrepancy between the pleadings and the proof amounted to a variance, the judgment should not be reversed on that ground, for the court below was not, and we are not, satisfied that the variance misled the appellant to his prejudice. (Practice Act, sec. 71.) Immaterial variances are to be disregarded on the trial, or whenever the question may be presented. This is a most beneficial provision, and should be literally [liberally?] construed and carried out."

So in Peasley v. Hart,[22a] where there was a variance in the amount of money to be paid on a contract to convey, it was held not to have been material, "for it could not have misled the plaintiff to his prejudice in maintaining his defense upon the merits to the defendant's cross-complaint." So in Hitchcock v. McElrath,[22b] where the complaint averred generally that plaintiff loaned the stock which was alleged to have been converted to

[21] Zeigler v. Wells, Fargo & Co., 28 Cal. 263.

[22] 32 Cal. 11; and see generally Quackenbush v. Sawyer, 54 Cal. 439; Shelby v. Houston, 38 Cal. 410; Dikeman v. Norrie, 36 Cal. 94; Corcoran v. Doll, 32 Cal. 82; Plate v. Vega, 31 Cal. 383; Sacramento Co. v. Bird, 31 Cal. 67; Blankman v. Vallejo, 15 Cal. 638; Mulliken v. Hull, 5 Cal. 245.

[22a] 65 Cal. 522, 4 Pac. 537.

[22b] 72 Cal. 565, 14 Pac. 305.

defendant, and the proofs show that it was loaned for a special purpose, the court said:

"Under these circumstances it is impossible to see how the variance was one which 'actually misled the adverse party to his prejudice in maintaining his action or defense upon the merits.'"

So in M. E. Church v. Seitz,[22c] where there was a variance in proving a reduced rent without pleading the agreement for the reduction, it was held not to have misled the defendant to his prejudice, and therefore was disregarded. So in Kurtz v. Forquer,[22d] where it was contended that there was a variance between the averment of the complaint and the proof with reference to the execution of a bond, but the case was fully tried on its merits, the court held that the variance, if such there was, must be disregarded. So in a number of other cases, similar rulings were made.[22e]

[22c] 74 Cal. 287, 15 Pac. 839.

[22d] 94 Cal. 91, 29 Pac. 413.

[22e] *California:* Christensen v. Jessen (Cal.), 40 Pac. 747; McIntyre v. Trautner, 63 Cal. 429; Sommer v. Smith, 90 Cal. 260, 27 Pac. 208; Carter v. Baldwin, 95 Cal. 475, 30 Pac. 595; Clark v. Chapman, 98 Cal. 110, 32 Pac. 812, 33 Pac. 750; Bode v. Lee, 102 Cal. 583, 36 Pac. 936; Amador G. M. Co. v. Amador G. M., 114 Cal. 346, 46 Pac. 80; Herman v. Hecht, 116 Cal. 553, 48 Pac. 611; Santa Monica L. & M. Co. v. Hege, 119 Cal. 376, 51 Pac. 555; Holt v. Holt, 120 Cal. 67, 52 Pac. 119; Stockton etc. Works v. Glens etc. Co., 121 Cal. 167, 53 Pac. 565; Moore v. Douglas, 132 Cal. 399, 64 Pac. 705; Lyles v. Perrin, 134 Cal. 417, 66 Pac. 472; Carter v. Rhodes, 135 Cal. 46, 66 Pac. 985, 21 Morr. Min. Rep. 694; Foster v. Carr, 135 Cal. 83, 67 Pac. 43; Miller v. Ballerino, 135 Cal. 566, 67 Pac. 1046, 68 Pac. 600; Antonelle v. Lumber Co., 140 Cal. 309, 73 Pac. 966; Cobb v. Doggett, 142 Cal. 142, 75 Pac. 785; Doble v. Keystone Co., 145 Cal. 490, 78 Pac. 1050; Redwood etc. Co. v. Whitney, 153 Cal. 421, 95 Pac. 885; Bollinger v. Bollinger, 154 Cal. 695, 99 Pac. 196; Nordstrom v. Corona City Water Co., 155 Cal. 206, 132 Am. St. Rep. 81, 100 Pac. 242; Pogue v. Ball, 4 Cal. App. 406, 88 Pac. 376; Star Mill & Lumber Co. v. Porter, 4 Cal. App. 470, 88 Pac. 497; Hedstrom v. Union Trust Co., 7 Cal. App. 278, 94 Pac. 386; Lucas v. Rea, 10 Cal. App. 641, 102 Pac. 822; and see dissenting opinion of Chief Justice Beatty in Davey v. Southern Pacific Co., 116 Cal. 325, 48 Pac. 117; and Higgins v. Graham, 143 Cal. 131, 76 Pac. 898, as to mitigation of rules of the common law with reference to variance; and see Pollitz v. Wickersham, 150 Cal. 238, 88 Pac. 911; and Maionchi v. Nicholini, 1 Cal. App. 690, 82 Pac. 1052.

Colorado: Denver etc. Co. v. Conway, 8 Colo. 1, 54 Am. Rep. 537, 5 Pac. 142; Buckingham v. Harris, 10 Colo. 455, 15 Pac. 817; Commissioners v. Marshall, 11 Colo. 84, 16 Pac. 837; York v. Fortenbury, 15 Colo. 129, 25 Pac. 163; Lux v. McLeod, 19 Colo. 465, 36 Pac. 246; Walsh v. Hastings, 20 Colo. 243, 38 Pac. 324; Miller v. Williams, 27 Colo. 34, 59 Pac. 740; Mulligan v. Smith, 32 Colo. 404, 76 Pac. 1063; Oligarchy etc. Co. v. Farm etc. Co., 40 Colo. 291, 88 Pac. 443; Rio Grande etc. Co. v. Rubenstein, 5 Colo. App. 121, 38 Pac. 76; Outcalt v. Johnson, 9 Colo. App. 519, 49 Pac. 1058.

Idaho: Hawkins v. Pocatella etc. Co., 3 Idaho, 766, 35 Pac. 711; Hewitt v. Maize, 5 Idaho, 633, 51 Pac. 607; Lewis v. Utah etc. Co., 10 Idaho, 214, 77 Pac. 336; Gumaer v. White Pine etc. Co., 11 Idaho, 591,

But the variance should not be disregarded if the party has been misled by it.[23]

The doctrine itself rests upon an express code provision, as has been suggested. The Code of Civil Procedure has reproduced section 71 of the old Practice Act;[24] and has in addition embodied the rules laid down in the earlier decisions in three new sections which are as follows:

"Sec. 469. No variance between the allegation in a pleading and the proof is to be deemed material, unless it has actually misled the adverse party to his prejudice in maintaining his action or defense upon the merits. Whenever it appears that a party has

83 Pac. 771; Later v. Haywood, 12 Idaho, 78, 85 Pac. 494.

Montana: Nyhart v. Pennington, 20 Mont. 158, 50 Pac. 413; Poindexter v. Oregon etc. Co., 33 Mont. 338, 83 Pac. 886; Vreeland v. Edens, 35 Mont. 413, 89 Pac. 735.

North Dakota: Halloran v. Holmes, 13 N. D. 411, 101 N. W. 310.

Oklahoma: Mulhall v. Mulhall, 3 Okl. 304, 41 Pac. 109; Shawnee etc. Co. v. Sears, 21 Okl. 13, 95 Pac. 449; Patterson v. M. K. & T. Co., 24 Okl. 747, 104 Pac. 31.

Oregon: Hill v. Mellon, 3 Or. 542; Dodd v. Denny, 6 Or. 156, 25 Am. Rep. 510; Moore v. Frazer, 15 Or. 635, 16 Pac. 869; Mendenhall v. Harrisburg Water Co., 27 Or. 38, 39 Pac. 399; Sabin v. Mitchell, 27 Or. 66, 39 Pac. 635; Miller v. Hirschberg, 27 Or. 522, 37 Pac. 85, 40 Pac. 506; Bishop v. Baisely, 28 Or. 119, 41 Pac. 936; Baker v. State etc. Co., 31 Or. 41, 48 Pac. 699; Denn v. Peters, 36 Or. 486, 59 Pac. 1109.

South Dakota: Brace v. Doble, 3 S. D. 416, 53 N. W. 859; North Star etc. Co. v. Stebbins, 3 S. D. 540, 54 N. W. 593; Hermiston v. Green, 11 S. D. 81, 75 N. W. 819; Cornwell v. McKinney, 12 S. D. 118, 80 N. W. 171; Meldrum v. Kenefick, 15 S. D. 370, 89 N. W. 863.

Washington: Bigelow v. Scott, 2 Wash. Ter. 378, 8 Pac. 494; Post etc. Co. v. Harris, 11 Wash. 500, 39 Pac. 965; Olsen v. Snake River etc. Co., 22 Wash. 139, 60 Pac. 156; Bringgold v. Spokane, 27 Wash. 202, 67 Pac. 612; Childs etc. Co. v. Page, 28 Wash. 128, 68 Pac. 373; Dudley v. Duval, 29 Wash. 528, 70 Pac. 68; Meals v. De Sota etc. Co., 33 Wash. 302, 74 Pac. 470; Griffith v. Ridpath, 38 Wash. 540, 80 Pac. 820; Irby v. Phillips, 40 Wash. 618, 82 Pac. 931; Butterworth v. Teale, 54 Wash. 14, 102 Pac. 768.

Wyoming: Kuhn v. McKay, 6 Wyo. 466, 49 Pac. 473; Chicago etc. Co. v. Pollock, 16 Wyo. 321, 93 Pac. 847.

If the pleadings are susceptible of two different meanings, one of which conforms to the proof, there is no material variance. It will be assumed that the meaning intended in the pleadings is the meaning established by the proof. See West v. Eley, 39 Or. 461, 65 Pac. 798; Hecla etc. Co. v. Gisborn, 21 Utah, 68, 59 Pac. 518; McDonald v. People, 12 Colo. App. 98, 54 Pac. 863; Ramsey v. Meade, 37 Colo. 465, 86 Pac. 1018; Hough v. Grant's Pass etc. Co., 41 Or. 531, 69 Pac. 655.

So when the proof corresponds to the pleading of the party complaining, the variance, although not to the pleading complained of, is not prejudicial, since it is not misleading. Griffith v. Ridpath, 38 Wash. 540, 80 Pac. 820.

So when the proof is consistent with some allegation, though not with all, there is no prejudicial variance. See Heron v. Weston, 44 Colo. 379, 100 Pac. 1130.

[23] Egan v. Delaney, 16 Cal. 85, 5 Morr. Min. Rep. 223. And see cases cited in notes 3 to 9k, *supra*, for instances where the variance was held fatal.

[24] See section 475, California Code of Civil Procedure.

been so misled, the court may order the pleadings to be amended upon such terms as may be just.[25]

"Sec. 470. Where the variance is not material, as provided in the last section, the court may direct the fact to be found according to the evidence, or may order an immediate amendment without costs.[25a]

"Sec. 471. Where, however, the allegation of the claim or defense to which the proof is directed is unproved, not in some particular or particulars only, but in its general scope and meaning, it is not to be deemed a case of variance within the last two sections, but a failure of proof."

These sections do not seem to change the pre-existing rules.[26]

[25] Section 570 of the Old Practice Act was similar to the above section, but applied only to justices' courts. As section 460 of the code was first enacted, it was somewhat different from the above quotation in phraseology, but not in effect. The amendment was made in 1874.

Corresponding provisions of other states are to be found in the following: Sections 4225, 4226 and 4227, Revised Codes of Idaho; sections 6585, 6586 and 6587, Revised Codes of Montana (sections 770, 771 and 772, Code of Civil Procedure); subsections 78, 79, and 80 of section 2685, Compiled Laws of New Mexico; sections 6879, 6880 and 6881, Revised Codes of North Dakota; sections 97, 98 and 99, Lord's Oregon Laws; sections 299, 300 and 301, Rem. & Bal. Code of Washington (sections 4949, 4950 and 4951, Bal. Code); sections 4591, 4592, and 4593, Compiled Statutes of Wyoming.

The practice in Arizona, Colorado and Nevada has no corresponding provision.

The code sections requiring the court to disregard errors and defects which do not affect the substantial rights of the parties are as follows: Section 1293, Revised Statutes of Arizona; section 475, Code of Civil Procedure of California; section 78, Mills' Annotated Code of Colorado; section 4231, Revised Codes of Idaho; section 6593, Revised Codes of Montana (section 778, Code of Civil Procedure); section 3166, Cutting's Compiled Laws of Nevada (section 71, Civil Practice); section 2685, subsection 85, Compiled Laws of New Mexico; section 6886, Revised Codes of North Dakota; section 107, Lord's Oregon Laws; section 307, Rem. & Bal. Code of Washington (section 4957, Bal. Code); section 4438, Compiled Statutes of Wyoming. See note 2, *supra*.

[25a] Where an amendment might have been allowed to cure a variance, the judgment will not be disturbed because no formal amendment was made. Kuhn v. McKay, 7 Wyo. 42, 49 Pac. 473, 51 Pac. 205. The amendment will be regarded as made. Nyhart v. Pennington, 20 Mont. 158, 50 Pac. 413; Mercier v. Insurance Co., 24 Wash. 147, 64 Pac. 158; Irby v. Phillips, 40 Wash. 618, 82 Pac. 931. See generally, Ernst v. Fox, 26 Wash. 526, 67 Pac. 258; Ada etc. Co. v. Farmers' etc. Co., 5 Idaho, 793, 51 Pac. 990, 40 L. R. A. 485; Western etc. Co. v. Kendrick etc. Co., 13 Idaho, 331, 90 Pac. 112; Kelly v. Fourth etc. Co., 21 Mont. 291, 69 Am. St. Rep. 668, 53 Pac. 959, 42 L. R. A. 621, 19 Morr. Min. Rep. 431. And see section 56, *ante*, as to amendments to conform to proof, in general.

[26] *Nonsuit on Opening Statement.* When the plaintiff makes an opening statement of the facts which he expects to prove, and it is apparent that the facts if proved would not avail him, the practice is sometimes adopted of moving that he be nonsuited on his opening statement. See instances in McQuade v. Whaley, 31 Cal. 526; Raimond v. Eldridge, 43 Cal. 506; Northam v. Gordon, 46 Cal. 582;

§ 116. The Party Moving for a Nonsuit must Specify the Grounds of His Motion.—It has been shown that objections to the admissibility of evidence must be specific.[1] The reasons upon which that rule rests apply to motions for nonsuit. The attention of the plaintiff should be directed to the supposed defects in his case, so that he may have an opportunity to remedy them if he be able to do so. In order to enforce this the defendant is confined to such grounds as he specifies in his motion. This has always been the rule in California. In Mateer v. Brown,[2] the action was to recover the value of some gold-dust which the plaintiff alleged he had lost at the defendant's inn. The motion for nonsuit was "on the ground that plaintiff had not proved by competent testimony the loss of any property of definite value." In the supreme court the defendant sought to rest his motion upon the ground that the evidence did not show that the plaintiff was a guest at the inn. But the court held that he must be confined to the ground specified in the motion in the court below, and Bennett, J., delivering the opinion, said: "This being the only position taken in support of the motion, unless that be tenable, the nonsuit was properly refused, notwithstanding there may have been other good and sufficient reasons, for which, if urged at the proper time, it might have been demanded. A party making his motion on one ground thereby impliedly waives all others. He cannot avail himself of a different position on appeal

Poehlman v. Kennedy, 48 Cal. 201. Sometimes the opening statement consists in merely reading the complaint, and in such case the motion is made upon the facts stated in the complaint. See Robinson v. Black Diamond Co., 50 Cal. 460, 14 Morr. Min. Rep. 93; Snodgrass v. Ricketts, 13 Cal. 359. The practice of nonsuiting the plaintiff upon his opening statement proceeds upon the assumption that the plaintiff will truly and fully state his case in his opening. It is sometimes a convenient way of presenting a question. In Emerson v. Weeks, 58 Cal. 382, Thornton, J., delivering the opinion, said: "We would observe that it would be much better not to nonsuit on an opening statement unless it is clearly made, and it is plainly evident therefrom that no case can be made out. It is much better to permit the plaintiff to put in his testimony, and that the motion should be then made. It will be found on pursuing this course that on many occasions there would be no ground for nonsuit."

See, also, Roach v. Rutter, 40 Mont. 167, 105 Pac. 555.

But see Wheeler v. Oregon etc. Co., 16 Idaho, 375, 102 Pac. 347; Rauh v. Oliver, 10 Idaho, 3, 77 Pac. 20; Kroetch v. Morgan, 10 Idaho, 172, 77 Pac. 19; Sullivan v. Williamson, 21 Okl. 844, 98 Pac. 1001. In these cases the motion was made at the conclusion of the opening statement of plaintiff's counsel. If the complaint sets up an adequate cause of action, the plaintiff is not concluded or estopped by a mere statement of his counsel, or anything short of an actual deficiency in his proof.

[1] See section 105, *ante*.

[2] 1 Cal. 221, 52 Am. Dec. 303, 7 Morr. Min. Rep. 156.

from that which he assigned in the court below. This doctrine is well established and is necessary to be sustained in order that the plaintiff may not be misled in the course of the trial, and in the settlement of his bill of exceptions in case the nonsuit should be ordered." So in People v. Banvard,[3] one of the grounds of the affirmance of the judgment in favor of the relator was that the defendant had not specified any grounds of his motion for nonsuit; and Shafter, J., delivering the opinion, said:

"Most, if not all, of the considerations upon which it has been held that a party objecting to the introduction of testimony should state precisely the grounds of his objection, are equally applicable to show, when a nonsuit is moved for at the trial, that the attention of the court and of opposite counsel should be particularly directed to the supposed defects in the plaintiff's case. We not only understand such to be the rule, but consider its observance a matter of great practical consequence."

So in Coffey v. Greenfield,[4] where the motion for nonsuit was upon the general ground that "plaintiffs had not introduced any testimony tending to sustain the action," Thornton, J., delivering the opinion of department two, said: "The motion was properly denied. It is settled law in this state that a party moving for a nonsuit should state in his motion precisely the grounds on which he relied, so that the attention of the court and the opposite counsel may be particularly directed to the supposed defects in the plaintiff's case. (People v. Banvard, 27 Cal. 470; Sanchez v. Neary, 41 Cal. 485; Kiler v. Kimball, 10 Cal. 267; McGarrity v. Byington, 12 Cal. 426, [2 Morr. Min. Rep. 311].) The general ground above stated did not comply with the rule, and therefore the court did not err in denying the motion."

So in Shain v. Forbes,[4a] it was said:

"It is settled law in this state that when a party moves for a nonsuit, the grounds of the motion must be precisely stated, and no other grounds than those stated can be considered by the court in granting or refusing the motion, or by the appellate court in reviewing the order. (Coffey v. Greenfield, 62 Cal. 602; Gardiner v. Schmaelzle, 47 Cal. 588; Raimond v. Eldridge, 43 Cal. 506; Hayne on New Trial and Appeal, sec. 117.)"

[3] 27 Cal. 470.
[4] 62 Cal. 602.
[4a] 82 Cal. 577, 23 Pac. 198.

So in Bronzan v. Drobaz,[4b] it was said that "the only ground on which this ruling can be reviewed is that specifically stated when the motion was made. Other grounds cannot now be considered. (Raimond v. Eldridge, 43 Cal. 506; Coffey v. Greenfield, 62 Cal. 602; Loring v. Stuart, 79 Cal. 200, 21 Pac. 651; Miller v. Luco, 80 Cal. 257, 22 Pac. 195.)"

The reason of the rule, as above suggested, and as stated in Warner v. Warner,[4c] is that "the plaintiff might overcome the objection by additional evidence, but if the defect is inherent in his cause of action, and cannot be cured, the reason for the rule ceases to exist, and the rule itself has no application." It is, therefore, only when the ground of the nonsuit might have been obviated that the rule requiring that such grounds be specifically stated is operative.[4d]

[4b] 93 Cal. 647, 29 Pac. 254. And see Silva v. Holland, 74 Cal. 530, 16 Pac. 385; Carter v. Hopkins, 79 Cal. 82, 21 Pac. 549; Loring v. Stuart, 79 Cal. 200, 21 Pac. 651; Miller v. Luco, 80 Cal. 257, 22 Pac. 195; Belcher v. Murphy, 81 Cal. 39, 22 Pac. 264; Daley v. Russ, 86 Cal. 114, 24 Pac. 867; Palmer & Rey v. Marysville Pub. Co., 90 Cal. 168, 27 Pac. 21; Flynn v. Dougherty, 91 Cal. 669, 27 Pac. 1080, 14 L. R. A. 230; Harper v. Gordon, 128 Cal. 489, 61 Pac. 84; Durfee v. Seale, 139 Cal. 603, 73 Pac. 435; Warner v. Warner, 144 Cal. 615, 78 Pac. 24; De Leonis v. Hammel, 1 Cal. App. 390, 82 Pac. 349.

The necessity for the specification of the grounds of the motion is also enunciated in the following cases: De Leonis v. Hammel, 1 Cal. App. 390, 82 Pac. 349; Idaho etc. Co. v. Kalanquin, 7 Idaho, 295, 62 Pac. 925; Wright v. Ins. Co., 12 Mont. 474, 31 Pac. 87; Soyer v. Water Co., 15 Mont. 1, 37 Pac. 838; Jacobs v. Union etc. Co., 17 Mont. 61, 42 Pac. 109; Kavanaugh v. Flavin, 35 Mont. 133, 88 Pac. 764; Sharon v. Minnock, 6 Nev. 377; Burns v. Rodefer, 15 Nev. 59; Ferguson v. Ingle, 38 Or. 43, 62 Pac. 760; Meier v. Northern Pacific Co., 51 Or. 69, 93 Pac. 691; Frank v. Bullion-Beck Co., 19 Utah, 35, 56 Pac. 419; McIntyre v. Ajax Mining Co., 20 Utah, 323, 60 Pac. 552, 20 Morr. Min. Rep. 142; Lewis v. Mining Co., 22 Utah, 51, 61 Pac. 860; Skeen v. Oregon etc. Co., 22 Utah, 413, 62 Pac. 1020; White v. Rio Grande etc. Co., 22 Utah, 138, 61 Pac. 568; Wild v. Union Pacific Co., 23 Utah, 265, 63 Pac. 886.

[4c] 144 Cal. 615, 78 Pac. 24.

[4d] See Daley v. Russ, 86 Cal. 114, 24 Pac. 867, where Mr. Commissioner Hayne, who wrote the opinion of the court, said:

"It is objected, however, that the defendants did not specify this as a ground of their motion for nonsuit. It is undoubtedly the settled rule that a motion for nonsuit should specify the grounds upon which it is made, and ordinarily a ground which is not stated cannot be considered. Kiler v. Kimball, 10 Cal. 267; McGarrity v. Byington, 12 Cal. 426, 2 Morr. Min. Rep. 311; Holverstot v. Bugby, 13 Cal. 43; Baker v. Joseph, 16 Cal. 173; People v. Banvard, 27 Cal. 470; Sanchez v. Neary, 41 Cal. 485; Raimond v. Eldridge, 43 Cal. 506; Silva v. Holland, 74 Cal. 530, 16 Pac. 385; Loring v. Stuart, 79 Cal. 200, 21 Pac. 651; Miller v. Luco, 80 Cal. 257 22 Pac. 195. But the reason of the rule is to afford an opportunity to correct such defects as admit of correction. It is plain that this reason does not apply where the defects do not admit of correction. As to such cases the rule does not apply. Or if the phrase be preferred, where the defects cannot be corrected, the error

If the grounds of the motion be not stated, and the motion be denied, the appellate court will not disturb the ruling.[5] If the grounds stated in the court below be untenable, and the motion be denied, the appellate court will not disturb the ruling although there may have existed grounds which would have prevailed had they been stated.[6] If the grounds are stated generally as being "plaintiff's failure to prove any of the material allegations of the complaint," and certain grounds are specified particularly, entire failure of the evidence as to a particular ground, not so specified, will not be deemed ground for reversing an order denying the motion, there being sufficient evidence for the plaintiff as to the points specifically pointed out. The general statement is insufficient and will be disregarded.[6a] If the ground of the motion is stated generally and pointed at "all the causes of action mentioned in the complaint," it was held to have been properly denied when only one cause of action was unsupported.[6b]

If the record does not show on what grounds the motion was granted, but there be an "undeniable inference" that it was granted on a ground which was erroneous, the judgment will be reversed.[7] If the motion be made on grounds which are not tenable, and it be granted, a new trial will be directed although there exist

of not specifying the grounds of the motion is immaterial. Compare Nightingale v. Scannell, 18 Cal. 323." See, also, Fontana v. Pacific Can Co., 129 Cal. 51, 61 Pac. 580; Warner v. Warner, 144 Cal. 615, 78 Pac. 24.

[5] Kiler v. Kimball, 10 Cal. 267; McGarrity v. Byington, 12 Cal. 426, 2 Morr. Min. Rep. 311; Holverstot v. Bugby, 13 Cal. 43; Baker v. Joseph, 16 Cal. 173; People v. Banvard, 27 Cal. 470; Silva v. Holland, 74 Cal. 530, 16 Pac. 385; Loring v. Stuart, 79 Cal. 200, 21 Pac. 651; Miller v. Luco, 80 Cal. 257, 22 Pac. 195; Durfee v. Seale, 139 Cal. 603, 73 Pac. 435.

[6] Gardiner v. Schmaelzle, 47 Cal. 588; Palmer & Rey v. Marysville Pub. Co., 90 Cal. 168, 27 Pac. 21; Harper v. Gordon, 128 Cal. 489, 61 Pac. 84; De Leonis v. Hammel, 1 Cal. App. 390, 82 Pac. 349.

It is sometimes sought to limit the operation of this rule. Thus, in White v. Rio Grande etc. Co., 22 Utah, 138, 61 Pac. 568, it was contended that the rule requiring the exact grounds to be specified was subject to the general rule that where a motion is denied or an objection overruled, the moving party is permitted on review to urge only the grounds pointed out, and, if the motion or objection is sustained, any grounds at all, whether specified or not, sustaining the action of the court, might be assigned on appeal. The court held, however, that whatever the rule might be on the review in the higher court, the moving party could not be excused in the matter of specifying the grounds upon which his motion is founded. The trial court and adverse party must be adequately informed of the exact defects in the proof relied upon, in order that the one may properly determine the question presented, and the other supply the defect, if possible.

[6a] Belcher v. Murphy, 81 Cal. 39. 22 Pac. 264.

[6b] Pacific Vinegar Works v. Smith, 152 Cal. 507, 93 Pac. 85.

[7] Morgan v. Thrift, 2 Cal. 562.

grounds which would have prevailed had they been stated as grounds of the motion.[8] It would seem, however, from the analogy to the rule requiring specific objections to evidence,[9] that if the court can see that plaintiff's case is so radically defective that he could not possibly recover under any circumstances, the action of the court below in nonsuiting him would not be disturbed although untenable grounds or no grounds at all were stated.

No particular form of expression is required. Any phraseology sufficiently precise and definite to put the adverse party upon notice, and so enable him, where practicable, to remedy the defects pointed out, serves the purpose of the specification required, and meets every legal requisite. This was the tenor of the language of the court in the case of Carter v. Hopkins,[10] where it was said:

"The grounds on which the nonsuit was asked were sufficiently stated. They are equivalent to the statement that the plaintiff had failed to prove a single allegation of his complaint. The plaintiff's attorney, no doubt, understood what was meant by the statement made by the attorney for the defendants; viz., that the plaintiff had not proved a single material allegation of the complaint."

§ 117. Effect to be Given to the Plaintiff's Evidence upon Motion for a Nonsuit.—It has been said that a motion for a nonsuit is in the nature of a demurrer to evidence. In other words, the truth of the plaintiff's testimony is admitted. Its sufficiency only is denied.[1] However this may be, it is clear that the motion

[8] Raimond v. Eldridge, 43 Cal. 506; Sanchez v. Neary, 41 Cal. 485. In this the rule differs from that which prevails where an objection to the admissibility of evidence is sustained. For where evidence is rejected, the opposite party may assign any reason in support of the ruling, whether it was advanced in the court below or not. See latter part of section 105, *ante*.

[9] See notes, 4c, 4d, and 4e, *supra*. And see Nightingale v. Scannel, 18 Cal. 315; and look at Enright v. S. F. & S. R., 33 Cal. 230.

[10] 79 Cal. 82, 21 Pac. 549.

[1] Butler v. Hyland, 89 Cal. 575, 26 Pac. 1108. And see Wright v. Roseberry, 81 Cal. 87, 22 Pac. 336; Warner v. Darrow, 91 Cal. 309, 27 Pac. 737; and see last part of section.

In some states provision by statute is made for a proceeding denominated a "demurrer to evidence." A notable instance is Oklahoma, section 11 of the organic act of which (Stats. 1893, p. 44), borrowed from the code of Indiana, sets out such a proceeding. See Jaffrey v. Wolf, 4 Okl. 303, 47 Pac. 496, as to this section. The effect of a demurrer to evidence, under the statutes and decisions of Oklahoma, following those of the older states, is substantially as outlined in the text. Thus in Conklin v. Yates, 16 Okl. 266, 83 Pac. 910, it was held that in order to sustain a demurrer to the evidence the court must be able to say as a matter of law that the party introducing the evidence has not proved his case. In the same case, and in Ziska v. Ziska, 20 Okl. 634, 95

admits, for the purpose of the motion at least, whatever the plaintiff's evidence tends to prove; and if there be any evidence in support of the case upon the point in which it is attacked, the motion should be denied; if, however, plaintiff has introduced no evi-

Pac. 254, 23 L. R. A., N. S., 1, and Shawnee etc. Co. v. Sears, 21 Okl. 13, 95 Pac. 449, it was held that a demurrer to evidence admits every fact to be true which the evidence in the case tends to prove, whether directly or by reasonable deduction or inference. See, also, to same effect, Yingling v. Redwine, 12 Okl. 64, 69 Pac. 810; Watkins v. Havinghorst, 13 Okl. 128, 74 Pac. 318; Edmisson v. Drumm-Flato Co., 13 Okl. 440, 73 Pac. 958. So in Belcher v. Whitlock, 6 Okl. 691, 56 Pac. 23, it was held that when a petition states facts sufficient to constitute a cause of action and plaintiff's testimony fairly tends to establish every material fact alleged, a demurrer to the evidence should be overruled. To which, carrying out the analogy, it might have been added, so should a demurrer to the plea. The connection between the two classes of demurrer is very close. In Shultz v. Jones, 3 Okl. 504, 41 Pac. 400, it was held that an objection to the introduction of any testimony whatever on the ground that petition failed to state a cause of action was equivalent to a demurrer; but to the petition and not the evidence.

If evidence is introduced making out a case otherwise defective after a demurrer to evidence has been overruled, the order overruling the motion will not be disturbed. This was held in Meyer v. White, 27 Okl. 400, 112 Pac. 1005, thus clearly illustrating the parallel between a demurrer to evidence and a compulsory nonsuit.

In Oregon the supreme court has applied the phrase "demurrer to evidence" to an entirely distinct proposition. Thus in Hawley v. Dawson, 16 Or. 344, 18 Pac. 592, with reference to a motion to strike out certain testimony as incompetent, as being outside the issues, the court said: "This motion is in the nature of a demurrer to the evidence, and must be tested by the same rules. In such a case the rule is that the demurrer admits all that the testimony objected to has proved, and all that it tends to prove; and hence, if there is testimony tending to prove the issues in favor of plaintiff, the judgment must be in his favor." The difference seems to be somewhat obscure, but no doubt expresses the earlier view. Another use of the phrase is to be found in Willis v. Crawford, 38 Or. 522, 63 Pac. 985, 64 Pac. 866, 53 L. R. A. 904, and still another in Brown v. Lewis, 50 Or. 358, 92 Pac. 1058, which last may be said to be more nearly in consonance with the statutory use by the Oklahoma courts and elsewhere. The decision of the court was that a defendant could not demur to evidence offered by plaintiff without *himself* also resting his case, and that a motion for a nonsuit was the only proceeding open to him to test the sufficiency of plaintiff's evidence at the close of the latter's case. But see Jackson v. Sumpter Valley Co., 50 Or. 455, 93 Pac. 356, where the expression was used in the statutory sense, as used in Oklahoma and other states where a demurrer to evidence is a distinct proceeding.

See, also, Messenger v. Woge, 20 Colo. App. 275, 78 Pac. 314, where it was said that a motion for a nonsuit under the provisions of section 166, Mills' Annotated Code, on the ground that plaintiff failed to prove a sufficient case for the jury, is in the nature of a demurrer to the evidence. In Bush v. Wood, 8 Cal. App. 647, 97 Pac. 709, similar language was made use of. See, also, as to the general subject of demurrer to evidence: Archer v. United States, 9 Okl. 569, 60 Pac. 268; Hanenkratt v. Hamil, 10 Okl. 219, 61 Pac. 1050; Pringey v. Guss, 16 Okl. 82, 86 Pac. 292, 8 Ann. Cas. 412; Doyle v. Eschen, 5 Cal. App. 55, 89 Pac. 836; Archibald v. Matteson, 5 Cal. App. 441, 90 Pac. 723.

dence in support of the material allegation attacked by the motion for nonsuit, the motion should be granted.[1a]

In the case of Mateer v. Brown,[1b] the supreme court said:

"The general rule by which courts should be guided in determining whether a nonsuit when applied for should be ordered is, that if the evidence given by the plaintiff would not authorize the jury to find a verdict for him, or if the court would set it aside if so found as contrary to the evidence, in such case it is the duty of the court to nonsuit the plaintiff."

Similar language was used in Geary v. Simmons,[1c] Vanderford v. Foster,[1d] Fagundes v. C. P. R. R. Co.,[1e] Fox v. Southern Pac. Co.,[1f] Downing v. Murray,[1g] and Estate of Morey,[1h] but, in spite of the frequency with which the phrase, or its equivalent, has been repeated by the court, it would seem to be not quite accurate as an expression of the true legal principle governing the granting of nonsuits.

A motion to set aside a verdict as contrary to the evidence is addressed to the discretion of the judge of the trial court, who has power, under the decisions, to set aside the verdict if not satisfactory to him, even though there be a substantial conflict in the evidence.[2] Such being the case, it is evident that the court may set aside a verdict as being contrary to the evidence in cases where it could not grant a nonsuit, and therefore the test suggested by the cases just cited is apt to mislead, unless it be borne in mind that it is to be applied to the plaintiff's case alone without reference to the testimony which may have been adduced on behalf of the defendant. When so applied it is usually accurate enough. For if, at the close of plaintiff's case, it be apparent that a verdict for him would have to be set aside, the court should grant a nonsuit, and the same result must follow, if the motion be made, as it may properly be made,[2a] after the defendant has introduced the whole or part of his testimony, and before the final submission of the cause. The

[1a] Harley v. McLeran, 66 Cal. 34, 4 Pac. 884.

[1b] 1 Cal. 221, 52 Am. Dec. 303, 7 Morr. Min. Rep. 156. See, also, Ensminger v. McIntire, 23 Cal. 593, 14 Morr. Min. Rep. 440.

[1c] 39 Cal. 224.

[1d] 65 Cal. 49, 2 Pac. 736.

[1e] 79 Cal. 97, 21 Pac. 437, 3 L. R. A. 824.

[1f] 95 Cal. 234, 30 Pac. 384.

[1g] 113 Cal. 455, 45 Pac. 869.

[1h] 147 Cal. 495, 82 Pac. 57.

[2] See section 97, *ante*.

[2a] Geary v. Simmons, 39 Cal. 224; Vanderford v. Foster, 65 Cal. 49, 2 Pac. 736; Fagundes v. C. P. R. R. Co., 79 Cal. 97, 21 Pac. 437, 3 L. R. A. 824; Fox v. S. R. R. Co., 95 Cal. 234, 30 Pac. 384; Toulouse v. Pare, 103 Cal. 251, 37 Pac. 146.

limitation of the defendant's right to a nonsuit to cases in which the insufficiency of the plaintiff's case is manifested by his own testimony results directly from the wording of subdivision 5 of section 581, Code of Civil Procedure, providing that a judgment of nonsuit may be entered "when upon the trial the plaintiff fails to prove a sufficient case for the jury." The plaintiff's case must fail by reason of its own inherent weakness as disclosed by his own proof, and not by reason of anything shown by the defendant.[ab] This is so clear as to render difficult of comprehension two cases in which a different view seems to have been taken by the court, Geary v. Simmons and Vanderford v. Foster, in each of which the plaintiff made out a good *prima facie* case; the defendant then introduced evidence which showed that the plaintiff should not recover, and moved for a nonsuit, which was granted. In each case, the motion for a nonsuit could not have been granted if made at the close of the plaintiff's testimony and before the evidence of the defendant was introduced. In neither case did the plaintiff fail to prove a sufficient case for the jury, and in both cases the plaintiff was nonsuited on the evidence given on behalf of the defendant.

In the last of these two cases the court seemed to be not quite sure of its own conclusion, as, in affirming the order denying a new trial, it said:

"We think it proper to say, however, that the practice of moving for nonsuit after the defendant's evidence is in should rarely be resorted to. Especially is this so when, as in the case at bar, the plaintiff introduced evidence to sustain all the averments of the complaint, as against a mere trespasser, and the materiality of establishing an immediate delivery and actual and continued change of possession only appeared after the defendant had made out his affirmative defense; that he was sheriff and took the property under process, etc."

Geary v. Simmons and Vanderford v. Foster may, perhaps, be safely regarded as exceptional cases, in which the court, in view of all the evidence, refused to disturb the only judgment that seemed possible thereunder.

The defendant is not restricted to the remedy of nonsuit. It is well settled that where the evidence is such that a verdict for plaintiff would have to be set aside and a new trial granted for insufficiency of the evidence (the condition covered by Geary v.

[ab] Section 114, *ante*, and note 10 therein.

Simmons, and other similar cases), the defendant is entitled to an instruction directing a verdict in his favor.[2c] The same rules are said to govern with respect to the instruction as govern the motion for nonsuit, and it is said that conditions which would authorize the court to grant a nonsuit upon a consideration of plaintiff's evidence alone, would, upon a consideration of all the evidence, authorize the instruction referred to. But this is the full extent of the similarity. They are not only dissimilar in the matter of the evidence, but are so far inconsistent with each other that the one contemplates a dismissal of the action, while the other asks for a judgment upon the merits.[2d]

The rule to be observed in passing upon motions for nonsuit has been more satisfactorily stated in other cases. The general rule was first expressed in Ringold v. Haven,[3] where Bennett, J., delivering the opinion, said:

"If there be some evidence which, in legal construction, fairly tends, or conduces to prove all the material allegations of the complaint, the sufficiency thereof is a question solely for the jury."

And this rule has been restated in a number of subsequent decisions, and is well settled.[3a] But it has its limitations, and the supreme court, in the same case, further said:

"But here the rule stops. And, therefore, whilst it is conceded that where the evidence is conflicting or doubtful, or even slight, it is proper that it should be left to the jury to pass upon; yet, at the same time, where there is no evidence upon some material point necessary to be proved in order to sustain the complaint equally, as where there is no evidence at all upon any point it becomes the

[2c] See note 36c, section 121, *post*.

[2d] The following cases illustrate the distinction between conditions which justify a nonsuit and those which suggest an instruction: McCurrie v. Southern Pacific Co., 122 Cal. 558, 55 Pac. 324; and see Estate of Arnold, 147 Cal. 583, 82 Pac. 252, and cases there cited. And see Anderson v. Hinshaw, 110 Cal. 682, 43 Pac. 389; O'Connor v. Witherby, 111 Cal. 523, 44 Pac. 227.

[3] 1 Cal. 108.

[3a] See Felton v. Millard, 81 Cal. 540, 21 Pac. 533, 22 Pac. 750; Higgins v. Ragsdale, 83 Cal. 219, 23 Pac. 316; Bonetti v. Treat, 91 Cal. 223, 27 Pac. 612, 14 L. R. A. 151; Leonard v. Flynn, 89 Cal. 535, 23 Am. St. Rep. 500, 26 Pac. 1097; O'Connor v. Hooker, 102 Cal. 528, 36 Pac. 939; Warren v. McGill, 103 Cal. 153, 37 Pac. 144; Pacific Mutual L. I. Co. v. Fisher, 109 Cal. 566, 42 Pac. 154; Anderson v. Hinshaw, 110 Cal. 682, 43 Pac. 389; Zilmer v. Gerichten, 111 Cal. 73, 43 Pac. 408; Chapman v. Neary, 115 Cal. 79, 46 Pac. 867; McAlpine v. Laydon, 115 Cal. 68, 46 Pac. 865; Goldstone v. Merchants' etc. Co., 123 Cal. 625, 56 Pac. 776; Ferris v. Baker, 127 Cal. 520, 59 Pac. 937; Vermont etc. Co. v. Declez etc. Co., 135 Cal. 579, 87 Am. St. Rep. 143, 67 Pac. 1057, 56 L. R. A. 728; Freese v. Hibernia etc. Co., 139 Cal. 392, 73 Pac. 172; Estate of Arnold, 147 Cal. 583, 82 Pac. 252.

duty of the court, upon the motion of defendant, to order a nonsuit."

The test is, generally speaking, whether the question is one of fact or of law. If the former, the jury must be permitted to determine it, and it must not be taken from them, either by nonsuit or by an instruction. If the latter, it is the duty of the court to decide it.

Where the facts are admitted, or the evidence is undisputed, or where there is no shadow of conflict therein, the question is said to be one of law, and exclusively within the province of the court, and a motion for a nonsuit should be granted.[3b] On the other hand, where the facts are doubtful as the result of uncertain or conflicting evidence, or there is room for a difference of opinion between reasonable men, or different conclusions may reasonably be drawn from the evidence, even though it be not conflicting, the question is one of fact for the jury, and not of law for the court, and nonsuit should be denied.[3c]

As to the degree of proof necessary to defeat a motion for a nonsuit, it has been said that if the plaintiff makes out a *prima facie* case, without material variance between averment and proof, nonsuit is error.[3d] The showing must be sufficient to raise more than a mere surmise or conjecture that the facts as alleged are true. It must be sufficient to enable a rational mind to draw a conclusion

[3b] See Nehrbas v. C. P. R. R. Co., 62 Cal. 320; Glascock v. C. P. R. R. Co., 73 Cal. 137, 14 Pac. 518; Fagundes v. C. P. R. R. Co., 79 Cal. 97, 21 Pac. 437; Overacre v. Blake, 82 Cal. 77, 22 Pac. 979; Orcutt v. Pacific Coast Co., 85 Cal. 291, 24 Pac. 661; Nagle v. California etc. Co., 88 Cal. 86, 25 Pac. 1106; Whalen v. Arcata etc. R. R. Co., 92 Cal. 669, 28 Pac. 833; Stephenson v. Southern Pacific Co., 102 Cal. 143, 34 Pac. 618, 36 Pac. 407; Davis v. California etc. Co., 105 Cal. 131, 38 Pac. 647; Van Praag v. Gale, 107 Cal. 438, 40 Pac. 555; McCurrie v. Southern Pacific Co., 122 Cal. 558, 55 Pac. 324.

See following cases as to instruction: People v. Phillips, 70 Cal. 61, 11 Pac. 493; Vulicevich v. Skinner, 77 Cal. 239, 19 Pac. 424; Dean v. Ross, 105 Cal. 227, 38 Pac. 912.

[3c] See Simpson v. Applegate, 67 Cal. 471, 8 Pac. 39; Whalen v. Arcata etc. Co., 92 Cal. 669, 28 Pac. 833; Redington v. Pacific etc. Co., 107 Cal. 317, 48 Am. St. Rep. 132, 40 Pac. 432; Pacific Mut. L. I. Co. v. Fisher, 109 Cal. 566, 42 Pac. 154; O'Connor v. Witherby, 111 Cal. 523, 44 Pac. 227; McAlpine v. Laydon, 115 Cal. 68, 46 Pac. 865; Buchel v. Gray Brothers, 115 Cal. 421, 47 Pac. 112; Herbert v. Southern Pacific Co., 121 Cal. 227, 53 Pac. 651; McCurrie v. Southern Pacific Co., 122 Cal. 558, 55 Pac. 324; Snyder v. Holt Mfg. Co., 134 Cal. 324, 66 Pac. 311; Greenberg v. Western Turf Assn., 148 Cal. 126, 113 Am. St. Rep. 216, 82 Pac. 684.

See following case as to instructions: Los Angeles etc. Co. v. Thompson, 117 Cal. 594, 49 Pac. 714; O'Connor v. Witherby, 111 Cal. 523, 47 Pac. 112; Smith v. Occidental etc. Co., 99 Cal. 462, 34 Pac. 84.

[3d] Chapman v. Neary, 115 Cal. 79, 46 Pac. 867.

therefrom that the facts exist.[36] Actual demonstration is not required; that is, such a degree of proof as excludes the possibility of error. Moral certainty, such proof as is sufficient to produce conviction in an unprejudiced mind, is adequate.[37]

Presumptions are not strong for a ruling of nonsuit. In Vermont etc. Co. v. Declez etc. Co. [38] the court held that "the evidence must be construed as strongly as possible the other way, and if there is any substantial evidence for the plaintiff, he is entitled to a judgment on the merits." As above stated, for the purposes of the motion, and as favoring a hearing of the cause upon its merits, whatever plaintiff's evidence tends to prove is admitted. This is in accord with fundamental principles, and received early sanction by the supreme court. In Dow v. G. & C. M. Co.,[4] Rhodes, J., delivering the opinion, said: "In considering the correctness of the ruling of the court on the motion for a nonsuit, we must accept as proven every fact which the evidence tended to prove, and which was essential to be proven to entitle the plaintiff to a recovery upon the cause of action stated in the complaint."

Full effect must be given on appeal to all of plaintiff's evidence, whether properly or improperly admitted.[5] This has long been the rule with respect to the review of questions as to insufficiency of the evidence.[6] The motion for a nonsuit is in the nature of a demurrer to evidence. The truthfulness of the testimony is admitted, but its sufficiency is challenged.[7] The motion admits the truth of plaintiff's evidence and every inference of fact which can be properly drawn therefrom.[8]

[36] Freese v. Hibernia etc. Co., 139 Cal. 392, 73 Pac. 172.

[37] Freese v. Hibernia etc. Co., 139 Cal. 392, 73 Pac. 172.

[38] 135 Cal. 579, 87 Am. St. Rep. 143, 67 Pac. 1057, 56 L. R. A. 728. Also see Goldstone v. Merchants' etc. Co., 123 Cal. 625, 56 Pac. 776; Hanley v. California etc. Co., 127 Cal. 232, 50 Pac. 577, 47 L. R. A. 597; Ferris v. Baker, 127 Cal. 520, 59 Pac. 937.

[4] 31 Cal. 629. See, also, McKee v. Green, 31 Cal. 418; Ferris v. Baker, 127 Cal. 520, 59 Pac. 937.

[5] See Wright v. Roseberry, 81 Cal 87, 22 Pac. 336.

[6] See section 98, *ante*.

[7] Butler v. Hyland, 89 Cal. 575, 26 Pac. 1108; Ferris v. Baker, 127 Cal. 520, 59 Pac. 937.

[8] The rule, as expressed in a recent Nevada decision (Burch v. Southern Pacific Co., 31 Nev. 000, 104 Pac. 225, quoted in McCafferty v. Flinn, 32 Nev. 000, 107 Pac. 225), that "in considering the granting or refusing of a motion for nonsuit, the court must take as proven every fact which the plaintiff's evidence tended to prove, and which was essential to his recovery, and every inference of fact that can be legitimately drawn therefrom, and give the plaintiff the benefit of all legal presumptions arising from the evidence, and interpret the evidence most strongly against the de-

§ 118. Defects in Plaintiff's Case may be Cured After Motion for Nonsuit.—As has been shown, the object of requiring the defendant to specify the grounds of his motion for nonsuit is to

fendant," is sustained by a long list of the decisions of the courts of all states whose codes contain provisions similar to those of the California code. The following by no means constitutes a complete list, but includes the leading cases, and those which fairly illustrate the application of the rule:

California: Warner v. Darrow, 91 Cal. 309, 27 Pac. 737; Goldstone v. Merchants' etc. Co., 123 Cal. 625, 56 Pac. 776; Hanley v. California etc. Co., 127 Cal. 232, 50 Pac. 577, 47 L. R. A. 597; Wagner v. Wedell, 3 Cal. App. 274, 85 Pac. 126; Kramm v. Stockton etc. Co., 3 Cal. App. 606, 86 Pac. 738; S. C., 86 Pac. 903; Doyle v. Eschen, 5 Cal. App. 55, 89 Pac. 836; Archibald Estate v. Matteson, 5 Cal. App. 441, 90 Pac. 723; Estate of Welch, 6 Cal. App. 44, 91 Pac. 336; Non-Refillable etc. Co. v. Robertson, 8 Cal. App. 103, 96 Pac. 324; Paolini v. Fresno Canal Co., 9 Cal. App. 1, 97 Pac.. 1130; Van Lue v. Wahrlich-Cornett Co., 12 Cal. App. 749, 108 Pac. 717; Hoff v. Los Angeles etc. Co., 158 Cal. 596, 112 Pac. 53.

Colorado: Schwenke v. Union etc. Co., 12 Colo. 341, 21 Pac. 43; Nichols v. Chicago etc. Co., 44 Colo. 501, 98 Pac. 808; Baldwin etc. Co. v. Quinn, 46 Colo. 590, 105 Pac. 1101; Denver etc. Co. v. Wright, 47 Colo. 366, 107 Pac. 1074.

Idaho: York v. Pacific etc. Co., 8 Idaho, 574, 69 Pac. 1042; Later v. Haywood, 12 Idaho, 78, 85 Pac. 494; Pilmer v. Boise etc. Co., 14 Idaho, 327, 125 Am. St. Rep. 161, 94 Pac. 432, 15 L. R. A., N. S., 254; Colvin v. Lyons, 15 Idaho, 180, 97 Pac. 572; McDaniel v. Moore (Idaho), 112 Pac. 317.

Montana: State v. Benton, 13 Mont. 306, 34 Pac. 301; Mayer v. Carothers, 14 Mont. 274, 36 Pac. 182; Soyer v. Great Falls etc. Co., 15 Mont. 1, 37 Pac. 838; Cameron v. Kenyon etc. Co., 22 Mont. 312, 74 Am. St. Rep. 602, 56 Pac. 358, 44 L. R. A. 508; Freeman v. Sand etc. Co., 25 Mont. 194, 64 Pac. 347; Cummings v. Helena etc. Co., 26 Mont. 434, 68 Pac. 852; McCabe v. Montana etc. Co., 30 Mont. 323, 76 Pac. 701; Allen v. Bell, 32 Mont. 69, 79 Pac. 582; Anderson v. Northern Pacific Co., 34 Mont. 181, 85 Pac. 884; Roach v. Rutter, 40 Mont. 167, 105 Pac. 555; Johnson v. Butte etc. Co., 41 Mont. 158, 108 Pac. 1057.

Nevada: Brown v. Warren, 16 Nev. 228; Patchen v. Keeley, 19 Nev. 404, 14 Pac. 347; Fox v. Myers, 29 Nev. 169, 86 Pac. 793.

Oklahoma: Myers v. Church, 11 Okl. 544, 69 Pac. 874.

Oregon: In re Morgan's Estate, 46 Or. 233, 77 Pac. 608, 78 Pac. 1029; Putnam v. Stalker, 50 Or. 210, 91 Pac. 363; Kunz v. Oregon etc. Co., 51 Or. 191, 93 Pac. 141, 94 Pac. 504; Dillard v. Olalla etc. Co., 52 Or. 126, 94 Pac. 966, 96 Pac. 678; Patty v. Salem etc. Co., 53 Or. 350, 96 Pac. 1106, 98 Pac. 521, 100 Pac. 298.

Utah: Lowe v. Salt Lake City, 13 Utah, 91, 57 Am. St. Rep. 708, 44 Pac. 1050; Tuckett v. American etc. Laundry, 30 Utah, 273, 116 Am. St. Rep. 832, 84 Pac. 500, 4 L. R. A., N. S., 990; Gesas v. Oregon etc. Co., 33 Utah, 156, 93 Pac. 274, 13 L. R. A., N. S., 1074.

Washington: Degginger v. Martin, 48 Wash. 1, 92 Pac. 674; Luper v. Henry, 59 Wash. 33, 109 Pac. 208.

Applying the principles thus outlined, it has been held that a nonsuit would not be granted in the absence of such a total failure of proof as would require a verdict for plaintiff to be set aside: Grant v. Baker, 12 Or. 329, 7 Pac. 318; Watson v. Manitou etc. Co., 41 Colo. 138, 92 Pac. 17, 17 L. R. A., N. S., 916; Jacobson v. Bunker Hill etc. Co., 3 Idaho, 126, 26 Pac. 396; and it is not proper to grant a nonsuit if there is any evidence on behalf of the plaintiff's case, which, if believed by the jury, would authorize a verdict in his favor. Black v. Lewiston, 2 Idaho, 254 (276), 13 Pac. 80. If there is no evidence at all in support of plaintiff's case a nonsuit is proper. Lalande v. McDonald, 2 Idaho, 283 (307), 13 Pac. 347; Denver etc. Co. v. Costes, 1 Colo. App. 336, 28 Pac. 1129; Baker v. Hughes, 2

call the attention of the plaintiff to the supposed defects in his case, so as to afford him an opportunity to remedy them if he can. It is within the discretion of the court to allow him to do so. In

Colo. 79; Tripp v. Fiske, 4 Colo. 24; Rensberger v. Britton, 31 Colo. 79, 71 Pac. 380; Small v. Harrington, 10 Idaho, 499, 79 Pac. 461; Briggs v. Collins, 27 Mont. 405, 71 Pac. 307; Brounton v. Southern Pacific Co., 2 Cal. App. 173, 83 Pac. 265; Mills etc. Co. v. Dunbar, 11 Idaho, 671, 83 Pac. 932.

Inasmuch as a motion for nonsuit admits the truth of plaintiff's evidence, if there is any competent evidence at all, tending to support his cause of action, he is entitled to have it go to the jury. In re Morgan's Estate, 46 Or. 233, 77 Pac. 608, 78 Pac. 1029; Idaho etc. Co. v. Lundstrum, 9 Idaho, 257, 74 Pac. 975; Ball v. Gussenhoven, 29 Mont. 321, 74 Pac. 871; North Pacific Co. v. Spore, 44 Or. 462, 75 Pac. 890; Whitmore v. Rio Grande etc. Co., 24 Utah, 215, 66 Pac. 1066; Olson v. Oregon etc. Co., 24 Utah, 460, 68 Pac. 148. So, if plaintiff makes out a *prima facie* case, it is error to order a nonsuit. Idaho etc. Co. v. Kalanquin, 7 Idaho, 295, 62 Pac. 925; McDaniel v. Moore (Idaho), 112 Pac. 317; Ferrera v. Parke, 19 Or. 141, 23 Pac. 883; Rader v. McElvane, 21 Or. 56, 27 Pac. 97; Wood v. Earls, 39 Wash. 21, 80 Pac. 837; Adams v. Bunker Hill etc. Co., 12 Idaho, 637, 89 Pac. 624, 11 L. R. A., N. S., 844; Kroetch v. Empire etc. Co., 9 Idaho, 277, 74 Pac. 868.

A motion for nonsuit cannot be sustained if the evidence tends to prove a state of facts entirely contrary to those relied upon to support the motion; particularly if the evidence is sufficient to establish a state of facts entitling the party against whom the motion is directed to maintain his case: De St. Aubin v. Field, 27 Colo. 414, 62 Pac. 199. But a nonsuit should be granted if the evidence, considered in the most favorable light for plaintiff in which the jury would be at liberty to view it, would not justify a verdict in his favor. Posten v. Denver etc. Co., 11 Colo. App. 187, 53 Pac. 391. So a nonsuit should be granted where plaintiff's evidence shows conclusively that he should not recover. Catterlin v. Bush, 39 Or. 496, 59 Pac. 706, 65 Pac. 1064; Burraston v. Bank, 22 Utah, 328, 62 Pac. 425; Cummings v. Helena etc. Co., 26 Mont. 434, 68 Pac. 852; Crane Co. v. Etna etc. Co., 43 Wash. 516, 86 Pac. 849; King's Powder Co. v. Dillon, 42 Colo. 316, 96 Pac. 439. To sustain the motion the court must be able to say, as matter of law, that there is no evidence to justify a verdict for plaintiff. Buffington v. Sussex etc. Co., 48 Colo. 554, 108 Pac. 970; Robinson v. Salt Lake City (Utah), 109 Pac. 817.

A nonsuit should not be granted where there is a conflict in the evidence. Swadling v. Barneson, 21 Wash. 699, 59 Pac. 506; Hoffman v. Titlow, 48 Wash. 80, 92 Pac. 888; Boswell v. Bank, 16 Wyo. 161, 92 Pac. 624, 93 Pac. 661; Dossett v. St. Paul etc. Co., 40 Wash. 276, 82 Pac. 273; Crowley v. Taylor, 49 Wash. 511, 95 Pac. 1016; Strandell v. Moran, 49 Wash. 533, 95 Pac. 1106; Mayhew v. Smith, 42 Colo. 534, 95 Pac. 549. This follows necessarily from the rule requiring the court to treat the plaintiff's evidence as true, rejecting all that is merely contradictory offered by the defendant. See Cooney v. Glynn, 157 Cal. 583, 108 Pac. 506; Palmer v. Portland etc. Co. (Or.), 108 Pac. 211; McGowan etc. Co. v. Midland etc. Co., 41 Mont. 211, 108 Pac. 655; Doyle v. Southern Pacific Co. (Or.), 108 Pac. 201; Johnson v. Butte etc. Co., 41 Mont. 158, 108 Pac. 1057. As a matter of course, a conflict of evidence can only arise in that class of cases where the practice permits a motion for nonsuit to be made after the evidence for defendant is in, unless there is a conflict in plaintiff's evidence itself, and the rule itself is, for this reason, a somewhat abnormal application of principle.

The question of the truth or falsity of the offered evidence is for the jury. The court must accept it as true, together with every fairly deducible inference therefrom. Meyers v. Highland etc. Co., 28 Utah, 96, 77 Pac. 347.

May v. Hanson [1] the report does not state precisely when the application to introduce further evidence was made. Probably it was before the motion for nonsuit was denied. The supreme court in its opinion said: "There was no error in allowing the plaintiff to introduce the ferry license after motion for nonsuit; this was a matter within the discretion of the court below, as we have often held before." In Abbey Homestead Assn. v. Willard [2] and Garber v. Gianella,[2a] further evidence was permitted to be introduced by plaintiff after the motion for nonsuit was denied. In both cases the supreme court held that it was wholly discretionary, and would not be disturbed except for abuse of discretion. In Low v. Warden [2b] the trial court, during the argument of a motion for a nonsuit, intimated that the plaintiff had failed to produce evidence as to an essential fact of his case. Upon this the plaintiff's counsel asked leave to open the case and introduce testimony concerning the fact. This the court refused to allow, and granted the motion. The supreme court regarded the refusal as an error and reversed the judgment. In Tuller v. Arnold [2c] the court allowed the plaintiff to introduce evidence after the motion was made and before it was decided, manifestly for the purpose of obviating the dangerous condition of his proof. The supreme court sustained the ruling as a proper exercise of discretion. Leave to amend his pleading has been placed upon the same basis as leave to introduce additional evidence, and the trial court's action in permitting such amendment was sustained in Kamm v. Bank of California,[2d] as an appropriate exercise of discretion.

No case has been found in which leave to introduce further evidence has been given after a nonsuit was granted. There would seem to be an inconsistency in such a course, unless the order of

[1] 5 Cal. 360, 63 Am. Dec. 135. In connection with the subject of this section, see section 56, *ante*.

[2] 48 Cal. 614.

[2a] 98 Cal. 527, 33 Pac. 458.

[2b] 70 Cal. 19, 11 Pac. 350.

[2c] 98 Cal. 522, 33 Pac. 445. In this case defendant raised a question as to his own right to introduce further evidence, but the point has no reference to the question here under consideration.

In Atlantic Ins. Co. v. Manning, 3 Colo. 224, it was held that it was a matter addressed to the discretion of the trial court to grant leave to plaintiff to introduce additional evidence to cure the defects pointed out by the motion for nonsuit, while overruling the latter.

[2d] 74 Cal. 191, 15 Pac. 765.

See, also, Kluska v. Yeomans etc. Co., 54 Wash. 465, 132 Am. St. Rep. 1121, 103 Pac. 819; Alkire v. Myers etc. Co., 57 Wash. 300, 106 Pac. 915.

nonsuit should first be set aside, which it is thought the court would have power to do.[3]

If the motion for nonsuit be improperly denied, it may happen that the defendant's evidence will supply the defects in plaintiff's case, pointed out on the motion for nonsuit. In such case the error of denying the motion is cured. This has several times been held. In Smith v. Compton[4] the supreme court, after saying that it was necessary to make certain proof in order to sustain the plaintiff's case, said: "This was not done in the opening, and the defendant was entitled to a judgment of nonsuit. The defendant, however, after his motion was denied, introduced evidence which enabled plaintiff to supply the defect in his case, and by so doing waived the objection." So in Winans v. Hardenbergh,[5] the court said: "The only exception taken by appellant in the court below was to the refusal to instruct the jury as in case of nonsuit, upon the close of the plaintiff's testimony. If this were an error, it was cured by the introduction of evidence on the part of defendants, which supplied every omission in plaintiff's case, and conclusively established his right to recover. (Smith v. Compton, 6 Cal. 24.)" So in the Abbey Homestead Assn. v. Willard, above cited, the court said: "The motion for nonsuit should have been granted. The answer denies that the defendant 'ever ousted or ejected the plaintiff' from the premises; and the plaintiff failed to prove the ouster; but the defendant afterward supplied the defect by proving that he had remained in possession ever since the execution of the lease above mentioned. The production of that evidence cured the error."

So in Vica Valley etc. Co. v. Mansfield,[6] where it was objected that defendant's motion for nonsuit should have been granted, the supreme court said:

"The obvious answer to this argument is, that the complaint alleged and the answers admitted that the defendants claimed and asserted an interest in the property. It was not necessary, therefore, for the plaintiff, in opening his case, to offer proof upon this subject. Besides, if such proof had been necessary, and the

[3] See, generally, Hastings v. Hastings, 31 Cal. 95; Valencia v. Couch, 32 Cal. 339, 91 Am. Dec. 589; Felch v. Beaudry, 40 Cal. 439.

[4] 6 Cal. 24.

[5] 8 Cal. 291. See, also, Perkins v. Thornburgh, 10 Cal. 189.

[6] 84 Cal. 560, 24 Pac. 145.

defendants were entitled to a judgment of nonsuit for the want of it, the error was cured when they afterward introduced in evidence the deed, mortgage, and note, on which they relied to defeat the action."

So in Higgins v. Ragsdale,[7] which was an action of ejectment, defendant moved for nonsuit at the close of plaintiff's evidence, "upon the ground that plaintiff had not shown that the corner was lost, and had not shown that the field-notes which he used to determine the fact that the corner was lost were copies of any official survey or record." The motion was denied, and defendant thereupon introduced in evidence a certified copy of the original field-notes of survey, which were compared with the field-notes made use of by the surveyor Uren and Meredith, plaintiff's witnesses upon the point in issue, and all found to correspond. The supreme court said:

"If the testimony of Uren was deficient by reason of his having been guided by an uncertified copy of the field-notes, the deficiency was supplied by defendant, who introduced a properly certified copy of the original field-notes, which corresponded with those used by Uren, and thereby removed or waived that alleged ground of nonsuit."

So in other cases.[8]

[7] 83 Cal. 219, 23 Pac. 316.

[8] Schlessinger v. Mallard, 70 Cal. 326, 11 Pac. 728; Russell v. Pacific Can Co., 116 Cal. 527, 48 Pac. 616; Scrivani v. Dondero, 128 Cal. 31, 60 Pac. 463; Williams v. Long, 139 Cal. 186, 72 Pac. 911; Elmore v. Elmore, 114 Cal. 516, 46 Pac. 458; Lowe v. San Francisco etc. Co., 154 Cal. 573, 98 Pac. 678.

The rule as to cure of defects of plaintiff's case by defendant's evidence was applied in Meyer v. White, 27 Okl. 400, 112 Pac. 1005.

It is sometimes held that when the defendant does not stand upon his motion he is not in a position to take advantage of error in the denial thereof, and that the introduction of evidence on his part amounts to a waiver of the ruling upon the nonsuit. The result of this condition is said to limit the defendant to the remedy of a review of the insufficiency of the evidence alone. In other words, having introduced his own evidence, he cannot ask the court to disregard it. This was held in Hochshultz v. Potosi Zinc Co. (Nev.), 110 Pac. 713; McCafferty v. Flinn, 32 Nev. 000, 107 Pac. 225; City of Ballard v. Lewis, 34 Wash. 413, 75 Pac. 982; Ryan v. Lambert, 49 Wash. 649, 96 Pac. 232; Reno etc. Co. v. Packard, 31 Nev. 443, 103 Pac. 415, 104 Pac. 801; Power v. Stocking, 26 Mont. 478, 68 Pac. 857. The effect of these decisions is believed to be somewhat modified, or limited, to say the least, by another line of decisions, equally authoritative, which holds that the defendant does not lose the advantage of any error that may have occurred in the ruling upon his motion for a nonsuit, in consequence of his failure to stand upon the same, unless the effect of his own evidence is to cure the defects in the proof of his adversary. See Patty v. Salem etc. Co., 53 Or. 350, 96 Pac. 1106, 98 Pac. 521, 100 Pac. 298; Bennett v. Express Co., 12 Or. 49, 6 Pac. 160; Carney v. Dunaway, 35 Or. 131,

§ 119. Exceptions to Rulings on Motions for Nonsuit.—As has been shown, an erroneous ruling on a motion for a nonsuit is an "error in law."[1] Under the language of the subdivision under consideration, therefore, it must be excepted to, unless it be one of those matters deemed to be excepted to under the provisions of the code.[2] Prior to the amendment of 1909 rulings of this description were not included in the list of those rulings deemed excepted to.[3] It was therefore necessary that the

57 Pac. 192, 58 Pac. 105; Trickey v. Clark, 50 Or. 516, 93 Pac. 457; Northern Pacific Co. v. Spencer (Or.), 108 Pac. 180; Alkire v. Myers etc. Co., 57 Wash. 300, 106 Pac. 915. But see Chamberlain v. Woodin, 2 Idaho, 642 (609), 23 Pac. 177, where waiver was sustained; and Shields v. Johnson, 12 Idaho, 329, 85 Pac. 972, where it was held to be necessary to renew the motion at close of evidence in order to save the point.

Defendant is not precluded from asking a verdict at the conclusion of all the testimony, by reason of waiver of nonsuit at the end of plaintiff's testimony. Gardner v. Porter, 45 Wash. 158, 88 Pac. 121.

As to the necessity of standing on his motion, it was held in Brown v. Lewis, 50 Or. 358, 92 Pac. 1058, that a defendant cannot demur to plaintiff's evidence unless he also rests his case. Nonsuit is the only method of attacking the sufficiency of plaintiff's evidence at the conclusion thereof.

And see Alta Investment Co. v. Worden, 25 Colo. 215, 53 Pac. 1047, and the cases there cited, where the court held that it was only when the defects of plaintiff's case were cured by defendant's evidence that the latter could be said to have waived his objection to the ruling upon nonsuit offered at the close of plaintiff's testimony.

As to curing defects in plaintiff's case by the introduction of evidence by the defendant after denying the motion for nonsuit, see Horn v. Reitler, 15 Colo. 316, 25 Pac. 501; Cattell v. Fergusson, 3 Wash. 541, 28 Pac. 750; Scoland v. Scoland, 4 Wash. 118, 29 Pac. 930; Weil v. Nevitt, 18 Colo. 10, 31 Pac. 487; Woodbury v. Hinckley, 3 Colo. App. 210, 32 Pac. 860.

[1] See section 112, *ante*.

[2] Section 647, California Code of Civil Procedure. See Flashner v. Waldron, 86 Cal. 211, 24 Pac. 1063, and Hanna v. De Garmo, 140 Cal. 172, 73 Pac. 830, decided before the amendment of 1909.

[3] See Stats. 1909, c. 355. By this amendment rulings upon nonsuit were added to those matters deemed excepted to. This provision clearly dispenses with the necessity of an exception where it is sought to take advantage of the error on appeal from the judgment. The court has not decided whether it also dispenses with the necessity of an exception where it is sought, under subdivision 7 of section 657, Code of Civil Procedure, to obtain a new trial on the ground of an error in such ruling. It is presumed that it will. The court has practically held that the amendment of 1907 (Stats. 1907, p. 715) by which rulings in giving or refusing instructions were added to the list of matters deemed excepted to in section 647, Code of Civil Procedure, dispensed with exceptions to such rulings in general, but the point as to whether exceptions were still necessary in new trial proceedings was not raised. See sections 107, *ante*, and 127, *post*. And see Randall v. Freed, 154 Cal. 299, 97 Pac. 669. See, also, Smith v. Hyer, 11 Cal. App. 597, 105 Pac. 787, where the point was raised but not decided.

Provisions similar to section 647 of the California Code of Civil Procedure are to be found in the codes of most of the other states. In none, however, except the California section, as amended in 1909, as above noted, can it be said that rulings upon nonsuit are included therein so as to except such rulings from the general rule

party who desired to take advantage of the error should save an exception.[4]

requiring exceptions to be reserved, if it is desired to have a review thereof. Provisions in similar form are section 386, Mills' Annotated Code of Colorado; section 4427, Revised Codes of Idaho; section 6784, Revised Codes of Montana (section 1151, Code of Civil Procedure); section 3288, Cutting's Compiled Laws of Nevada (section 193, Civil Practice); section 7054, Revised Codes of North Dakota; section 172, Lord's Oregon Laws; section 382, Rem. & Bal. Code of Washington (section 5051, Bal. Code); section 4598, Compiled Statutes of Wyoming.

Section 1463, Revised Statutes of Arizona (section 254, Civil Practice), contains the only exemption, i. e., rulings "giving, refusing or qualifying instructions," except "all rulings, the giving or refusal of instructions, or other action of a district court, made, announced, given, had or done, in any case pending before it, shall be deemed to be excepted to at the time," in matters relating to the amendment, correction and remission of parts of judgments. Section 1464 (section 255, Civil Practice) provides that where the ruling or other action of the court appears otherwise of record, no bill of exceptions shall be necessary.

Certain of the above provisions, as the Oregon, Oklahoma, Washington and Wyoming sections, are somewhat general in application, exempting very few rulings from the necessity of an express exception, except such as appear upon the face of the record. Section 3145, Compiled Laws of New Mexico, is so broad in its terms, with reference to exceptions to rulings and the necessity therefor, that it has been held that all rulings must be excepted to. See Laird v. Upton, 8 N. M. 409, 45 Pac. 1010; Southern California etc. Co. v. Stamm, 9 N. M. 361, 54 Pac. 345.

[4] See Randall v. Freed, 154 Cal. 299, 97 Pac. 669, as to rulings upon instructions.

The necessity for exceptions to rulings upon nonsuit in other states is, of course, unaffected by the California amendment. As stated in the preceding note, the codes of other states contain no provisions exempting such rulings from this necessity, and it is well settled that unless exceptions are implied by statute, or the error appears upon the face of the judgment-roll, errors in rulings of the trial court must be expressly excepted, otherwise they cannot be reviewed by the appellate court. In Laird v. Upton, 8 N. M. 409, 45 Pac. 1010, the court said: "It is abundantly established by authority that appellate courts, unless there are statutory provisions securing review without exceptions duly taken, will not consider errors committed in the trial of cases at law which were not excepted to in the trial court." In Territory v. Caffrey, 8 Okl. 193, 57 Pac. 204, it was said: "It may be conceded that the taking of exceptions and the preservation of the same is necessary to preserve for review errors in law occurring on the trial, and that generally the rulings of a trial court must be excepted," etc. And this decision was approved in Caffrey v. Overholser, 8 Okl. 202, 57 Pac. 206. See, also, to same effect, Hume v. Robinson, 23 Colo. 359, 47 Pac. 271; Burton v. Snyder, 21 Colo. 292, 40 Pac. 451; Barr v. Foster, 25 Colo. 28, 52 Pac. 1101; Thomas v. Glendinning, 13 Utah, 47, 44 Pac. 652; Galloway v. McLean, 2 Dak. 372, 9 N. W. 98.

In Newcomb v. White, 5 N. M. 435, 23 Pac. 671, the court said: "Only such matters of law and of fact as are brought before the court by exceptions are to considered." See, also, Brown v. Lockhart, 12 N. M. 10, 71 Pac. 1086. So in Metz v. Winne, 15 Okl. 1, 79 Pac. 223, it was said: "A failure to call the attention of the trial court to an alleged error, and except to its rulings, will be treated as a waiver."

In Goodwin v. Bickford, 20 Okl. 91, 129 Am. St. Rep. 729, 93 Pac. 548, it was held that errors in rulings of the trial court need not be expressly excepted if apparent upon the face of the judgment-roll. And this decision finds support in numerous others. See Southern California etc. Exchange v.

Exceptions to rulings upon nonsuit were required to be taken in the same manner as exceptions to the admission or rejection of evidence;[5] and, unless excepted to, it would be assumed on appeal that the ruling was properly made.[6]

§ 119a. Effect of an Order Granting a Nonsuit Under Subdivision 5, Section 581, Code of Civil Procedure.—The effect of a voluntary nonsuit was discussed above.[1] Under subdivision 1 of section 581, Code of Civil Procedure, which authorizes plaintiff to dismiss his action of his own volition, dismissal is in effect the end of the action, subject to plaintiff's right to bring another. This is not so, however, with respect to a dismissal under subdivision 2, such a dismissal operating as a common-law *retraxit*. In such case there is only an end to the existing action, but the right to bring another upon the same ground or for the same cause is forever gone. The conditions are somewhat more complex with regard to compulsory nonsuits. Under subdivision 3, dismissal results from plaintiff's failure to appear and prosecute his action, and is made upon defendant's motion. Since, in such case, there is no adjudication upon the merits, dismissal is without prejudice to his right to bring a second action, although the one dismissed is at an end.[1a] The same may be said of subdivision 4, where dismissal rests upon the abandonment of the action by the plaintiff, but is made by the court without any suggestion from the defendant.[1b]

Stamm, *supra*, and cases cited. Also Baker v. Hammett, 23 Okl. 480, 100 Pac. 1114; International etc. Co. v. Cameron, 25 Okl. 256, 105 Pac. 189; Stone v. Clogston, 25 Okl. 162, 105 Pac. 642. But if not shown upon the face of the roll, or deemed excepted to by statute, the appellate court will not consider an alleged error in a trial court ruling. Saxon v. White, 21 Okl. 194, 95 Pac. 783; Dunlap v. Flowers, 21 Okl. 600, 96 Pac. 643; Ecker v. Ecker, 22 Okl. 873, 98 Pac. 918, 20 L. R. A., N. S., 421, 98 Pac. 918; Capital etc. Co. v. Carroll, 26 Okl. 286, 109 Pac. 535; France v. Bank, 3 Wyo. 187, 18 Pac. 748; Smith v. Mock, 33 Colo. 154, 79 Pac. 1011; Marean v. Stanley, 21 Colo. 43, 39 Pac. 1086; Hinsdale etc. Co. v. Ogle, 45 Colo. 454, 101 Pac. 786; Ott v. Braun, 48 Colo. 417, 110 Pac. 73; Hewitt v. Huffman, 55 Or. 57, 105 Pac. 98.

See, also, Maben v. Scott, 12 Colo. App. 119, 54 Pac. 860; Alta etc. Co. v. Worden, 25 Colo. 215, 53 Pac. 1047.

[5] As to which see section 107, *ante*.

[6] See Kennedy v. Dusenberry, 116 Cal. 124, 47 Pac. 1008; Hanna v. De Garmo, 140 Cal. 172, 73 Pac. 830. And see McGary v. Pedrorena, 58 Cal. 91; Estate of Kasson, 141 Cal. 33, 74 Pac. 436.

[1] See section 113, *ante*.

[1a] Pyle v. Piercy, 122 Cal. 383, 55 Pac. 141.

See, also, Lewis v. Superior Court, 11 Cal. App. 483, 105 Pac. 763; Smith v. Superior Court, 2 Cal. App. 529, 84 Pac. 54; Hibernia v. Portener, 139 Cal. 90, 72 Pac. 716; Guthiel v. Gilmer, 27 Utah, 496, 76 Pac. 628.

[1b] Oakland v. Oakland Water Front Co., 118 Cal. 249, 50 Pac. 268.

Under subdivision 5, however, an order of nonsuit may or may not terminate the proceedings in the action. Thus in Poehlmann v. Kennedy [2] it was held that a nonsuit on defendant's motion did not carry with it an intervention. And in Warner v. Darrow,[3] it was held that a nonsuit on defendant's motion, which is, of course, a nonsuit under subdivision 5, "did not operate as a dismissal of the action so as to prevent the trial of the issues arising upon a cross-complaint and the answer thereto. The effect of this order was, that plaintiff was entitled to no relief against the defendant on account of matters alleged in the complaint, but the issues made by the cross-complaint and the answer thereto still remained, and the appellant was entitled to have them tried and disposed of. This was, in effect, held in Mott v. Mott, 82 Cal. 413, 22 Pac. 1140, 1142. The case of Wood v. Ramond, 42 Cal. 643, upon which the respondent relies, is not in conflict with this view. In that case there was no cross-complaint, and what was there said about an order of nonsuit being, in effect, a dismissal of the action, does not apply here."

But, aside from special conditions, such as are here outlined, there is no doubt but that a nonsuit under subdivision 5 is, in effect, a dismissal of the action. The plaintiff is not, however, precluded from bringing a fresh action upon the same subject matter, and he may do so whenever he feels that he is able to supply the deficiency of his former action.[4]

§ 119b. **Nonsuit in Criminal Actions.**—Nonsuit, as such, is not recognized as a proper proceeding in criminal actions. The court has no power to dismiss a criminal action except as such power is limited and defined in section 118 of the Penal Code, which provides: "If, at any time after the evidence on either side is closed, the court deems it insufficient to warrant a conviction, it may advise the jury to acquit the defendant. But the jury are not bound by the advice."

It thus appears that the court has no jurisdiction to dismiss a criminal action. Nor may the trial court *instruct* the jury to acquit,[1] but may *advise* such action only. In People v. Daniels,[1a] the court said:

"The motion to 'instruct' the jury was properly denied. The court was only authorized in any case to 'advise' the jury to ac-

[2] 48 Cal. 201.
[3] 91 Cal. 309, 27 Pac. 737.
[4] Merritt v. Campbell, 47 Cal. 542.
[1] People v. Horn, 70 Cal. 17, 11 Pac. 470.
[1a] 105 Cal. 262, 38 Pac. 720.

quit. (People v. Horn, 70 Cal. 17, 11 Pac. 470.) It must be borne in mind that the court has no such power to control the action of the jury in criminal as in civil cases, for in criminal cases the court cannot *direct*, but only 'advise,' an acquittal."

If, however, the court does, under an erroneous conception of its duty, "instruct" the jury to bring in a verdict of acquittal, and the jury should obey, the prosecution is without a remedy. In the case of People v. Horn, above referred to, the court, in this respect, said:

"The court was only authorized to 'advise' the jury to acquit, and the jury were not bound by the advice. (Penal Code, sec. 1118.) Here the bill of exceptions reads that the court 'instructed' the jury, but the jury retired and deliberated before rendering the verdict 'not guilty.' They were permitted to retire for deliberation, and found a verdict. *Non constat* that they did not act on the evidence. If through misdirection of the judge in matter of law a verdict is improperly rendered, it can never afterward, on application of the prosecution, in any form of proceeding, be set aside. (Bishop, cited by Sawyer, J., in People v. Webb, 38 Cal. 467.)"

§ 119c. **Miscellaneous.**—The rules governing the consideration of questions of nonsuit are the same whether the trial is by the court or by a jury.[1] It is not error to decline to ask for a nonsuit. It is a privilege, and the right of every litigant to demand a regular judgment on the merits cannot be abrogated by confining him to such privilege.[2] Appeal will not lie either from an order or from a judgment of nonsuit. The appeal is always from the judgment of dismissal of the action.[3]

[1] Goldstone v. Merchants' etc. Co., 123 Cal. 625, 56 Pac. 776; Freese v. Hibernia etc. Society, 139 Cal. 392, 73 Pac. 172.

[2] Barthe v. Rogers, 127 Cal. 52, 59 Pac. 310; San Jose etc. Co. v. San Jose etc. Co., 126 Cal. 322, 58 Pac. 824.

[3] Kimple v. Conway, 69 Cal. 71, 10 Pac. 189. An order of dismissal of an action is not a final judgment under section 7098, Revised Codes of Montana. Hovey v. Northern Pacific Co., 39 Mont. 40, 101 Pac. 146; Butte etc. Co. v. Montana etc. Co., 27 Mont. 152, 69 Pac. 714; Palmer v. Spaulding, 34 Mont. 1, 85 Pac. 369.

The supreme court of Washington, in De Graf v. Seattle etc. Co., 10 Wash. 468, 38 Pac. 1006, entertained an appeal from the order of nonsuit. The same court, in the more recent case of McPherson v. Seattle etc. Co., 53 Wash. 358, 101 Pac. 1084, for more obvious reasons, declined to accept an erroneous refusal to dismiss on plaintiff's motion, before counterclaim or affirmative defense, as an error of law which might be ground for new trial.

CHAPTER XVIII.

GROUNDS OF THE MOTION—ERROR IN LAW OCCURRING AT THE TRIAL—INSTRUCTIONS.

§ 120. Duty of judge in charging jury.
§ 120a. The judge must not submit questions of law to the jury.
§ 121. Judges must not charge juries with respect to matters of fact.
§ 122. The judge must not charge the jury with respect to principles of law which have no application to the evidence, or to the issues raised by the pleadings.
§ 123. The judge must not give contradictory instructions.
§ 124. Modifications of instructions requested.
§ 125. Repetition of instructions.
§ 126. Time for requesting instructions.
§ 127. Exceptions to erroneous instructions.
§ 128. Exceptions to the judge's charge must be specific.
§ 129. Time for taking exceptions and objections.
§ 130. Exceptions to instructions cannot be reviewed in the absence of the evidence, unless the instructions are erroneous in every conceivable state of the evidence.
§ 131. How instructions are to be construed.
§ 132. Miscellaneous matters relating to instructions.

§ 120. Duty of the Judge in Charging the Jury.—The provision of the Constitution has always been that "judges shall not charge juries with respect to matters of fact, but *may* state the testimony and declare the law." The Practice Act of 1851 provided that "in charging the jury the court *shall* state to them all matters of law *which it thinks necessary* for their information in giving their verdict."[1] This provision was not changed until the adoption of the Code of Civil Procedure. The corresponding provision of the code is the same as that of the act of 1851, except that it substitutes the word "may" for the word "shall."[2] These

[1] Laws of 1851, p. 76, sec. 165.

[2] Section 608, California Code of Civil Procedure.

Corresponding provisions of other codes are found in the following: Section 1407, Revised Statutes of Arizona (section 198, Civil Practice); section 187, Mills' Annotated Code of Colorado; section 4384, Revised Codes of Idaho; section 6746, Revised Codes of Montana; section 3262, Cutting's Compiled Laws of Nevada (section 167, Civil Practice); sections 2996 and 2998, Compiled Laws of New Mexico; sections 7021 and 7022, Revised Codes of North Dakota; section 5794, Compiled Laws of Oklahoma; section 132, Lord's Oregon Laws; section 256, Code of Civil Procedure of South Dakota; section 3147, Compiled Laws of Utah; section 339, Rem. & Bal. Code of Washington (section 4993, Bal. Code); section 4499, Compiled Statutes of Wyoming.

provisions do not make it the duty of the judge to charge the jury in all cases, but only when he thinks it "necessary for their information." Accordingly it has been held that the mere failure of the judge to instruct the jury upon any point is not error, in the absence of a formal request from the party.[3] With respect to the presumption of innocence, for example, the court ought, in every criminal case, of its own motion, to instruct the jury as to the well-established principles of law upon the point; but it has been held not to be ground for reversal, even in a capital case, to omit such an instruction unless it be asked for.[3a] The failure of the court to charge upon any material point, as well as the failure of the parties to ask for such a charge, usually proceeds from inadvertence; but the law casts upon the parties the duty of calling the attention of the court to the matter by a formal request for the instruction desired, and their neglect or failure to make such formal request cannot be assigned as an error of the court, or utilized as ground for reversal or new trial.

If the request is made, however, and the instruction asked for be a proper one, the failure or refusal of the court to give it is ground both for reversal and for new trial.[4]

A party, particularly a defendant in a criminal action, has a right to have the jury instructed so explicitly as to leave no reasonable doubt or ambiguity concerning the law applicable to the facts, and may ask for further instructions upon any definite point, even though general instructions covering the specific point have already been given;[4a] and the failure of the court to give

[3] Williams v. Hartford Ins. Co., 54 Cal. 442, 35 Am. Rep. 77; Chamberlin v. Vance, 51 Cal. 75; San Luis Obispo County v. White, 91 Cal. 432, 24 Pac. 864, 27 Pac. 756; Liebrandt v. Sorg, 133 Cal. 571, 65 Pac. 1098.

As to criminal cases, see People v. Haun, 44 Cal. 96; People v. Rodundo, 44 Cal. 538; People v. Ah Wee, 48 Cal. 236; People v. Collins, 48 Cal. 277; People v. Gray, 66 Cal. 271, 5 Pac. 240; People v. Flynn, 73 Cal. 511, 15 Pac. 102; People v. Northey, 77 Cal. 618, 19 Pac. 865, 20 Pac. 129; People v. McLean, 84 Cal. 480, 24 Pac. 32; People v. Christensen, 85 Cal. 568, 24 Pac. 888; People v. Balkwell, 143 Cal. 259, 76 Pac. 1017; People v. Weber, 149 Cal. 325, 86 Pac. 671. See, also, People v. Marks, 72 Cal. 46, 13 Pac. 149; People v. Fice, 97 Cal. 459, 32 Pac. 531.

[3a] See People v. Matthai, 135 Cal. 442, 67 Pac. 694. And see, as to discretion in matter of extreme penalty in murder, People v. Olsen, 80 Cal. 122, 22 Pac. 125.

[4] Section 609, California Code of Civil Procedure.

The provisions of other codes vary considerably from that of California, but rulings upon instructions are errors of law in every instance, and as such, are ground for new trial, as well as for reversal on appeal from the judgment. See note 2, *supra*, for corresponding sections of other codes.

[4a] See Rice v. Whitmore, 74 Cal. 619, 5 Am. St. Rep. 479, 16 Pac. 501.

As to criminal cases, see People v. Guidice, 73 Cal. 226, 15 Pac. 44;

such instructions is ground for reversal or new trial equally as though no instructions at all had been given; on the other hand, failure to give such explicit or specific instructions can no more be assigned as error and ground for reversal or new trial, unless they be asked for, than could the failure to instruct generally be taken advantage of for a like purpose in the absence of a general request.[4b]

People v. Olsen, 80 Cal. 122, 22 Pac. 125; People v. Appleton, 120 Cal. 250, 52 Pac. 582; People v. Oliveria, 127 Cal. 376, 59 Pac. 772; People v. Wilson, 135 Cal. 331, 67 Pac. 322; People v. Bailey, 142 Cal. 434, 76 Pac. 49; and see People v. Franklin, 70 Cal. 641, 11 Pac. 797.

[4b] See People v. Franklin, 70 Cal. 641, 11 Pac. 797; People v. Marks, 72 Cal. 46, 13 Pac. 149; People v. Guidice, 73 Cal. 226, 15 Pac. 44; People v. Olsen, 80 Cal. 122, 22 Pac. 125; People v. Dollor, 89 Cal. 513, 26 Pac. 1086; People v. McNutt, 93 Cal. 658, 29 Pac. 243; People v. Bruggy, 93 Cal. 476, 29 Pac. 26; People v. Scott, 93 Cal. 516, 29 Pac. 123; People v. Barney, 114 Cal. 554, 47 Pac. 41; People v. Arnold, 116 Cal. 682, 48 Pac. 803; People v. Appleton, 120 Cal. 250, 52 Pac. 582; People v. Oliveria, 127 Cal. 376, 59 Pac. 772; People v. Wilson, 135 Cal. 331, 67 Pac. 322; People v. Bailey, 142 Cal. 434, 76 Pac. 49; People v. Clark, 145 Cal. 727, 79 Pac. 434; People v. Modina, 146 Cal. 142, 79 Pac. 842; People v. Weber, 149 Cal. 325, 86 Pac. 671; and the following civil case: Rice v. Whitmore, 74 Cal. 619, 5 Am. St. Rep. 479, 16 Pac. 501.

The necessity for requests for instructions was enunciated in the following cases:

Arizona: Phoenix etc. Co. v. Landis (Ariz.), 112 Pac. 844.

California: Goodwin v. McCabe, 75 Cal. 584, 17 Pac. 705; Scott v. Wood, 81 Cal. 398, 22 Pac. 871; Henderson v. Traction Co., 150 Cal. 689, 89 Pac. 976; Donati v. Righetti, 9 Cal. App. 45, 97 Pac. 1128; Gomez v. Scanlan, 155 Cal. 528, 102 Pac. 12; Wyatt v. Pacific Electric Co., 156 Cal. 170, 103 Pac. 892; Morgan v. L. A. P. Co., 13 Cal. App. 12, 108 Pac. 735.

Colorado: Mackey v. Briggs, 16 Colo. 143, 26 Pac. 131; Leitensdorfer v. King, 7 Colo. 436, 4 Pac. 37; Venine v. Archibald, 3 Colo. 163; Denver etc. Co. v. Lassasso, 22 Colo. 444, 45 Pac. 409; Denver etc. Co. v. Crumbaugh, 23 Colo. 363, 48 Pac. 503; Willard v. Williams, 10 Colo. App. 140, 50 Pac. 207; Ruby etc. Co. v. Prentice, 25 Colo. 4, 52 Pac. 210; Baily v. Carnduff, 14 Colo. App. 169, 59 Pac. 407; Little Dorrit Co. v. Arapahoe Co., 30 Colo. 431, 71 Pac. 389; Newton v. Cardwell etc. Co., 41 Colo. 492, 92 Pac. 914; Hain v. Mattes, 34 Colo. 345, 83 Pac. 127; Colorado etc. Co. v. Webb, 36 Colo. 224, 85 Pac. 683; Whitehead v. Emmerich Co., 38 Colo. 13, 87 Pac. 790; Union etc. Co. v. Shovell, 39 Colo. 436, 89 Pac. 764; Burnside v. Peterson, 43 Colo. 382, 96 Pac. 256, 17 L. R. A., N. S., 76; National etc. Co. v. Duncan, 44 Colo. 472, 98 Pac. 634, 20 L. R. A., N. S., 340; Heron v. Weston, 44 Colo. 379, 100 Pac. 1130; Sandberg v. Borstadt, 48 Colo. 96, 109 Pac. 419; Donley v. Bailey, 48 Colo. 373, 110 Pac. 65; Downing v. Tipton, 48 Colo. 364, 110 Pac. 70; Melcher v. Beeler, 48 Colo. 233, 110 Pac. 181; Idaho etc. Co. v. Colorado etc. Co. (Colo.), 111 Pac. 553.

Montana: Kelley v. Cable Co., 7 Mont. 70, 14 Pac. 633; Helena etc. Co. v. Lynch, 25 Mont. 497, 65 Pac. 919; Gillies v. Clarke etc. Co., 32 Mont. 320, 80 Pac. 370; Bourke v. Butte Electric Co., 33 Mont. 267, 83 Pac. 470; Hardesty v. Largey etc. Co., 34 Mont. 151, 86 Pac. 29; Nelson v. Boston etc. Co., 35 Mont. 223, 88 Pac. 785; O'Flynn v. Butte, 36 Mont. 493, 93 Pac. 643.

New Mexico: Palatine etc. Co. v. Santa Fe etc. Co., 13 N. M. 241, 83

This point often arises in criminal actions where the statute sets out more than one degree of the crime charged. In cases of this character, it may so happen that the facts as proven justify specific instructions as to the several degrees; in which event it is the duty of the defendant to ask for such specific instructions, and if he fail to do so, it is not error if the court fails to give them.[4c] The question may also arise in other cases, as where explicit instructions are asked on the subject of self-defense,[4d] larceny from the person,[4e] what is to be deemed a deadly weapon,[4f] voluntary intoxication in criminal cases,[4g] and *alibi*.[4h]

In charging the jury the judge must not submit to them any question of law,[5] nor charge them with respect to matters of fact,[6] nor with respect to principles of law not applicable to the

Pac. 363; King v. Tabor, 15 N. M. 488, 110 Pac. 601.

North Dakota: State v. Haynes, 7 N. D. 352, 75 N. W. 267.

Oklahoma: Chicago etc. Co. v. Fix, 15 Okl. 37, 78 Pac. 316; Chicago etc. Co. v. Connally, 15 Okl. 45, 78 Pac. 318.

Oregon: Schoellhamer v. Rometsch, 26 Or. 394, 38 Pac. 344; Baker Co. v. Huntington, 48 Or. 593, 87 Pac. 1036, 89 Pac. 144; Triceky v. Clark, 50 Or. 516, 93 Pac. 457; Carroll v. Grande etc. Co., 52 Or. 370, 97 Pac. 552; Mahon v. Rankin, 54 Or. 328, 102 Pac. 608, 103 Pac. 53.

Utah: Stevens v. Stephens, 14 Utah, 255, 47 Pac. 76; Smalley v. Rio Grande etc. Co., 34 Utah, 423, 98 Pac. 311.

Washington: Cogswell v. West etc. Co., 5 Wash. 46, 31 Pac. 411; Box v. Kelso, 5 Wash. 360, 31 Pac. 973; McQuillan v. Seattle, 13 Wash. 600, 43 Pac. 893; Lownsdale v. Gray's Harbor etc. Co., 21 Wash. 542, 58 Pac. 663; Schwaninger v. McNeeley & Co., 44 Wash. 447, 87 Pac. 514; Scherrer v. Seattle, 52 Wash. 4, 100 Pac. 144.

Wyoming: Bunce v. McMahon, 6 Wyo. 24, 42 Pac. 23.

The court is not bound to give instructions not prepared and presented according to law: Schollay v. Moffitt-West Co., 17 Colo. App. 126, 67 Pac. 182.

Giving instructions that are incomplete and ambiguous is not reversible error, in the absence of a request that they be made more full and complete. Box v. Kelso, *supra*, and see Crowley v. Strouse (Cal.), 33 Pac. 456.

But the court when requested must give complete instructions. See Union Pacific Co. v. Jarvi, 3 Wyo. 375, 23 Pac. 398; and see section 124, *post*, as to modification of instructions.

If a party desires an instruction upon a given point, it is his duty to prepare such an instruction and ask the court to give it. State v. Smith, 10 Nev. 106.

[4c] People v. Franklin, 70 Cal. 641, 11 Pac. 797; People v. Guidice, 73 Cal. 226, 15 Pac. 44; People v. Scott, 93 Cal. 516, 29 Pac. 123; People v. McNutt, 93 Cal. 658, 29 Pac. 243; People v. Barney, 114 Cal. 554, 47 Pac. 41; People v. Wilson, 135 Cal. 331, 67 Pac. 322; People v. Bailey, 142 Cal. 434, 76 Pac. 49; People v. Clark, 145 Cal. 727, 79 Pac. 434; People v. Modina, 146 Cal. 142, 79 Pac. 842.

[4d] See People v. Bruggy, 93 Cal. 476, 29 Pac. 26; and see as to "apparent necessity," People v. Dollor, 89 Cal. 513, 26 Pac. 1086.

[4e] See People v. Appleton, 120 Cal. 250, 52 Pac. 582.

[4f] See People v. Arnold, 116 Cal. 682, 48 Pac. 803.

[4g] See People v. Oliveria, 127 Cal. 376, 59 Pac. 772.

[4h] See People v. Weber, 149 Cal. 325, 86 Pac. 671.

[5] See section 120a, *post*.

[6] See section 121, *post*.

evidence,[7] nor must he give them contradictory instructions;[8] but he is not bound to give instructions in the language of counsel,[9] nor to repeat his instructions,[10] nor to tell the jury the reasons upon which any rule of law rests. This last proposition was laid down in People v. Ramirez,[11] in which case McKee, J., delivering the opinion of the supreme court, said: " While it is true that principles of law should be stated to a jury in clear and explicit terms, yet where they are so stated it is not necessary, nor is a court bound, to give the grounds and first original causes from whence they have sprung. It is sufficient that the court correctly gives to the jury the law applicable to the facts of the case. 'A judge,' says the supreme court of Pennsylvania, 'is bound to instruct the jury on the law itself, and not on its history, object, or purpose. He does his duty by saying what the law is, without an exposition of its reasons.' (Lincoln v. Wright, 23 Pa. 76 [62 Am. Dec. 376].)"

§ 120a. The Judge must not Submit Questions of Law to the Jury.—Although mere neglect to charge upon any point is not error,[1] it is error to submit questions of law to be decided by the jury. A marked instance of such an error is to be found in Kelly v. Cunningham.[2] In that case the judge, after charging as to several matters, told the jury "to take into consideration all of the case and do equal justice between the parties." The supreme court held this to be improper, and said: "This, it is believed, is submitting too much to the jury. They are to pass upon the facts; the judge upon the law. The jury are to make up their verdict from the facts according to the law as given by the court, and then 'equal justice between the parties' will generally be the result; but if the jury are to find according to their views of equal justice, it is to be apprehended that in many cases prejudice and feeling may make that appear to be equal justice in one case which would be iniquitous in another. This instruction tends to mislead and confuse."

It is obviously impossible to enumerate all the questions which must be passed upon by the court. Suffice it to say that the court must decide questions of law, and the jury questions of fact. The

[7] See section 122, *post*.
[8] See section 123, *post*.
[9] See section 124, *post*.
[10] See section 125, *post*.
[11] 56 Cal. 533, 38 Am. Rep. 73.
[1] See preceding section.
[2] 1 Cal. 365; and see Funk v. Sterret, 59 Cal. 613.

following decisions will illustrate the general principle: In Fairbank v. Woodhouse,[3] it was held that mining laws introduced in evidence must be construed by the court, and that it was error to leave the jury to say whether under the said laws certain acts amounted to a forfeiture. So it is error to submit to the jury a question as to the construction of a contract or other instrument.[4] So it is error to submit to the jury a question as to whether a demand is barred by the statute of limitations, the facts being ascertained.[5] So in an action for malicious prosecution, the question as to whether there was probable cause is a question of law, and it is error to leave it to the jury.[6] So in an action in insolvency, an instruction which left it to the jury to determine whether the insolvent had complied with the requirements of the Insolvent Act as to his petition, schedule and affidavit, these being in evidence and before the court, was held to be improper, the question as to whether they were defective being a question of law for the court, which ought not to have been submitted to the jury.[7]

But, as will be hereafter shown, all questions of fact are for the jury, and therefore where the facts are disputed the judge must charge the jury hypothetically—that is, that if they believe a given

[3] 6 Cal. 433, 12 Morr. Min. Rep. 86.

[4] Luckhart v. Ogden, 30 Cal. 547, 2 Morr. Min. Rep. 601; McGarvey v. Little, 15 Cal. 27; Ellis v. Crawford, 39 Cal. 523; Whitman v. Steiger, 46 Cal. 256; Moody v. Palmer, 50 Cal. 31; Carpentier v. Thurston, 24 Cal. 268; Scoles v. Universal Life Ins. Co., 42 Cal. 523; and see Levy v. Gadsby, 3 Cranch (U. S.), 180, 2 L. ed. 404; Sweeny v. Easter, 1 Wall. (U. S.) 166, 17 L. ed. 681; Ward v. United States, 14 Wall. (U. S.) 20, 20 L. ed. 792. But where the effect of the instrument depends upon collateral facts *in pais* and extrinsic circumstances, the inferences of fact are to be left to the jury. Etting v. Bank of United States, 11 Wheat. (U. S.) 59, 6 L. ed. 419; Brown v. McGran, 14 Pet. (U. S.) 479, 10 L. ed. 550. When the contract is *silent* as to the time of performance, the question as to what is a reasonable time is sometimes for the jury. Luckhart v. Ogden, 30 Cal. 547, 2 Morr. Min. Rep. 601. As to the construction of a libel, see Van Vactor v. Walkup, 46 Cal. 124.

[5] Reed v. Swift, 45 Cal. 255.

[6] Potter v. Seale, 8 Cal. 217; Grant v. Moore, 29 Cal. 644; Harkrader v. Moore, 44 Cal. 144; Emerson v. Skaggs, 52 Cal. 246. But a most important element in the question as to the probable cause is the *belief* of the party who instituted the prosecution (Harkrader v. Moore, 44 Cal. 144; 2 Greenleaf on Evidence, sec. 455); and this is always for the party. See Stewart v. Sonneborn, 98 U. S. 194, 25 L. ed. 116.

[7] Dean v. Grimes, 72 Cal. 442, 14 Pac. 178.

It is error to submit to a jury the construction of a town ordinance. Denver etc. Co. v. Olsen, 4 Colo. 239; and as to the general rule prohibiting the submission of questions of law to the jury, see Jordan v. Duke, 4 Ariz. 278, 36 Pac. 896; Tompkins v. Montgomery, 123 Cal. 219, 55 Pac. 997; Gallick v. Bordeaux, 31 Mont. 328, 78 Pac. 583.

state of facts certain legal principles apply.[8] The judge must be careful not to assume the truth of any controverted fact. Thus in Emerson v. Skaggs,[9] which was an action for malicious prosecution, it was held to be error for the judge to instruct the jury that there was no probable cause, the facts upon which the instructions depended being controverted. And, on the other hand, it must be careful not to submit to them any question of law. Thus in Grant v. Moore,[10] which also was an action for malicious prosecution, it was held that to give a general definition of probable cause and submit to the jury whether the evidence showed probable cause within the definition was to leave a question of law to be decided by the jury, and that the proper course was for the judge to state what facts in the particular case would constitute probable cause, and to leave to the jury to say whether the evidence showed that state of facts.[11]

[8] In such case, if the jury render a general verdict, they have the power, though not the right, to decide, or rather to disregard the law; for if there be a conflict in the evidence, it is impossible to know (in a legal sense) whether the verdict was arrived at by a disregard of the instructions or a mistaken view of the evidence. If there be no conflict in the evidence, it can be reasonably inferred in some cases that the instructions were disregarded; and in such cases relief can be had on the ground that the verdict is "against law." See section 99, *ante*.

[9] 52 Cal. 246. See section 121, *post*.

[10] 29 Cal. 644.

[11] When a chancellor calls a jury to assist him in determining a question of fact, it is not necessary to instruct them. Dominguez v. Dominguez, 7 Cal. 424. And if he should instruct them erroneously, it would not be ground for reversal. Sweetser v. Dobbins, 65 Cal. 529, 4 Pac. 540; Schneider v. Brown, 85 Cal. 205, 24 Pac. 715; Hewlett v. Pilcher, 85 Cal. 545; Riley v. Martinelli, 97 Cal. 575, 33 Am. St. Rep. 209, 32 Pac. 579, 21 L. R. A. 33; Richardson v. Eureka, 110 Cal. 441, 42 Pac. 965; Scheerer v. Goodwin, 125 Cal. 154, 57 Pac. 789; Fisher v. Zumwalt, 128 Cal. 493, 61 Pac. 82; California etc. Co. v. Safe etc. Co., 145 Cal. 124, 78 Pac. 372; and see Saint v. Guerrerio, 17 Colo. 448, 31 Am. St. Rep. 320, 30 Pac. 335. See section 234, *post*.

Instructions are only proper where there is a jury. It seems there was at least one lawyer, though, who thought otherwise, as the following extract from the case of Touchard v. Crow, 20 Cal. 150, 81 Am. Dec. 108, will show; Field, C. J., delivering the opinion, said: "This action was tried by the court without the intervention of a jury. Of course in such cases the court not only performs its peculiar and appropriate duty of deciding the law, but also discharges the functions of a jury and passes upon the facts. The counsel of the appellants impressed, as it would seem, with this dual character, requested the court to charge itself as a jury, and handed in certain instructions for that purpose. The court thereupon formally charged that part of itself which was thus supposed to be separated and converted into a jury, commencing the charge with the usual address, 'gentlemen of the jury,' and instructing that imaginary body that if they found certain facts they should find for the plaintiff, and otherwise for the defendants, and that they were not concluded by the statements of the court, but were at liberty to judge of the facts for themselves. The record does not inform us whether the jury thus addressed differed in their conclusions from those of the court. These proceedings have about them so ludi-

§ 121. Judges must not Charge Juries with Respect to Matters of Fact.—Section 17 of article 6 of the Constitution of 1849 was as follows: "Judges shall not charge juries with respect to matters of fact, but may state the testimony and declare the law." The whole of article 6 was reproduced in 1862,[1] at the time of

crous an air that we could not believe they were seriously taken, but for the gravity with which counsel on the argument referred to them. If counsel, when a case is tried by the court without a jury, desire to present for consideration certain points of law as applicable to the facts established, or sought to be established, upon which the court might be called to charge a jury, where there is a jury in the case, the proper course is to present them in the form of propositions, preceding them with a statement that counsel makes the following points, or counsel contends as follows. The mode adopted in the present case, though highly original, is not of sufficient merit to be exalted into a precedent to be followed."

By the suggestion in the latter part of the above quotation, Judge Field probably meant nothing more than that counsel should make an argument upon such propositions as he desired to impress upon the mind of the court. He could not have meant that counsel should request the court to decide certain points of law, and except to his refusal, and bring up the exception to be reviewed, for such a course would not be different from that which was characterized as ludicrous in the above extract. But in Griswold v. Sharpe, 2 Cal. 17, Heydenfeldt, J., delivering the opinion, said: "In all cases where the judge below tries the facts of a case, the proper mode of reserving the questions of law arising upon the facts is to ask the court to decide the law as counsel may desire; and upon a refusal to have it noted in the bill of exceptions." No such practice has ever been followed. It is plain that if the judgment be right upon the facts found, it would not matter that the judge gave a wrong reason for it. See section 284, *post;* but look at Estate of Page, 57 Cal. 238, quoted in note 19 to section 256, *post.*

[1] See Laws of 1850, p. 31. In Desty's annotated compilation of the Constitution the section is marked "1862." If this means that the section was first adopted in 1862, it is an error. Probably the learned compiler was misled by the fact that article 6 was remodeled and reproduced in 1862, as a whole, and consequently section 17 appeared in the amendments of that year. See Laws of 1861, p. 661 et seq.

The same provision is to be found in article 6, section 12, Constitution of Nevada, and in article 4, section 16 of the Constitution of Washington, and in the codes of several other states, but is not made a constitutional provision in any others.

The following decisions illustrate the rule thus fixed by the constitutional provision that an invasion of the province of the jury by the giving of instructions which take from it the determination of issues of fact is ground for a reversal of the judgment, and, as an error of law, also constitutes ground for a new trial: Remy v. Olds (Cal.), 34 Pac. 216; Low v. Warden, 77 Cal. 94, 19 Pac. 235; Bunting v. Saltz, 84 Cal. 168, 24 Pac. 167; Vann v. McCreary, 77 Cal. 434, 19 Pac. 826; Munro v. Dredging Co., 84 Cal. 515, 18 Am. St. Rep. 248, 24 Pac. 303; Cousins v. Partridge, 79 Cal. 224, 21 Pac. 745; Haun v. Rio Grande etc. Co., 22 Utah, 346, 62 Pac. 908; Benson v. Tacoma etc. Co., 51 Wash. 216, 130 Am. St. Rep. 1096, 98 Pac. 605; Idaho Imp. Co. v. Lambach, 16 Idaho, 497, 101 Pac. 951; Cleary v. General Const. Co., 53 Wash. 254, 101 Pac. 888; Ryan v. Oakland etc. Co., 10 Cal. App. 484, 102 Pac. 558; Russell v. Oregon etc. Co., 54 Or. 128, 102 Pac. 619; Linforth v. San Francisco etc. Co., 156 Cal. 58, 103 Pac. 320; Schuyler v. Southern Pacific Co. (Utah), 109 Pac. 458; Kent Mfg. Co. v. Zimmerman, 48 Colo. 388, 110 Pac. 187.

the revision of 1862, but neither then nor at any other time was section 17 at all changed; and section 19 of article 6 of the Constitution of 1879 is in the same language. This provision applies alike to civil and criminal cases, and has always been strictly enforced.[3] Its effect is not only to prohibit the judge from instructing the jury directly to find a certain verdict,[3] or to find a fact a certain way,[4] and from giving an instruction which ignores a material fact or defense,[4a] but also to prohibit him from assuming the truth of matters upon which the jury are to pass, and from charging as to what presumptions of fact are to be made, and from intimating an opinion as to the credibility of a witness, or as to which way the jury ought to find. These consequences of the constitutional prohibition, although more or less connected, are not entirely the same, and will be considered separately.

1. *The Judge must not Assume the Truth of Any Matter upon Which the Jury is to Pass.*—The following cases will illustrate this proposition. In Preston v. Keys,[5] the party requested the following instruction: "If the jury believe that Kehoe was prevented from complying with the statute in relation to maintaining possessory actions on public lands by the action of Preston in pulling down his house and hauling off the materials, and interfering with him, then the jury will find for the defendants in the same man-

[3] See People v. Welch, 49 Cal. 174. The policy of the provision has been questioned. In People v. Taylor, 36 Cal. 255, Sanderson, J., delivering the opinion of the majority of the court, said: "At common law the judges are not thus fettered but are allowed to charge in respect to facts and express their opinion as to the weight of the evidence. People v. King, 27 Cal. 507, 87 Am. Dec. 95. They may, therefore, direct the attention of the jury to the facts and circumstances which they deem of controlling weight, and warn them against false lights. Which is the wiser rule it is not for us to say; but it admits of serious doubt whether the cause of justice has been promoted by the adoption of the rule by which the courts of this state are governed. There could have been no objection for the change except to afford to life and liberty further protection against judicial dishonesty and tyranny. Such a movement would have found fitting occasion when Henry VIII divorced his wives and kindled the fires of the *auto de fe*, or when Jeffreys advised and judicially enforced the despotic and sanguinary measures of James II. But in this day and place the ermine is not the gift of tyrants, but of the people, whose will is subserved by an honest —not corrupt—exercise of its functions; and to deprive the jury of the aid and experience of the judge in sifting and weighing the testimony may be of doubtful wisdom."

[3] See Battersby v. Abbott, 9 Cal. 565; Scott v. Harbor, 18 Cal. 704; Parks v. Barney, 55 Cal. 239.

[4] See People v. Carabin, 14 Cal. 438; Miller v. Stewart, 24 Cal. 502; Harris v. Burns, 50 Cal. 140; People v. Ah Oon, 56 Cal. 188.

[4a] Newcomb v. Tisdale, 62 Cal. 575, 8 Pac. C. L. J. 170; Smith v. Arnold, 56 Cal. 640; Black v. Sprague, 54 Cal. 266; Perkins v. Eckert, 55 Cal. 400.

[5] 23 Cal. 193.

ner as though the statute had been complied with." The supreme court held that it was properly refused, and said: "This instruction is objectionable because it assumes as a fact that Preston had pulled down Kehoe's house and hauled off the materials. This was one of the facts respecting which evidence was given, and it was the province of the jury to determine from the evidence whether such were the facts or not; and it would have been improper for the court to give an instruction virtually assuming that such facts had been proved." So in Cahoon v. Marshall,[6] the question was whether a transfer of certain personal property by one Miller to the plaintiff was in fraud of the rights of the other creditors of Miller; the facts were that the personal property was, at the time of the transfer, upon a ranch, and that Miller had transferred both the ranch and the personal property to the plaintiff. In its charge, with reference to plaintiff, the court said: "Being in possession of the ranch he was also in possession of the personal property." The supreme court held that this assumed that plaintiff was in possession of the ranch, which was an important element in the question, and reversed the judgment. So in Brumagim v. Bradshaw,[7] it was held that no absolute rule can be laid down as to what acts of dominion are sufficient to establish a *possessio pedis*, the question varying with the particular locality, and that therefore it was error to instruct the jury that certain acts were sufficient, as that assumed that the locality was of a particular character. So in Wood v. Tomlinson,[8] the action was to recover the value of one hundred and ninety-eight hogs, alleged to have been sold and delivered. The answer admitted the delivery of one hundred and twenty-eight hogs, but denied that any greater number had been delivered. The court gave the following instruction: "If from the evidence you find that defendant agreed to receive the hogs at plaintiff's ranch, then you will find for plaintiff for the amount the hogs would bring at four cents a pound, less the three hundred dollars advanced by defendant therein." The supreme court held that the instruction assumed that all the hogs had been delivered, and reversed the judgment. So in Dean v. Ross,[9] where part ownership in a certain vessel was a material fact, and was contested, evidence being introduced tending to show

[6] 25 Cal. 197.
[7] 39 Cal. 24. Compare Castro v. Gill, 5 Cal. 40. See Goodwin v. McCabe, 75 Cal. 584, 17 Pac. 705.
[8] 53 Cal. 720.
[9] 105 Cal. 227, 38 Pac. 912.

want of ownership in the party who claimed it, the supreme court held that an instruction assuming the ownership as claimed was obnoxious to the rule here enunciated, and was prejudicial error warranting a new trial. So in People v. Webster,[9a] where, on a trial for rape, the guilt or innocence of the defendant rested upon the age of the prosecuting witness, the evidence as to consent having been conflicting, it was held prejudicial error to instruct the jury, assuming, in effect, that the age of the prosecutrix was under fourteen years, there being no other evidence of that fact than the girl's own testimony, the supreme court saying: "The girl's age, as we have suggested, was a prominent fact in the case, and essentially one for the jury to pass upon."

So in other cases.[9b]

[9a] 111 Cal. 381, 43 Pac. 1114.

[9b] People v. Ybarra, 17 Cal. 166; People v. Levison, 16 Cal. 98, 76 Am. Dec. 505; People v. Carabin, 14 Cal. 438; People v. Ah Fung, 16 Cal. 137; Perry v. S. P. R. R. Co., 50 Cal. 578; City of San Francisco v. Clark, 1 Cal. 452; Caldwell v. Center, 30 Cal. 539, 89 Am. Dec. 131; People v. Messersmith, 61 Cal. 246; People v. Kraker, 72 Cal. 459, 14 Pac. 196; People v. Lee Chuck, 74 Cal. 30, 15 Pac. 322; Llewellyn etc. Co. v. Malter, 76 Cal. 242, 18 Pac. 271; Vulicevich v. Skinner, 77 Cal. 239, 19 Pac. 424; Childers v. Mercury P. & P. Co., 105 Cal. 284, 45 Am. St. Rep. 40, 38 Pac. 903; Shade v. Sisson etc. Co., 115 Cal. 357, 47 Pac. 135; Phelan v. Anderson, 118 Cal. 504, 50 Pac. 685; People v. Roberts, 122 Cal. 377, 55 Pac. 137; People v. Putnam, 129 Cal. 258, 61 Pac. 961; People v. Allen, 144 Cal. 298, 77 Pac. 948; People v. Craig, 152 Cal. 42, 91 Pac. 997.

And see paragraph 4, below, and cases there cited; also section 122, *post*, as to hypothetical instructions.

The converse of the proposition is, of course, true, and it is error to instruct a jury that they are called upon to decide a fact admitted by the pleadings. Taylor v. Middleton, 67 Cal. 656, 8 Pac. 594, 15 Morr. Min. Rep. 284; and see Sukeforth v. Lord, 87 Cal. 399, 25 Pac. 497, where it seems not to have been regarded as reversible error.

The following cases illustrate the general rule forbidding the assumption of facts which are in controversy, and hence within the exclusive province of the jury:

California: Carraher v. San Francisco etc. Co., 81 Cal. 98, 22 Pac. 480; Elledge v. National etc. Co., 100 Cal. 282, 38 Am. St. Rep. 290, 34 Pac. 720, 34 Pac. 852; Anderson v. Seropian, 147 Cal. 201, 81 Pac. 521; Lyon v. United Moderns, 148 Cal. 470, 113 Am. St. Rep. 291, 83 Pac. 804, 4 L. R. A., N. S., 247, 7 Ann. Cas. 672; Johnson v. Beadle, 6 Cal. App. 251, 91 Pac. 1011; Matteson v. Southern Pacific Co., 6 Cal. App. 318, 92 Pac. 101; Still v. S. F. etc. Co., 154 Cal. 559, 129 Am. St. Rep. 177, 98 Pac. 672, 20 L. R. A., N. S., 322.

Colorado: Brooklyn etc. Co. v. Peterson, 11 Colo. 80, 16 Pac. 563; Patrick etc. Co. v. Skoman, 1 Colo. App. 323, 29 Pac. 21; Downing v. Brown, 3 Colo. 571; Jackson v. Burnham, 20 Colo. 532, 39 Pac. 577; Bradbury v. Alden, 13 Colo. App. 208, 57 Pac. 490; De St. Aubin v. Field, 27 Colo. 414, 62 Pac. 199; Denver etc. Co. v. Spencer, 25 Colo. 9, 52 Pac. 211; Wolfer v. Redding etc. Co., 48 Colo. 58, 108 Pac. 980; Pouppirt v. Greenwood, 48 Colo. 405, 110 Pac. 195.

Montana: Fitzgerald v. Clark, 17 Mont. 100, 52 Am. St. Rep. 665, 42 Pac. 273, 30 L. R. A. 803; Lawrence v. Westlake, 28 Mont. 503, 73 Pac. 119; Gallick v. Bordeaux, 31 Mont. 328, 78 Pac. 583; Lindsley v. McGrath, 34 Mont. 564, 87 Pac. 961;

If, however, the fact is admitted, or there is no shadow of conflict of evidence with respect to it, an instruction assuming its existence does not warrant a reversal.[9c] For where a fact is admitted, or there is no shadow of conflict in the evidence with regard to it, the court is justified in taking it from the jury. It then becomes a question of law, and is no longer one of fact.[9d] The assumption of an undisputed fact can never be prejudicial.[9e]

So the court may assume a hypothetical case by way of illustration,[9f] and may apply the law to a hypothetical case, and ask the jury if such case is true upon the evidence adduced.[9g]

An appellant cannot complain of an erroneous instruction assuming a fact in his favor.[9h]

2. *The Judge must not Charge as to Presumptions of Fact.*— The truth of this proposition will be manifest from the following decisions. In People v. Walden[10] the defendant was indicted for altering ballots. It was shown at the trial that a key was found in his possession which fitted the lock of the room in which the ballots were kept, and that he had been seen in an adjoining room. In reference to this the judge charged as follows: "The possession

Stephens v. Elliott, 36 Mont. 92, 92 Pac. 45.

Nevada: Tognini v. Kyle, 17 Nev. 209, 45 Am. Rep. 442, 30 Pac. 829.

New Mexico: Pryor v. Portsmouth Cattle Co., 6 N. M. 44, 27 Pac. 327.

Oklahoma: Archer v. United States, 9 Okl. 569, 60 Pac. 268; Goodwin v. Greenwood, 16 Okl. 489, 85 Pac. 1115; Chicago etc. Co. v. Stibbs, 17 Okl. 97, 87 Pac. 293.

Oregon: Neppach v. Jordan, 15 Or. 308, 14 Pac. 353; Salomon v. Cress, 22 Or. 177, 29 Pac. 439; Owens v. Snell, 29 Or. 483, 44 Pac. 827; Baker Co. v. Huntington, 48 Or. 593, 87 Pac. 1036, 89 Pac. 144.

Washington: Bell v. Washington etc. Co., 8 Wash. 27, 35 Pac. 405; Bardwell v. Ziegler, 3 Wash. 34, 28 Pac. 360; Hall v. West etc. Co., 39 Wash. 447, 81 Pac. 915, 4 Ann. Cas. 587; Johnson v. Northport etc. Co., 50 Wash. 567, 97 Pac. 746.

[9c] People v. Phillips, 70 Cal. 61, 11 Pac. 493, and see People v. Messersmith, 61 Cal. 246; People v. Lee Sare Bo, 72 Cal. 623, 14 Pac. 610; Dean v. Ross, 105 Cal. 227, 38 Pac. 912; People v. Putnam, 129 Cal. 258, 61 Pac. 961; People v. Allen, 144 Cal. 298, 77 Pac. 948.

[9d] See section 117, *ante*, as to cases when the court may take an issue from the jury.

[9e] See Hill v. Finigan, 77 Cal. 267, 11 Am. St. Rep. 279, 19 Pac. 494.

[9f] People v. Campbell, 30 Cal. 312.

[9g] Baddeley v. Shea, 114 Cal. 1, 55 Am. St. Rep. 56, 45 Pac. 990, 33 L. R. A. 747.

[9h] Hill v. Finigan, 77 Cal. 267, 11 Am. St. Rep. 279, 19 Pac. 494.

[10] 51 Cal. 588. The court in this case adopted Greenleaf's definition of presumptions of fact, saying: "Presumptions of fact embrace all the connections and relations between the facts proved and the hypothesis stated and defended, whether they are mechanical and physical, or of a purely moral nature. It is the class of presumptions which prevails in the ordinary affairs of life, namely, the process of ascertaining one fact from the existence of another, without the aid of any rule of law, and therefore it falls within the exclusive province of the jury."

by the defendant of the key unexplained (if you believe that he had it in his exclusive possession) raises a reasonable presumption that he had it for purposes shown by the evidence it could be used for; or, in other words, if you believe it would open the clerk's office where these ballots were kept, then the possession by the defendant, unexplained, raises a reasonable presumption that he had it for the purpose of opening that door." For the giving of this instruction the judgment was reversed, and the supreme court said: "In no view can this charge be sustained. If it be said that it was an attempt to charge in respect to a legal presumption it was clearly error, since no such presumption would arise from the fact stated, as a matter of law. If it was an attempt on the part of the court to instruct the jury that the existence of one fact, in view of the ordinary experience of mankind, and connection of events, must be presumed from the existence of another, this was an interference with what we have shown is the exclusive province of the jury. It was charging the jury 'with respect to matters of fact,' and was in contravention of section 18 [17], article 6, of the Constitution of the state." In the subsequent case of McNeil v. Barney,[11] the court below gave the following instructions: "If you should find that the defendant was at this time under contract with Meyerstein & Co. to haul a certain amount of freight, for instance, fifty tons a month for the period of one year, that fact will go far toward clearing up any suspicion attaching to testimony going to prove a contract, without other apparent reasons." On account of this instruction the judgment was reversed, the court saying: "This instruction was not upon a question of law, but upon a matter of fact involved, and the weight of the evidence which should be left to the determination of the jury. Besides, the proposition is incorrect in itself." So in Stone v. Geyser Q. M. Co.,[12] the court below instructed the jury as follows: "If the jury believe from the evidence that the plaintiff or his grantors left the premises in controversy vacant and unoccupied for a series of years, and during that time exercised only casual acts of ownership upon the claims at long intervals, and that during that time no actual work was done toward working or developing the mine, either upon or in proximity to the claims, and that the defendants, finding the ground apparently abandoned, entered upon and located the same

[11] 51 Cal. 603.
[12] 52 Cal. 315, 1 Morr. Min. Rep. 59.

in pursuance of the mining laws of the district, and the laws of Congress, and have continued to comply with said laws, and have in good faith, reasonably believing said ground had been abandoned, expended large sums of money in developing said mines, then you are authorized to find the fact of abandonment." The supreme court held this to be erroneous on several grounds and said: "The charge was also erroneous in that the court informed the jury that a presumption of fact was created by the proof of other facts. Such was in effect the instruction that if certain facts were established the jury would be authorized to find an abandonment. It is erroneous for the court to charge that the existence of facts developed in the evidence 'raises a reasonable presumption' of the existence of another fact. (People v. Walden, 51 Cal. 588.) To say to the jury that they would be authorized to find a fact because of the existence of another, is but saying in another form that the existence of the latter raises the reasonable presumption of the former, since the jury can find the former only as a presumption from the existence of the latter. It is a very different thing from saying that one fact *tends* to prove another. It is the duty of the court to pass upon questions as to the admissibility of evidence, but it is solely the province of the jury to determine questions of fact, and this includes the duty of ascertaining the existence of a fact from the existence of other facts, without the aid of any rule of law. (1 Greenl. on Ev. 48.)" So in People v. Carrillo,[18] which was the trial of an indictment against a tax collector for appropriating public money, the judge charged the jury as follows: "If you find that seventeen thousand one hundred and twenty-nine dollars, or a lesser amount of the city's money, was collected by the defendant as tax collector, and it has never been paid over by him to the proper authority, it will then be for you to determine whether he has feloniously appropriated the same, or a part thereof, to his own use; and while the prisoner is not called upon to prove his innocence, but, on the contrary, the prosecution to prove the charge as alleged in the indictment, still the fact, if such be the fact, that the defendant received the money and failed to pay over the same as required by law, raises a presumption of a felonious appropriation, which will authorize a verdict of guilty, unless the other evidence in the case satisfactorily explains the reason of the failure to pay over." For this instruction the judg-

[18] 54 Cal. 63.

ment was reversed, and the supreme court said: "This instruction is clearly erroneous, in that the jury are told that the failure of the prisoner to pay over the money, if unexplained, *raises a presumption of a felonious appropriation,* which will authorize a verdict of guilty. The alleged felonious appropriation was the ultimate fact to the solution of which the deliberations of the jury were to be addressed. It was the ultimate and important fact to be found by their verdict, before judgment of conviction could properly go against the prisoner. To tell them, therefore, that if they should find some other and merely probative fact, then the principal fact of guilty appropriation was to be reached by *mere presumption,* was an unwarrantable interference with the functions of the jury. This rule was announced here, upon a thorough examination of the authorities in People v. Walden, 51 Cal. 588, and subsequently in Stone v. Geyser Quicksilver Min. Co., 52 Cal. 315, 1 Morr. Min. Rep. 59."

In the case of People v. Williams,[12a] the supreme court, by Temple, J., very clearly outlined the dangerous character of such instructions. The obnoxious instruction in that case was as follows:

"If the jury believe, from the evidence, that on the day of the homicide Clark came to the town of Monticello, and that Williams, seeing or meeting him on the street, spoke to Clark, and said he wanted to see him, and requested Clark to go to the shade on the north side of Fowler's saloon, and if, when they had reached the shade, Williams informed Clark of what he had heard that Clark had said about Williams mistreating his wife, or poisoning his wife, and asked Clark to retract it or take it back, or words to that effect, and that Clark refused to retract or take back what he had said, and that then Williams, without further cause or provocation, shot and killed Clark, then Williams committed murder of the first degree, and you should so find."

This instruction manifestly omitted the two very essential elements of any definition of murder in the first degree—premeditation and deliberation. Counsel for the people contended that this was not important in view of the fact that there were previous instructions fully covering this omitted point. But it is clear that the instruction stood alone, and, if it meant anything at all, could only have meant that if the probative facts stated should be found to be true, then the ultimate fact of murder, and hence, guilt, must

[12a] 73 Cal. 531, 15 Pac. 97.

be presumed, without regard to any definition of murder supposed to be given elsewhere. Counsel also suggested that the instruction did actually contain the elements of deliberation and premeditation; but, even if this were so, which cannot be successfully maintained, the instruction would still have been erroneous, for it invaded the province of the jury, and found for them a conclusion from the evidence which must always be left to the determination of the jury, unless, as above suggested, the question be one of law, and not of fact.[13b] The learned justice said, in effect, upon this point, that if premeditation and deliberation, elements held to be essential to constitute murder of the first degree, might be presumed from these, or any other, facts, the court might omit them in every case, and might tell the jury that any state of facts recited must be held to constitute such omitted facts. Moreover, the court might, in every case, instruct the jury that the probative facts recited constituted proof of the ultimate fact in issue. It would be but a step further to enter judgment without a trial. The function of the jury would be merely the registration in the form of a verdict of the findings of the court.

So in Sullivan v. Market Street Ry. Co.,[13c] an instruction that "under the case and proofs as here made no presumption of negligence arises against defendant from the mere fact that an accident has occurred," was held to be erroneous, as, in effect, telling the jury that the ultimate fact involved in the issues could not be held to follow from the probative facts recited. So in Manning v. App. Cons. etc. Co.,[13d] an instruction that certain facts constituted negligence *per se*, the evidence being conflicting, the supreme court held it erroneous as an invasion of the province of the jury. So in other cases.[14]

While the result is the same, the instruction in each case being erroneous as in contravention of the constitutional inhibition, and

[13b] See section 117, *ante*. And see below.

[13c] 136 Cal. 479, 69 Pac. 143.

[13d] 149 Cal. 35, 84 Pac. 657.

[14] Fernandes v. Sacramento City Ry. Co., 52 Cal. 45; People v. Mitchell, 55 Cal. 236; People v. Wong Ah Ngow, 54 Cal. 151, 35 Am. Rep. 69; Helbing v. Svea Ins. Co., 54 Cal. 156, 35 Am. Rep. 72; People v. Ah Sing, 59 Cal. 400; Weiderkind v. Tuolumne etc. Co., 65 Cal. 431, 4 Pac. 415; People v. Gutierrez, 74 Cal. 81, 15 Pac. 444; People v. Cline, 74 Cal. 575, 16 Pac. 391; People v. Murray, 86 Cal. 31, 24 Pac. 802; People v. Chew Sing Wing, 88 Cal. 268, 25 Pac. 1099; Wise v. Wakefield, 118 Cal. 107, 50 Pac. 310; People v. Slater, 119 Cal. 620, 51 Pac. 957; Hennesey v. Bingham, 125 Cal. 627, 58 Pac. 200; Kerrigan v. Market Street Ry. Co., 138 Cal. 506, 71 Pac. 621; Hampton v. Occidental etc. Co., 139 Cal. 706, 73 Pac. 579.

See paragraph 4, below, as to cases where such instructions are proper.

while the distinction between these two classes of erroneous instructions is not so vital as to require more than a brief reference, it is nevertheless not to be lost sight of in any case. Briefly stated, the distinction between an instruction which assumes the truth of any matter upon which the jury is to pass, and one as to a presumption of fact, is, generally speaking, that the former is addressed to a probative, and the latter to an ultimate, fact.

In the case of People v. Messersmith,[14a] for example, the court instructed the jury, "That a tendency to commit suicide does not prove insanity," etc. Here the probative fact is "tendency to commit suicide," and the ultimate fact, "insanity." It is obvious that the court assumes that a tendency to commit suicide has been proven, or is admitted, and so is treated as a question of law and taken from the jury. Under the rule, therefore, if there was any shadow of conflict of the evidence with respect thereto, and it was not admitted or uncontroverted, the instruction was erroneous under the first rule, as assuming that a probative fact has been established. It so happened, however, that, in the case at bar, the record did not show whether the tendency to commit suicide was controverted or admitted, or, if controverted, whether proved without a shadow of conflict of the evidence or not. The appellate court, therefore, assumed that the fact was admitted or uncontroverted, or that it had been so proved, and that the instruction was not erroneous for that reason.

But the instruction also declared, as matter of law, that the ultimate fact of "insanity" was not proved by the assumed fact of "tendency to commit suicide." It was therefore obnoxious under the second rule, as taking from the jury the determination of this ultimate fact; for it was manifestly within their exclusive province to consider whether the ultimate fact of insanity really followed from the probative facts established by the evidence. The court held, in effect, in this case, that this instruction would have been ground for reversal, but for the qualifying phraseology which followed that above quoted, and for the reason stated.

It is the exclusive province of the jury to determine both probative and ultimate facts, if they are controverted, and there is any conflict of the evidence with respect to them, or, even though there be no conflict, if there is reasonable ground for a difference of opinion thereon, or room for a debate as to the inferences to be

[14a] 61 Cal. 246.

drawn, as to the latter, even if the probative facts from which such inferences are to be drawn are undisputed, and instructions which invade this province are erroneous as being in contravention of the constitutional provision above referred to.[14b]

3. *The Judge must not Express Any Opinion as to What the Evidence Proves.*[14c]—In People v. Soeder,[14d] the supreme court, by Angellotti, J., thus gave expression to the rule here referred to:

"Under our system the trial judge is rigorously prohibited from actions or words having the effect of conveying to the jury his personal opinion as to the truth or falsity of any evidence. The determination of questions of fact must be made by the jury free from the influence that the knowledge of the trial judge's views thereon might have."

In People v. Williams,[15] upon an objection to a question the judge remarked "that while it appears beyond any reasonable doubt at any rate, and perhaps beyond any doubt, that this woman had stolen money there, it does not appear that it was Taylor's money." In its instructions the court did not tell the jury to disregard this remark that the defendant "had stolen money there," but sought to remove any impression created by its statement that it did not appear that "it was Taylor's money." For this the judgment was reversed, the supreme court saying:

"If the court had corrected itself in this respect in its instructions, we might perhaps hold that the jury could not have been misled by that unfortunate remark. But the court, in its instruction, seems to have aimed only at removing from the minds of the jury any impression that might have been made favorable to the appellant, by the statement that it did not appear that the stolen money which she had belonged to Taylor. We have no more doubt that the remark and instruction which we have quoted, taken together, constitute a very grave error, than we have that a person accused of crime is entitled to a fair trial."

So in Andrews v. Runyon,[15a] where the judge, after submitting the case to the jury upon the question as to whether there was contributory negligence, remarked to them that he did not see how the acts alleged to constitute such contributory negligence could be re-

[14b] See Hennesey v. Bingham, 125 Cal. 627, 58 Pac. 200; Merrifield v. Maryland etc. Co., 143 Cal. 54, 76 Pac. 710.

[14c] Query: Is this an irregularity of court, or a violation of the constitutional inhibition?

[14d] 150 Cal. 12, 87 Pac. 1016.

[15] 57 Cal. 108.

[15a] 65 Cal. 629, 4 Pac. 669.

garded as unreasonable, or something which an ordinary man would not do. The supreme court, in reversing the case, said:

"This was in effect telling them that there was no contributory negligence by plaintiff. If this was so, the court should not have submitted the question to the jury at all, but should have directed them that there was no question of the kind for their consideration. The court did right in submitting the question to the jury, but when the instruction given was qualified by the remark just above quoted, they were directed as to what the evidence proved. The authority of the court is limited to stating the evidence and declaring the law."

So in Howland v. Oakland etc. Co.,[15b] where the trial judge remarked that "the testimony may stand for what it is worth," the supreme court held that it was error, saying:

"It was likewise improper for the judge, in denying plaintiff's motion to strike out certain testimony of appellant's witness Mulverhill, to suggest that the testimony might 'stand *for what it is worth.*' Although evidently not so intended, the expression was liable to be taken by the jury as an intimation that in the opinion of the court the evidence was of little consequence. If proper to remain for the consideration of the jury the evidence was to be weighed solely by the latter."

And it is no less a violation of the rule here stated, although the personal opinion of the trial judge be expressed through the sanctity of an instruction. Thus in People v. Barry,[16] where the court instructed the jury that "confessions when corroborated by other evidence are sufficient to convict, *and are entitled to the belief of the jury,*" it was held that "by this instruction the court assumed the prerogative of the jury, whose office it was to pass upon the credibility and weight of the circumstances, and was for that reason erroneous." So in People v. Baldwin,[17] where the trial judge instructed the jury: "I will say here, however, that I do not think, after careful consideration, that upon the evidence in this case there could be a conviction of an attempt. If, gentlemen, the evidence satisfies you that an attempt was ever made, it must as well satisfy you that it was accomplished." The supreme court held that it was in violation of the constitutional prohibition. So in Estate of Blake,[18] it was held prejudicial error for the trial judge

[15b] 115 Cal. 487, 47 Pac. 255.
[16] 31 Cal. 357.
[17] 117 Cal. 244, 49 Pac. 186.
[18] 136 Cal. 306, 89 Am. St. Rep. 135, 68 Pac. 827.

to instruct a jury with regard to expert evidence of insanity that it was "unreliable" and "unsatisfactory," and that "it was not entitled to as much weight as facts," and otherwise, and in general terms, to attempt to discredit such evidence.

Any attempt on the part of the trial judge to weigh the evidence and assign to it a value is obnoxious to this rule. Any argumentative instruction which attempts or is calculated to guide the judging minds of the jury in any direction and to any conclusion is violative of it. Thus in Estate of Carpenter,[19] where there was an instruction to the effect that if Carpenter firmly and persistently believed that his relatives had mistreated him, and such belief was firm and immovable, and not based on fact, evidence, or probability, and was such as a rational man under like circumstances would not have had, he was, in the eyes of the law, suffering from an insane delusion, the supreme court said:

"But the chief objection to this is that even if the logic be sound, it is not a conclusion of law, but of the judging mind from the evidence. The court has no right to dictate or suggest the process of reasoning by which the evidence shall be judged."

So in other cases.[19a]

But it frequently happens that in passing upon questions of the admissibility of evidence it is necessary for the judge to pass upon evidence provisionally, and it is not improper on such occasions for him to announce his conclusions with respect to it. Thus in Reed v. Clark,[20] it was urged as a ground of error that the court in passing upon the admissibility of certain evidence remarked in the hearing of the jury that as the case then stood a *prima facie* promise had been proven. But it was held that the remark was not improper, and Niles, J., delivering the opinion, said: "It frequently happens that the admissibility of a particular piece of evidence depends upon the establishment of some necessary preliminary fact. In such case the court must determine what facts have been shown to exist, in order to determine what further facts may properly be shown. It is not unusual or improper for the judge, in passing upon such a question, to announce, for the guidance and

[19] 94 Cal. 406, 29 Pac. 1101.

[19a] See In re Carpenter, 79 Cal. 382, 21 Pac. 835; Kauffman v. Maier, 94 Cal. 269, 29 Pac. 481, 18 L. R. A. 124; and see cases cited below in subdivisions 4 and 5. And see herein as to instructions with regard to relative weight of direct and circumstantial evidence, and similar subjects, under section 2061, California Code of Civil Procedure.

[20] 47 Cal. 194; People v. McLean, 84 Cal. 480, 24 Pac. 32; but look at People v. Williams, 57 Cal. 108.

benefit of counsel, the reasons which controlled him in the admission or rejection of proffered evidence. This necessarily involves the expression of an opinion upon the evidence already introduced. But this expression is not addressed to the jury, or intended for their guidance, as is an instruction given at the request of counsel, or by the court upon its own motion, and which it is the duty of the jury to follow strictly and without questioning." And it is not improper for the judge to state in his charge, as a basis for some principle of law, that evidence had been introduced *tending* to show certain facts.[21] And see in this connection section 38, *ante*.

4. *Nor Should the Judge Express Any Opinion Concerning the Credibility of the Witnesses.*—All that is said above with respect to expressions of the personal opinion of the judge as to the weight of the evidence applies with equal force to such expressions as to the credibility of the witnesses. Thus in People v. Willard,[21a] where the court, commenting on an objection to the introduction of certain testimony, remarked in the presence and hearing of the jury, with regard to the testimony of the defendant, that she "had contradicted herself several times in the record," the defendant excepted to this language. Thereupon the judge reiterated this statement, and added, "That is the chief reason why I admit those letters in evidence." In reversing and remanding for a new trial, the supreme court said:

"We do not think these remarks were necessary to explain the ruling of the court, and we do think that, unretracted and unexplained, after they had been objected to, they must necessarily have prejudiced the case of the defendant. She was her sole witness, and, in effect, the jury were told by the court that she was unworthy of credit. Even if her self-contradictions had been much more evident than they appear to us, the judge should not have given his opinion to the jury that she had sworn falsely. 'Judges shall not charge juries with respect to matters of fact, but may state the testimony and declare the law.' (Const., art. 6, sec. 19; McMinn v. Whelan, 27 Cal. 300.)"

In People v. Eckert,[21b] the judge instructed the jury "that though the witness, Mr. Billingsby, was impeached, if his testimony

[21] People v. Vasquez, 49 Cal. 560; People v. Perry, 65 Cal. 568, 4 Pac. 572; Morris v. Lachman, 68 Cal. 109, 8 Pac. 799; People v. Giancoli, 74 Cal. 642, 16 Pac. 510; People v. Cummings, 113 Cal. 88, 45 Pac. 184. But see, in this connection, People v. Schoedde, 126 Cal. 373, 58 Pac. 859; People v. Plyler, 126 Cal. 379, 58 Pac. 904.

[21a] 92 Cal. 482, 28 Pac. 585.

[21b] 16 Cal. 110.

was corroborated by the testimony of witnesses unimpeached, they were bound to believe his testimony." This was held to be error, and Baldwin, J., delivering the opinion, said: "The credibility of any and all statements of a witness is a matter for the jury, and the court should not interfere with their province in this respect. It does not follow because a witness impeached, or not impeached, is supported, in some degree, or in some portions of his evidence, by other witnesses, that the jury are bound as a matter of law, to believe everything he says. Many things may characterize a cause, or the testimony of a witness, which deny or impair credit to his assertions; and the jury should be left free to pass upon all the circumstances and considerations in connection with his testimony, and assign to his statements their true weight and value as proof. A witness may be supported in a particular part of his testimony, and thus supported, the jury may believe that part, while in other respects they think him altogether incredible."

So in McMinn v. Whelan,[21c] the judge said of one of the witnesses that she was a woman of respectability, in relation to which Currey, J., delivering the opinion of the witnesses, said: "From the high and authoritative position of a judge presiding at a trial before a jury, his influence with them is of vast extent, and he has it in his power by words, or actions, or both, to materially prejudice the rights and interests of one or other of the parties. By words or conduct he may on the one hand support the character or testimony of a witness, or on the other may destroy the same in the estimation of the jury; and thus his personal and official influence is exerted to the unfair advantage of one of the parties, with a corresponding detriment to the cause of the other. We regret the necessity for an expression of our disapproval of the irregularity of which complaint is made, and though we do not impugn the expression, as designed to aid the side of the plaintiff, we may say, we should not hesitate to reverse the judgment because of it, if the same depended in any material degree upon the testimony of the witness whose character and standing was thus indorsed."

So in People v. Fong Ching,[21d] where the judge instructed the jury, " But neither is it among the recognized customs of this country to subsidize the personal integrity of our citizens in order to prevent them from lapsing into falsehood and perjury," the supreme court, McFarland, J., delivering the opinion, said:

[21c] 27 Cal. 300.

[21d] 78 Cal. 169, 20 Pac. 396.

"This language could have but one meaning and purpose. In addition to incorporating an unproved fact into the case, it was an argument against the truthfulness of the defendant's testimony, and its direct tendency was to influence the jury not to believe it. It might have been a legitimate argument in the mouth of the attorney for the prosecution; and, in such event, the attorney for defendant could have answered it as best he knew how, upon, at least, equal terms,—counsel against counsel. But the weight of the opinion of the court had no place in the scale."

So in People v. Christensen,[21e] where the judge of the trial court instructed the jury with reference to "this class of witnesses telling the truth," thus conveying to the minds of the jurors that the defendant's witnesses were of a disreputable class, whose testimony was scarcely to be credited, such instruction was held to be reversible error. So in People v. Gordon,[21f] where the trial judge, in an instruction, said, with reference to the conduct of the defendant upon the occasion of the assault which was the basis of the offense charged, "and immediately made a demonstration," and "addressed him in a sharp tone," there being no evidence that the tone was "sharp," and the entire question as to whether there was in fact a demonstration or not being one for the jury exclusively, the instruction was severely criticised by the supreme court in the following language:

" The judge undertook to state to the jury the substance of the prosecuting witness' testimony, which is a dangerous thing to do; for it is essentially the province of the jury to decide what the substance of the prosecuting witness' testimony was. Selecting what constitutes the substance of a witness' testimony is to a greater or less extent a matter of opinion, and the jurors and the judge may have widely different views as to what the substance of the prosecuting witness' testimony really was."

So in other cases.[21g]

21e 85 Cal. 568, 24 Pac. 888.

21f 88 Cal. 422, 26 Pac. 502.

21g See People v. Williams, 17 Cal. 142; People v. Choynski, 95 Cal. 640, 30 Pac. 791; People v. Hertz, 105 Cal. 660, 39 Pac. 32, and see cases cited below as to intimation of opinion as to what the jury should find; and see note 20, *supra*, as to right of judge to comment on evidence upon its admission; and see below as to limitations upon the rule; and note 21, *supra*, as to instructions that evidence *tends* to show.

And see paragraph "Miscellaneous," herein, as to instructions as to credibility of witnesses who testify for themselves, and for accomplices, etc., and similar subjects under section 2061, Code of Civil Procedure.

5. The Judge must not Intimate an Opinion as to Which Way the Jury Ought to Find.—An argumentative instruction is as much a usurpation of the functions of counsel as is an expression of an opinion as to the weight of the evidence or the credibility of the witnesses. The argumentative feature is seldom absent from instructions which are obnoxious on account of violations of the constitutional prohibition above referred to. The distinction between instructions wherein appear the personal opinion of the judge as to the verdict the jury ought to find, and those which convey an opinion as to the weight of the evidence or the credibility of the witnesses, is exceedingly slight. The principle is the same. But while all such instructions are more or less in violation of the constitutional inhibition, it is not for that reason alone that argumentative instructions are erroneous; nor is it because they interfere with the right of counsel to argue the case, because mere argument is never more than a privilege, or, at least, is not so sacred a right as to require or justify a constitutional guaranty; but it is for the reason that they are an unwarranted interference with the jury's exclusive functions, not only by dictating or suggesting the process of reasoning which should govern them, but by the exercise of that controlling or dominating influence which belongs to the office of presiding judge of a *nisi prius* court. The cases, both early and recent, illustrate in clear and precise language, not only the dangerous character of such instructions, but the fundamental reason therefor. In People v. Williams,[22] the judge charged the jury as follows:

"The fact that the deceased was a Chinaman gave the defendant no more right to take his life than if he had been a white person; nor did the fact, if you so find, that the defendant was seeking to enforce the collection of taxes against another Chinaman, or even against his *victim*, give the defendant a right to take his life."

The judgment was reversed upon another ground, but with reference to the above charge the supreme court said: "The word 'victim,' in the connection in which it appears, is an unguarded expression, calculated, though doubtless unintentionally, to create prejudice against the accused. It seems to assume that the deceased was wrongfully killed, when the very issue was as to the character of the killing. We are not disposed to criticise language very closely in order to reverse a judgment of this sort, but it is apparent

[22] 17 Cal. 142.

that in a case of conflicting proofs, even an equivocal expression coming from the judge may be fatal to the prisoner. When the deceased is referred to as 'a victim,' the impression is naturally created that some unlawful power or dominion had been exerted over his person. And it was nearly equivalent, in effect, to an expression characterizing the defendant as a criminal. The court should not directly or indirectly assume the guilt of the accused, nor employ equivocal phrases which may leave such an impression. The experience of every lawyer shows the readiness with which a jury frequently catch at intimations of the court, and the great deference which they pay to the opinions and suggestions of the presiding judge, especially in a closely balanced case, when they can thus shift the responsibility of a decision of the issue from themselves to the court. A word, a look, or a tone may sometimes, in such cases, be of great or even controlling influence. A judge cannot be too cautious in a criminal trial in avoiding all interference with the conclusions of the jury upon the facts."

So in People v. Dick,[23] the judgment was reversed because of the following language in the charge: "The defendant is charged with having murdered, in this county, on or about the twelfth day of May, 1866, one S. M. Simpson." Now, the first question for your decision is this: "Was S. M. Simpson on or about the fourteenth day of May, 1866, in this county murdered? *In determining this question the court thinks you can have no hesitation whatever.*" Sanderson, J., delivering the opinion, said: "We are of opinion, however, that the other portion of the charge noted is within the clause of the Constitution which prohibits judges from charging juries upon matters of fact (art. 6, sec. 17), and are unable to conceive of any state of facts under which, in view of that restriction, a judge can be allowed to address such language to a jury. Whether wisely or not the Constitution has abrogated the rule of common law by which judges were allowed to express their opinions as to the facts in issue, or as to the weight of evidence. To weigh the evidence and find the facts is, in this state, the exclusive province of the jury, and with the performance of that duty the judge cannot interfere without a palpable violation of the organic law."

So in People v. Matthai,[23a] where there was a long and argumentative instruction, in which, by suggestion, innuendo, and other

[23] 34 Cal. 663.

[23a] 135 Cal. 442, 67 Pac. 694.

of the usual insignia of argument and rhetoric, the judge outlined the evidence, both that admitted and that controverted, and plainly told the jury that they ought to find against the defendant, the supreme court, Henshaw, J., delivering the opinion, said:

"The court in instructing the jury should limit itself to a declaration of the principles of law necessary for their guidance in considering the evidence. It is as dangerous as it is unnecessary for the court to attempt to state the evidence. To state the evidence means to state it with fairness and exactness, and this is impracticable, unless all the evidence in the case should be repeated. The attempt usually results, as it has in this case, in an instruction upon the facts, or upon the supposed facts, which is both argumentative and unjust, — argumentative, because the apparent opinion of the court as to defendant's guilt can be seen thinly veiled; unjust, because of its assumption of matters either not proved, or at least in dispute,—an assumption which eliminates any consideration of the evidence favorable to the defendant, and which, coming from the court, bears most heavily against him."

Again, in Quint v. Dimond,[23b] where there was another instruction of this description, and it was held, in effect, that instructions are necessarily obnoxious to the constitutional inhibition if they are argumentative in the least degree, the supreme court, by McFarland, J., said:

"We do not see in this instruction any proposition of law, nor anything other than an instruction that the jury should draw certain inferences from certain evidence and facts. It was, substantially, an argument to the jury in favor of plaintiff upon questions of fact. Whether or not it would be wiser to allow judges to instruct juries as to matters of evidence and fact and thus influence their verdicts as to such matters—as is permitted in some jurisdictions—is not a question to be here considered. Our constitution expressly prohibits it. 'To tell the jury what weight to give or not to any particular evidence is to express an opinion upon a matter of fact' (People v. O'Brien, 96 Cal. 171, 31 Pac. 45); 'to weigh the evidence and find the facts is, in this state, the exclusive province of the jury, and with the performance of this duty the judge cannot interfere without a palpable violation of the organic law' (People v. Dick, 34 Cal. 663); and 'the court has no right to dictate, or suggest, the process of reasoning by which the

[23b] 147 Cal. 707, 82 Pac. 310.

evidence shall be judged.' (Estate of Carpenter, 94 Cal. 406, 29 Pac. 1101.) See, also, Kauffman v. Maier, 94 Cal. 269, 29 Pac. 481, 18 L. R. A. 124; Estate of Blake, 136 Cal. 306, 89 Am. St. Rep. 135, 68 Pac. 827; McNeil v. Barney, 51 Cal. 603; People v. Fong Ching, 78 Cal. 169, 20 Pac. 396."

So in numerous other decisions.[23c]

But the foregoing propositions must be taken with these limitations, viz., that the judge may state the testimony to the jury, and may charge with respect to facts that are not controverted, or are admitted, or concerning which there is no shadow of a conflict of evidence; and may caution the jury against the argument of counsel, in a proper case. In doing so, he is permitted a fair and reasonable latitude of observation concerning the effect of the evidence and the credibility of the witnesses, as they are governed by the rules of law and viewed in the light of common sense. These limitations will be considered separately.

(a) *The Judge may State the Testimony to the Jury.*—As above stated, the constitution permits the judge to "state the testimony and declare the law." In the case of Weil v. Paul,[24] the supreme court held that the trial court properly refused the following instruction: "If the jury believe the evidence of A. Strauss, the plaintiff's witness, that he had the possession of the goods in controversy after the sale to the plaintiff, and was selling and peddling them out, they will find a verdict for defendants," upon

[23c] See People v. Hurley, 57 Cal. 145; People v. Messersmith, 61 Cal. 246; People v. Casey, 65 Cal. 260, 3 Pac. 874; Morris v. Lachman, 68 Cal. 109, 8 Pac. 799; People v. Lanagan, 81 Cal. 142, 22 Pac. 482; People v. Travers, 88 Cal. 233, 26 Pac. 88; People v. McNamara, 94 Cal. 509, 29 Pac. 953; People v. Stanton, 106 Cal. 142; People v. Barney, 114 Cal. 557; Mabb v. Stewart, 133 Cal. 556, 65 Pac. 1085; and see cases cited in the text in quotation from Quint v. Dimond; and see below, as to the limitations of the rule, and see note 20, *supra*, as to right of judge to comment on evidence in ruling upon its admission; and note 21, *supra*, as to instructions that the evidence *tends* to show.

The following brief extract from the dissenting opinion of Justice De Haven in People v. Bruggy, 93 Cal. 476, 29 Pac. 26 (concurred in by Chief Justice Beatty), is interesting in this connection:

"Instructions should not, directly or indirectly, assume or suggest that a defendant is guilty of any degree of crime. People v. Lanagan, 81 Cal. 142, 22 Pac. 482. And when a defendant claims that the act of killing was done in self-defense, the act should not be spoken of by the judge as murder."

The exact language of People v. Lanagan is, "Instructions should not, directly or indirectly, assume or hypothetically suggest the guilt of the defendant."

[24] 22 Cal. 492. The refusal of the instruction may be sustained on the ground that the court need not state the testimony unless it sees fit. But this does not seem to be the ground upon which the opinion places it.

the ground that "it included a statement by the court that the witness had testified to certain facts, and the jury are proper judges of what a witness has testified to." This decision seems to be to the effect that it is improper for the judge to tell the jury what a witness has testified to. In view of the provision of the Constitution that the judge may "state the testimony," it would seem that this decision cannot be sustained, unless the provision is to be construed as meaning that if the judge undertake to state the testimony he must state the whole of it, *pro* and *con*. This, however, has not been decided in any other case. And it would seem from People v. Doyell,[25] that it is not improper for the judge to state a portion of the testimony.[26]

The right to state the testimony includes the right to state to the jury that there is no evidence upon any point, if such be the case. This was decided in People v. King.[27] In that case the court below gave the following instruction: "In the case that is now being submitted to you, there is no evidence on any points or matters given in proof which reduce the crime charged in the indictment to manslaughter; if the defendant be found guilty, therefore, you cannot consider the question of manslaughter upon the evidence in this case." This was held to be not improper, and Sanderson, C. J., delivering the opinion, said: "Judges may still, as formerly, state what facts are in evidence and what are not, or in other words they may state the evidence, *pro* and *con*, in view of which the existence of certain facts is affirmed or denied, which includes the right to state to the jury that there is no evidence as to particular facts or issues when such is the case."

When the judge undertakes to state the testimony the judgment will not be reversed for slight mistakes in the statement.[28] It is otherwise if the statement of the court is stronger than is warranted

[25] 48 Cal. 85.

[26] But if the judge undertakes to tell the jury that if they believe a certain state of facts they must render a certain verdict, the instruction must embrace all the material facts in controversy. If any material fact be omitted, the instruction is erroneous. Gallagher v. Williamson, 23 Cal. 331, 83 Am. Dec. 114; and look at Smith v. Arnold, 56 Cal. 640; Roberts v. Unger, 30 Cal. 676; Preston v. Keys, 23 Cal. 193; Perry v. S. P. R. R. Co., 50 Cal. 578; McNamara v. N. P. R. R. Co., 50 Cal. 581. But if one issue will dispose of the case if found in a certain way, the jury may be told that if they find that way they need proceed no further. Broadus v. Nelson, 16 Cal. 79.

[27] 27 Cal. 507, 87 Am. Dec. 95. See, also, People v. Dick, 34 Cal. 663; People v. Welch, 49 Cal. 174. See, also, People v. Sternberg, 111 Cal. 11, 43 Pac. 201.

[28] People v. Boggs, 20 Cal. 432; People v. Doyell, 48 Cal. 85.

by the testimony purported to be quoted.[28a] As was said in People v. Doyell,[29] "the safer way is to recite the language of the witness as taken down by the reporter or in the judge's notes."[30]

It is probable that in most cases, or at least in such cases as where the discrepancy is not greatly aggravated, it will be disregarded unless the court can see that it was prejudicial.[30a]

The Code of Civil Procedure provides with reference to the statement of the testimony by the court, that "if it state the testimony of the case, *it must inform the jury that they are the exclusive judges of all questions of fact.*"[31] The old Practice Act had substantially the same provision.[32]

A distinction is to be noted in this connection between instructions which declare that the testimony "shows" so and so, and those which merely state the testimony itself. "To *state* the testimony is one thing. To declare what it *shows* is another and very different thing. It is for the jury, exclusively, to determine what the testimony *shows.*"[32a]

(b) *The Judge may Charge With Respect to Facts Which are not Controverted.*—It is not within the province of the jury to determine uncontroverted facts. If but one finding is possible from the evidence, it does not rest within the arbitrary discretion of the jury. There is no room for deliberation, and mere conjecture is always out of place in a jury-room. For this reason it is said to be the duty of the trial judge to instruct the jury as to what facts are admitted by the pleadings;[33] and he may, in a proper

[28a] People v. Casey, 65 Cal. 260, 3 Pac. 874.

[29] 48 Cal. 85.

[30] In Reynolds v. Jourdan, 6 Cal. 108, the judge laid down the astounding proposition that "if the jury differed in opinion as to what the witness did say, *they were compelled to take the recollection of the judge.*" The supreme court intimated that if the testimony concerning which this remark was made had been relevant the judgment would have been reversed.

[30a] People v. Casey, 65 Cal. 260, 3 Pac. 874.

[31] Section 608, California Code of Civil Procedure.

[32] Laws of 1851, p. 76, sec. 165.

[32a] See People v. Casey, 65 Cal. 260, 3 Pac. 874. But the judge may instruct the jury in certain cases that the testimony *tends* to show. (See cases cited in note 21, *supra.*)

[33] Tevis v. Hicks, 41 Cal. 123; and see Blood v. Light, 31 Cal. 115; Tynan v. Walker, 35 Cal. 634, 95 Am. Dec. 152; Dean v. Grimes, 72 Cal. 442, 14 Pac. 178; Williams v. Casebeer, 126 Cal. 77, 58 Pac. 380; and see first part of section.

That instructions may assume the truth of uncontroverted facts was accepted as the established rule in the following cases: Hogan v. Shuart, 11 Mont. 498, 28 Pac. 969; Weil v. Nevitt, 18 Colo. 10, 31 Pac. 487; Cooper v. Denver etc. Co., 11 Utah, 46, 39 Pac. 478; Choctaw etc. Co. v. Deperade, 12 Okl. 367, 71 Pac. 629; Black v. Rocky Mountain etc. Co., 26 Utah, 451, 73 Pac. 514; Shafer v. Russell, 28 Utah,

case, charge them that a certain fact is proven. In strictness, if the judge does instruct the jury that the evidence shows a certain fact, he violates the prohibition of the Constitution; but if there be no conflict in the evidence, the error is said to be immaterial and is not to be regarded.[33a] This was the view taken in Pico v. Stevens.[34] In that case the judge instructed the jury that under the evidence one Birch was to be considered the proprietor of a certain stage line. In relation to this instruction Cope, J., delivering the opinion of the supreme court, said: "We have repeatedly held that an instruction of this character is in violation of the constitutional provision prohibiting judges from charging juries with respect to matters of fact; but we have also held that where no other conclusion could be arrived at upon the evidence, the error will not be sufficient to justify a reversal. (Terry v. Sickles, 13 Cal. 427; Caulfield v. Sanders, 17 Cal. 569.) There is no evidence in this case adverse to the correctness of the instruction in point of fact, and the error committed could not have operated to the prejudice of the defendant." So in Watson v. Damon,[35] where the court below instructed the jury that their verdict should be for a fixed sum less certain payments, the amount of which was specified by the court, Morrison, C. J., delivering the opinion of department one, said: "That the facts of the case must be left to

444, 79 Pac. 559; Halverson v. Seattle etc. Co., 35 Wash. 600, 77 Pac. 1058; Craig v. Leschen etc. Co., 38 Colo. 115, 87 Pac. 1143; Choctaw etc. Co. v. Burgess, 21 Okl. 653, 97 Pac. 271; Wolfer v. Redding etc. Co., 48 Colo. 58, 108 Pac. 980; Frederick v. Hale, 42 Mont. 153, 112 Pac. 70.

The constitutional provision that "judges shall not charge juries in respect to matters of fact, but may state the testimony and declare the law," does not prevent them from charging what would be the legal effect of facts found to be established, and uncontroverted. State v. Anderson, 4 Nev. 265.

The trial court should not assume facts unless they are undisputed or belong to a class of which judicial notice is properly taken. Bills v. Salt Lake City (Utah), 109 Pac. 745.

[33a] Hughes v. Wheeler, 76 Cal. 230, 18 Pac. 386. It is otherwise, of course, if there is a conflict, or even if there is no conflict, if there is room for two opinions with reference to the question. See Manufacturing Co. v. Malter, 76 Cal. 242, 18 Pac. 271; and see above, paragraph, or subdivision, 1, and cases cited in note 5 et seq. But in any event, such an instruction would perhaps not be regarded as ground for reversal, if it appeared that appellant had not been injured thereby, and that the verdict was a proper one under the evidence. See section 286, *post*.

The rule as to conflict, here stated, received support in the following cases: Still v. San Francisco etc. Co., 154 Cal. 559, 129 Am. St. Rep. 177, 98 Pac. 672, 20 L. R. A., N. S., 322; State v. Duffy, 6 Nev. 138.

[34] 18 Cal. 376. See cases cited in passage quoted, and also Bradley v. Lee, 38 Cal. 362, 4 Morr. Min. Rep. 470; Robinson v. W. P. R. R. Co., 48 Cal. 409; Tompkins v. Mahoney, 32 Cal. 231.

[35] 54 Cal. 278.

the jury, and that the court cannot interfere with the exclusive prerogative of the jury in passing upon the facts of the case, are familiar principles, well settled by authority in this state; but it will be found on examination of the transcript that there was no conflict in the evidence respecting the cost of the building. The plaintiff testified that it was to cost two thousand two hundred and fifty dollars; and the defendant, when called as a witness, stated 'that he knew the house was to cost two thousand two hundred and fifty dollars.' In this view of the case, the appellant was not prejudiced by the instruction complained of. (Terry v. Sickles, 13 Cal. 427; Pico v. Stevens, 18 Cal. 376; Tompkins v. Mahoney, 32 Cal. 231.)"

But it has also been held that the judge may go even further than this, and may, in a proper case, direct the jury to return a verdict in favor of one or the other of the parties.[35a] Indeed, such conclusion logically flows from the principle stated; for if the judge may properly charge the jury that any one fact in issue has been proven, and is therefore beyond controversy, and not for their determination, assuredly he may with equal propriety instruct them that any specific line of facts is established, along with all reasonable inferences from such facts, and such line of facts may well include all material issues involved in the cause.

It has therefore long been a common practice for a party to ask for, and the court, upon a proper showing, to give, an instruction to the jury to render a verdict in his favor. The general rule is, that if there is no shadow of conflict of the evidence, or if the essential facts involved are admitted, or if there is no room for debate as to the inferences to be drawn from the evidence, the issues, as in the case of a single party, become issues of law; or, if the evidence is all one way and only one conclusion is reasonably possible, then it is a matter of law, and not of fact, and it is the province of the court to say whether the party who asks for relief is entitled to have it. In such a case, it has been held that an instruction directing the jury to render a verdict for one of the parties is not in violation of the constitutional prohibition above referred to. One of the earliest cases in which the supreme court stated this doctrine was that of People v. Welch,[36] where the court said:

[35a] See section 117, *ante*.

[36] 49 Cal. 174.

"In a proper case, the court may act on the assumption that there is no evidence in respect to a particular issue, and grant a nonsuit, or advise an acquittal, or frame its charge to the jury, without reference to the existence of facts as to which no evidence has been produced. The 'matters of fact' as to which the court is not permitted to charge the jury, are the facts contested, or, in some degree, sought to be established by the evidence."

So in Los Angeles etc. Co. v. Thompson,[36a] the court said:

"The appellants also contend that the court erred in directing the jury to find a verdict in favor of the plaintiff. The correctness of this ruling depends upon whether there was any evidence before the jury which would have authorized a different verdict. If, upon the trial of the issue, there is any conflict of the evidence, or if different inferences of fact may be drawn from the evidence, it is the function of the jury to determine the issue; but, if upon all the evidence in the case only the conclusion or finding can be made, it is immaterial whether the jury make that conclusion or finding by direction of the court or upon their own deliberation."

The test here is the same as in the case of a nonsuit, except as to the latter only evidence offered on behalf of plaintiff is entitled to consideration, while in the matter of the instruction, the whole case is under consideration. If the showing is such that the issue is no longer an issue of fact, but one of law, such an instruction as is here defined would not be error. In Holloway v. Pasadena etc. Co.,[36b] the trial court directed a verdict for the defendant, where the question was, whether plaintiff's injury was caused by defendant's negligence. The supreme court said:

"It was the province of the judge to determine whether or not the evidence offered by plaintiff had any legal tendency to establish negligence, and it was for the jury to say, after weighing and considering all the evidence, whether or not the negligence had been sufficiently proven. If the evidence on the part of the plaintiff was such that the jury would have the right to infer negligence therefrom, the court did not have the right to usurp the function of the jury and take the case from them. The test is this: Would the evidence on the part of the plaintiff be sufficient to sustain a verdict in his favor, if such verdict had been rendered?"

[36a] 117 Cal. 594, 49 Pac. 714.
[36b] 130 Cal. 177, 62 Pac. 478. And see McCurrie v. Southern Pacific Co., 122 Cal. 558, 55 Pac. 324.

See section 117, *ante*, as to nonsuit.

So in Los Angeles etc. Co. v. Thompson, *supra*, upon this point the court said:

"....If the evidence is such that the court would be bound to set aside a verdict in favor of one party as contrary to the evidence, the matter becomes a question of law to be ruled upon by the court, and it is not required to submit the case to the arbitrament of the jury, but may direct a verdict in accordance with its rulings upon the question of law."

The doctrine is supported by numerous authorities.[86e]

[86e] See Martin v. Ward, 69 Cal. 129, 10 Pac. 276; Davies v. Oceanic etc. Co., 89 Cal. 280, 26 Pac. 827; Smith v. Occidental etc. Co., 99 Cal. 462, 34 Pac. 84; Lacey v. Porter, 103 Cal. 597, 37 Pac. 635; O'Connor v. Witherby, 111 Cal. 523, 44 Pac. 227; City of Santa Ana v. Gildmacher, 133 Cal. 395, 65 Pac. 883; Wilson v. Alcatraz etc. Co., 142 Cal. 182, 75 Pac. 787; and see White v. Warren, 120 Cal. 322, 49 Pac. 129, 52 Pac. 723; Estate of Morey, 147 Cal. 495, 82 Pac. 57; and see section 117, *ante*, as to nonsuit.

The principle involved here arises most often in dealing with questions of negligence and contributory negligence, and the court has found it necessary to draw the distinction between questions of law and questions of fact with reference to the duty and province of the court and of the jury more often in relation to these subjects than in any other. The practitioner will therefore find it useful to study the various lines of decisions in reference to such subjects in this connection. No attempt will be made to cite the decisions here. They are not only too numerous, but are aside from the subject of the treatise in hand.

The law is not substantially otherwise in jurisdictions having similar rules of practice. Under constitutional provisions like those of California, it is only by the most liberal concessions that the practice of directing a verdict can be sustained. Justice McFarland, in one of the leading cases on the subject, that of O'Connor v. Witherby, 111 Cal. 523, 44 Pac. 227, said: "Of course, such an instruction could not be upheld where there was conflicting evidence as to material facts, which the jury had a right to pass on; but where there is no substantial conflict of evidence as to the facts determinative of the case, or such facts are admitted, there the judgment will not be reversed for such an instruction, although the practice is hazardous, and can be sanctioned only in the clearest cases." And this is expressive of the attitude of all the courts. The decisions really mean that it is only when there is no issue of fact at all, but the question is merely whether there is a showing which, as matter of law, will sustain only one possible verdict, is the court justified in directing a verdict. In some cases, the court has attempted to draw a parallel between an order of nonsuit and an instruction, as a legal basis for the latter. Thus in McKay v. Railway Co., 13 Mont. 15, 31 Pac. 999, the court said: "This order simply makes the jury the passive clerical agent of the court, to announce its conclusion that the plaintiff has failed to 'prove a case sufficient for the jury,' and after all, such verdict, being nothing more than the determination of the case by the court on the ground which calls for nonsuit we think it should be classified as a nonsuit." And similar language was made use of in the later case of Creek v. McManus, 13 Mont. 152, 32 Pac. 675. But it is obvious, as elsewhere suggested, that the two acts are entirely different, since one is a dismissal without prejudice and the other is a final judgment on the merits. The better view is to base the authority for such a direction upon the fundamental rule that it is only issues of fact that require to be left to the discretion and determination of the jury.

The following cases illustrate the doctrine above outlined: In Root v.

(c) *The Court may, in Proper Cases, Caution the Jury as to Argument of Counsel, Effect of Evidence of Alibi, Proof of Insanity as a Defense in Criminal Actions, and Other Matters.*—The right to caution the jury as to argument of counsel was established

Fay, 5 Ariz. 19, 43 Pac. 527, it was held that where the testimony is insufficient to sustain a verdict if one should be rendered, the court should direct a verdict to the contrary. In Ewing v. United States, 11 Ariz. 1, 89 Pac. 593, it was held that where the court would feel constrained to set aside a verdict for the plaintiff, if one should be rendered, it would be justified in directing a verdict for the defendant.

The general rule, so often expressed, that the court must direct a verdict for one party when the evidence is such that it would be its duty to set aside a different verdict, or a verdict for the adverse party, finds support in the following cases: Snyder v. Colorado etc. Co., 36 Colo. 288, 118 Am. St. Rep. 110, 85 Pac. 686, 8 L. R. A., N. S., 781; Livesay v. Bank, 36 Colo. 526, 118 Am. St. Rep. 120, 86 Pac. 102, 6 L. R. A., N. S., 598; Mageon v. Alkire, 41 Colo. 338, 92 Pac. 720; Webster v. Rhodes (Colo.), 112 Pac. 324; Brown v. Potter, 13 Colo. App. 512, 58 Pac. 785; Bean v. Missoula etc. Co., 40 Mont. 31, 104 Pac. 869; Lutz v. Atlantic etc. Co., 6 N. M. 496, 30 Pac. 912, 16 L. R. A. 819; Gildersleeve v. Atkinson, 6 N. M. 250, 27 Pac. 477; Candelaria v. Atchison etc. Co., 6 N. M. 266, 27 Pac. 497; Alexander v. Tennessee etc. Co., 3 N. M. 173 (255), 3 Pac. 735; Lockhart v. Wills, 9 N. M. 263, 50 Pac. 318; Armstrong v. Aragon, 13 N. M. 19, 79 Pac. 291; Childers v. Hubbell, 15 N. M. 450, 110 Pac. 1051; Neeley v. Southwestern etc. Co., 13 Okl. 356, 75 Pac. 537, 64 L. R. A. 145; Guss v. Federal Trust Co., 19 Okl. 138, 91 Pac. 1045.

If there is a disputed question of fact, or a conflict of evidence, the court will not be authorized to direct a verdict for either party. See Colorado etc. Co. v. John, 5 Colo. App. 213, 38 Pac. 399; McQuown v. Thompson, 5 Colo. App. 466, 39 Pac. 68; Kline v. Hanke, 14 Mont. 361, 36 Pac. 454; Osterholm v. Boston etc. Co., 40 Mont. 508, 107 Pac. 499; Chaves v. Chaves, 3 N. M. 199 (300), 5 Pac. 331; Lockhart v. Wills, 9 N. M. 263, 50 Pac. 318; Brown v. Baird, 5 Okl. 133, 48 Pac. 180; Weir v. Seattle etc. Co., 41 Wash. 657, 84 Pac. 597; Menasha etc. Co. v. Nelson, 45 Wash. 543, 88 Pac. 1018; McKay v. Anderson etc. Co., 51 Wash. 679, 99 Pac. 1030. If, however, there is no dispute as to the facts, no conflict in the evidence, or the facts are admitted, or no other verdict can be sustained, the court is authorized to direct the proper verdict: Winchester v. Joslyn, 31 Colo. 220, 102 Am. St. Rep. 30, 72 Pac. 1079; Israel v. Day, 41 Colo. 52, 92 Pac. 698; Stearns v. Hazen, 45 Colo. 67, 101 Pac. 339; Armijo v. New Mexico etc. Co., 3 N. M. 244 (427), 5 Pac. 709; Solomon v. Yrisarri, 9 N. M. 480, 54 Pac. 752; Kentucky etc. Co. v. Purcell etc. Co., 13 Okl. 220, 73 Pac. 945; Sovereign etc. Camp v. Welch, 16 Okl. 188, 83 Pac. 547; Hanna v. Mosher, 22 Okl. 501, 98 Pac. 358; Harrah v. Bank, 26 Okl. 620, 110 Pac. 725; Fidelity etc. Co. v. Stegall, 27 Okl. 151, 111 Pac. 389; Coffin v. Hutchinson, 22 Or. 554, 30 Pac. 424; American etc. Co. v. Hutchinson, 19 Or. 334, 24 Pac. 515; Smalley v. Rio Grande etc. Co., 34 Utah, 423, 98 Pac. 311; Robinson v. Salt Lake etc. Co. (Utah), 109 Pac. 817; Clancy v. Reis, 5 Wash. 371, 31 Pac. 971; Clancy v. Williams, 5 Wash. 492, 32 Pac. 770; Underwood v. Stack, 15 Wash. 497, 46 Pac. 1031; Murray v. Bush, 29 Wash. 662, 70 Pac. 133; Boswell v. Bank, 16 Wyo. 161, 92 Pac. 624, 93 Pac. 661.

The case of Harris v. Missouri etc. Co., 24 Okl. 341, 103 Pac. 758, is cited as containing an interesting discussion of this subject. Briefly stated, the court there said that the question presented to the trial court was whether, admitting the truth of all the evidence in favor of the party against whom the verdict is to be directed, together with such inferences and conclusions as may be reasonably drawn, there is sufficient competent

in the well-known case of People v. Cronin.[87] In that case the counsel for defense read and commented upon a large number of cases in which innocent persons had been convicted upon circumstantial evidence. The point of the argument was addressed to the fallible character of this kind of evidence, and the danger of accepting even a strong showing, as sufficient to justify a verdict. For the purpose of counteracting the effect of this argument the prosecution asked and obtained an instruction whose purpose was to caution the jury not to attach too much weight to these cases. The instruction was, in part, as follows:

"These cases read and recited are extreme cases, and probably do not occur but very seldom in cases decided upon circumstantial evidence. The quotation of such cases is proper in order to make the jury careful in arriving at a proper conclusion from such evidence, but the plain, practical rules of evidence which have been established for ages ought not to be shaken, because of the recital of extreme cases, wherein improper convictions have been had; and

evidence to reasonably sustain a verdict should the jury find one. If there is, the jury must be permitted to go on and determine the controversy themselves.

In this connection it is proper to note that, as in the case of nonsuit, a motion to direct a verdict admits the truth of all the evidence against the same. Keane v. Pittsburg etc. Co., 17 Idaho, 179, 105 Pac. 60; Moran v. Ebey, 39 Mont. 517, 104 Pac. 522. All the evidence conflicting with, or contradictory of, the evidence which would sustain a contrary verdict, must be disregarded. Cooper v. Flesner, 24 Okl. 47, 103 Pac. 1016; Harris v. Missouri etc. Co., *supra;* and the evidence, including reasonable and proper inferences and deductions therefrom, in support of plaintiff's case must be considered most favorably in his behalf. Pierce v. Spokane, 59 Wash. 615, 110 Pac. 537. Incompetent evidence admitted over objection should not be considered. Clinton v. McKennon, 26 Okl. 835, 110 Pac. 649.

It is always the duty of the court to pass upon the sufficiency of the evidence upon an issue of fact. Law v. Smith, 34 Utah, 394, 98 Pac. 300; Pepperall v. City Park etc., 15 Wash. 176, 45 Pac. 743, 46 Pac. 407.

Where both parties move for the direction of a verdict, it is the duty of the court to direct a verdict according as the evidence warrants. Saxton v. Perry, 47 Colo. 263, 107 Pac. 281; Easterly v. Mills, 54 Wash. 356, 103 Pac. 475.

The practice in this connection has not always been even as liberal as it now is. The earlier California cases, cited in note 3 et seq., and in this note, throw considerable doubt upon the subject, and in some of the other states it was specifically held that the court could not direct a verdict. See Smith v. Shattuck, 12 Or. 362, 7 Pac. 335. In other states, express authority was given by statute (see section 6761, Revised Codes of Montana [section 1104, Code of Civil Procedure]), with the evident purpose of providing an express limitation to the practice, by requiring the courts to direct verdicts "only" when the case presents questions of law (Michener v. Fransham, 29 Mont. 240, 74 Pac. 448); and the courts there have held that a verdict cannot be directed if there is any evidence tending substantially to support the plaintiff's case. Ball v. Gussenhoven, 29 Mont. 321, 74 Pac. 871.

[87] 34 Cal. 191.

if much search be made, it would be found that probably a greater number of cases might be cited wherein improper convictions have been had from direct, positive evidence, through inattention or perjury of witnesses. All human testimony is fallible; but jurors in their decisions must take and consider circumstances, and if sufficient, act upon them, although the main fact is proved by no eye-witness." This was held to be a proper admonition, and Sanderson, J., delivering the opinion, said: "Nor do we see any substantial objection to the remarks of the court to the jury in relation to those extreme cases of circumstantial evidence, where there had been convictions, and it had afterward transpired that the parties were innocent, which had been read to them by counsel for the defendant. Those cases having been read to the jury and commented upon at length by counsel for the purpose of creating in their minds a distrust of the kind of evidence upon which the prosecution was forced to rely, it was competent for the court to caution them against the alleged dangerous tendency of circumstantial evidence claimed by counsel to be demonstrated by those cases."

As a principle of law, and as containing a true expression as to the relative weight of direct and circumstantial evidence, the instruction of the Cronin case was followed for a period of more than thirty years by the courts of California,[38] and in other states where there were similar constitutional provisions.[39] The decisions

[38] See People v. Padillia, 42 Cal. 535; People v. Ramirez, 56 Cal. 533, 38 Am. Rep. 73; People v. Morrow, 60 Cal. 142; People v. Hardisson, 61 Cal. 378; People v. Eckman, 72 Cal. 582, 14 Pac. 359; People v. Ah Fook, 64 Cal. 880, 1 Pac. 347; People v. Sternberg, 127 Cal. 510, 59 Pac. 942; and see People v. Murray, 41 Cal. 66; People v. Urquidas, 96 Cal. 239, 31 Pac. 52; People v. Ward, 105 Cal. 335, 38 Pac. 945; People v. Durrant, 116 Cal. 179, 48 Pac. 75.

Even as far back as the decision of the court in People v. Travers, 88 Cal. 233, 26 Pac. 88, with reference to an instruction almost identical with the Cronin instruction, upon which it was probably founded, the supreme court said:

"This instruction was clearly erroneous. In the first place, it is objectionable—although perhaps not fatally so—on account of its apparent hostility to the defendant. The jury would be very apt to get the impression from it that the court considered the defendant as one of the 'criminals' alluded to, and feared that the jury would fail to convict him on account of 'sympathy or prejudice.' In the second place, it is objectionable as an argument in favor of the prosecution on the weight of the evidence, and thus was an invasion of the province of the jury; for 'to weigh the evidence and find the facts is in this state the exclusive province of the jury; and with the performance of that duty the judge cannot interfere without a palpable violation of the organic law.'"

[39] Particularly Montana, Colorado and Nevada; but in the last-named state it appears that the supreme court departed from the doctrine of the Cronin case somewhat earlier even than did California.

are characterized by a gradual but constant diminution of approval, however, and in People v. Dole,[40] Beatty, C. J., for the court, with respect thereto, said:

"This language is quoted literally from the opinion of Justice Sanderson in People v. Cronin, 34 Cal. 191, and since the decision in that case has been repeated in hundreds of criminal trials in this state. It is, nevertheless, not a correct and logical statement of the law, and has been repeatedly criticised in later decisions of this court, though it has never been deemed a sufficient ground of reversal."

But in the subsequent case of People v. Vereneseneckockockhoff[41] (the "Hoff" case), the court saw proper to depart from the principle of the Cronin case, and Justice Temple, who wrote the opinion of the court in bank, at the conclusion of an elaborate argument upon the comparative value of direct and circumstantial evidence, in which the instruction of the Cronin case, and all other instructions of similar phraseology, was characterized as "plainly an argument for the prosecution," said:

"Instructions have undoubtedly been given, and have to some extent been sanctioned by this court, where the question of the limitation upon the right of the judge to charge the jury as to questions of fact was not raised. The case most often referred to as sanctioning discussions of this kind is People v. Cronin, 34 Cal. 191. A very able opinion was rendered by Chief Justice Sanderson, who entirely disregarded this provision of the Constitution. Probably it was not called to his attention. He expressed the opinion that in reply to an argument of the defense as to the alleged danger of action upon circumstantial evidence, 'It was competent for the court to caution them against the alleged dangerous tendency of circumstantial evidence claimed by counsel to be demonstrated by these cases.' That is, he could answer the argument of counsel for the defense as to the weight and value of evidence, and he gives as authority for the proposition the case of Tom Jones (2 Wheel. C. C. 461), in the circuit court of the United

[40] 122 Cal. 486, 68 Am. St. Rep. 50, 55 Pac. 581. The following cases decided after the Hoff case sustain that decision: People v. O'Brien, 130 Cal. 1, 62 Pac. 297; People v. Botkin, 132 Cal. 231, 84 Am. St. Rep. 39, 64 Pac. 286; Estate of Blake, 136 Cal. 306, 89 Am. St. Rep. 135, 68 Pac. 827; and see People v. Rushing, 130 Cal. 449, 80 Am. St. Rep. 141, 62 Pac. 742, where the language of the court in People v. Dole, *supra*, was approved, but the instruction was held not to be ground for reversal (as in the Dole case, also), because of an added sentence which limited its meaning.

[41] 129 Cal. 497, 58 Pac. 156, 62 Pac. 111.

States, where there is no such restriction, showing plainly that the learned justice did not have this restriction in mind. He proceeds expressly to approve of the action of the judge in replying to the persistent attack of counsel for the defense on this class of evidence, directly and expressly declaring that the court may and should charge the jury as to facts, and going so far as to say that the court could properly single out a particular witness and charge the jury as to his credibility. But even Judge Sanderson did not say that as a general rule circumstantial evidence was as satisfactory proof of fact as positive evidence. He said, on the other hand, that in the nature of things it was not, but that in some cases it was as satisfactory and would produce the same degree of conviction, and might in particular cases be superior. No one ever disputed this last proposition. A case may be completely made out by circumstantial evidence, and positive and direct testimony may be false. But is it proper under our constitution for the judge, in his charge to the jury, to answer the argument of counsel for the defense on the facts? Such it admittedly was in the Cronin case, which is the father of the whole errant brood. The constitutional inhibition is too plain to admit of discussion, and such a charge is necessarily a charge with respect to matters of fact, if the domain of fact was correctly defined by the learned judge in his charge. That distinction is older than the courts of the United States, and, so far as I am aware, has never been criticised. There are a few other cases in which the Cronin case has been blindly followed, all ignoring this constitutional inhibition. The Constitution is too plain to be disregarded on such authority. The cases do not attempt to construe the inhibition, or to reconcile it with such instructions, and I think the attempt would necessarily have failed had it been made."

As shown by the opinion of the learned justice, the vice in People v. Cronin lay in the failure to distinguish between an interference with the province of the jury, even when in the form of a caution concerning the argument of counsel, and an attempt to instruct or caution the jury as to counsel's argument.

It is unfortunate that the principal authority in support of the right of the judge to caution the jury with regard to the argument of counsel should have become so thoroughly discredited, although the right itself, so long as it is restricted to matters within the province of the judge, and does not invade that of the jury,

has not been questioned. It is a right, however, to be exercised with extreme care, since it can never be justified except in flagrant cases, where counsel have themselves exceeded their rights.

Alibi.—It has been held that the judge may caution the jury as to the effect of evidence of an *alibi;*[42] but here again the rule stated has been so limited and restricted, so surrounded by necessary precautions to avoid violations of the constitutional prohibition, that it is of little or no value. If such instructions are given in such form as to pass muster they cannot be very effective, for there is no provision of law requiring the defense by *alibi* to be scrutinized otherwise or differently from the other defenses in the action.[43] Nevertheless, cautionary instructions upon the subject have been given, and sustained.

Defense of Insanity.—It has been held proper for the trial judge to caution the jury, where the defense is insanity, by instructing them, in substance, that while they are to weigh the defense fully and justly, and should sustain it as humane and just, when satisfactorily established, yet "they are to examine it with care, lest an ingenious counterfeit of such mental disorder should furnish protection to guilt."[44] But again, such instructions are not to be given except when clearly justified under the well-established rules of law.[45]

Miscellaneous.—Certain instructions as to the duty of the jury to receive with caution the testimony of relatives have been upheld,[46] but apparently upon the same ground that similar instructions on the subject of evidence of *alibi* have been upheld, viz., that they were mere reminders of facts and circumstances in the case before them, which, as men of ordinary observation, they were already bound to know, the caution being within the proper latitude of the court's discretion in giving its charge to the jury.

The Cronin case is also responsible for an instruction upon the subject of evidence given by and the credibility of witnesses in

[42] See People v. Wong Ah Foo, 69 Cal. 180, 10 Pac. 375; People v. Lee Gam, 69 Cal. 552, 11 Pac. 183; People v. Levine, 85 Cal. 39, 22 Pac. 969, 24 Pac. 631. See, also, People v. Bush, 71 Cal. 602, 12 Pac. 781, for a caution in an instruction as to witnesses who are related to one of the parties to the action.

[43] People v. Levine, 85 Cal. 39, 22 Pac. 969, 24 Pac. 631.

[44] People v. Donlan, 135 Cal. 489, 67 Pac. 761, and cases there cited.

[45] See People v. Manoogian, 141 Cal. 592, 75 Pac. 177, and cases there cited.

[46] People v. Bush, 71 Cal. 602, 12 Pac. 781. But see People v. Hertz, 105 Cal. 660, 39 Pac. 32.

their own behalf, which was followed with approval in numerous decisions, and was not finally overturned until very recently.[47] The instruction itself was often criticised, the supreme court upholding it, but without enthusiasm. The language of the court in People v. Tibbs,[48] quoted in People v. Wells,[49] illustrates the attitude of the court in this respect:

"This instruction was in effect the same as an instruction given in the case of People v. Cronin, ... and there held to be correct. It has since been frequently held that where this instruction, though it may be regarded as erroneous, is kept well within the language considered in the Cronin case, the judgment will not be reversed on account of it."

But later on, in People v. Maughs,[50] the supreme court served notice that thereafter the giving of the Cronin instruction would be deemed ground for a new trial; and in People v. Ryan,[51] which had already been tried when the decision in the Maughs case was published, the court held that, while the language of the latter would be upheld in the future, and that the giving of the Cronin instruction would be regarded as evidence of unfairness, yet, that it was not retroactive in its effect, and, for the last time, the Cronin instruction was sustained.

Section 2061, Code of Civil Procedure,[52] provides among other things, that the trial court may, in a proper case, instruct the jury

[47] This instruction was given in the following cases: People v. Cronin, 34 Cal. 191; People v. Morrow, 60 Cal. 142; People v. Nichols, 62 Cal. 518; People v. Wheeler, 65 Cal. 77, 2 Pac. 892; People v. O'Neal, 67 Cal. 378, 7 Pac. 790; People v. Knapp, 71 Cal. 1, 11 Pac. 793; People v. Murray, 86 Cal. 31, 24 Pac. 802; People v. Faulke, 96 Cal. 17, 30 Pac. 837; People v. O'Brien, 96 Cal. 171, 31 Pac. 45; People v. Fehrenbach, 102 Cal. 394, 36 Pac. 678; People v. Curry, 103 Cal. 548, 37 Pac. 503; People v. Lang, 104 Cal. 363, 37 Pac. 1031; People v. Hitchcock, 104 Cal. 482, 38 Pac. 198; People v. Anderson, 105 Cal. 32, 38 Pac. 513; People v. Van Ewan, 111 Cal. 144, 43 Pac. 520; People v. Ellenwood, 119 Cal. 166, 51 Pac. 553; People v. Dobbins, 138 Cal. 694, 72 Pac. 339; People v. Boren, 139 Cal. 210, 72 Pac. 899; People v. Tibbs, 143 Cal. 100, 76 Pac. 904; People v. Wells, 145 Cal. 138, 78 Pac. 470; People v. Maughs, 149 Cal. 253, 86 Pac. 187; People v. Ryan, 152 Cal. 364, 92 Pac. 853.

[48] 143 Cal. 100, 76 Pac. 904.

[49] 145 Cal. 138, 78 Pac. 470.

[50] 149 Cal. 253, 86 Pac. 187.

[51] 152 Cal. 364, 92 Pac. 853.

[52] This section is as follows:

"Section 2061. The jury, subject to the control of the court, in the cases specified in this code, are the judges of the effect and value of evidence addressed to them, except when it is declared to be conclusive. They are, however, to be instructed by the court on all proper occasions:

"1. That their power of judging of the effect of evidence is not arbitrary, but to be exercised with legal discretion, and in subordination to the rules of evidence;

"2. That they are not bound to decide in conformity with the declaration of any number of witnesses, which do not produce conviction in their minds, against a less number or

that a witness shown to be false in one part of his testimony is to be distrusted in others;[53] that the testimony of an accomplice is to be viewed with distrust,[54] and the oral admissions of a party are to be received with caution;[55] and that evidence presented in the

against a presumption or other evidence satisfying their minds;

"3. That a witness false in one part of his testimony is to be distrusted in others;

"4. That the testimony of an accomplice ought to be viewed with distrust, and the evidence of the oral admissions of a party with caution;

"5. That in civil cases the affirmative of the issue must be proved, and when the evidence is contradictory the decision must be made according to the preponderance of evidence; that in criminal cases guilt must be established beyond a reasonable doubt;

"6. That evidence is to be estimated not only by its own intrinsic weight, but also according to the evidence which it is in the power of one side to produce, and of the other to contradict; and, therefore,

"7. That if weaker and less satisfactory evidence is offered, when it appears that stronger and more satisfactory was within the power of the party, the evidence offered should be viewed with distrust."

[53] This instruction was given in the following cases: People v. Hicks, 53 Cal. 354; People v. Sprague, 53 Cal. 491; People v. Soto, 59 Cal. 367; People v. Righetti, 66 Cal. 184, 4 Pac. 1063, 1185; White v. Disher, 67 Cal. 402, 7 Pac. 826 (in this case the striking out of the words "is to" and the insertion of the word "may" in a requested instruction, "a witness willfully false in one part of his testimony is to be distrusted in his other testimony," was held to be in error; see, also, People v. Paulsell, 115 Cal. 6, 46 Pac. 734); People v. Treadwell, 69 Cal. 226, 10 Pac. 502; People v. Flynn, 73 Cal. 511, 15 Pac. 102; People v. Clark, 84 Cal. 573, 24 Pac. 313; People v. McCoy, 71 Cal. 395, 12 Pac. 272; O'Rourke v. Vennekohl, 104 Cal. 254, 37 Pac. 930; People v. Oldham, 111 Cal. 648, 44 Pac. 312; People v. Luchetti, 119 Cal. 501, 51 Pac. 707; People v. Plyler, 121 Cal. 160, 53 Pac. 553 (in this case it was held that the instruction must be to the effect that the false testimony be willful); People v. Lon Yeek, 123 Cal. 246, 55 Pac. 984; People v. Patterson, 124 Cal. 102, 56 Pac. 882; Thomas v. Gates, 126 Cal. 1, 58 Pac. 315; People v. Arlington, 131 Cal. 234, 63 Pac. 347; People v. Wilder, 134 Cal. 182, 66 Pac. 228; People v. Fitzgerald, 138 Cal. 39, 70 Pac. 1014; People v. Dobbins, 138 Cal. 694, 72 Pac. 339; People v. Lonnen, 139 Cal. 634, 73 Pac. 586 (in this case the rule was adopted that the instruction should not be confined to the testimony on one side of the case or against a particular witness; see, also, People v. Patterson, People v. Gates and People v. Arlington); People v. Stevens, 141 Cal. 488, 75 Pac. 62; People v. Grill, 151 Cal. 592, 91 Pac. 515; People v. Hower, 151 Cal. 638, 91 Pac. 507. The instruction is best given in the language of the statute. People v. Sprague and People v. Treadwell. If emphasized too much, or if the jury are charged that it is their duty, as a matter of law, to reject all of the testimony of a witness found to be false in part, it is error. People v. Oldham.

[54] People v. O'Brien, 96 Cal. 171, 31 Pac. 45 (the instruction in this case was held to be erroneous); People v. Bonney, 98 Cal. 278, 33 Pac. 98; People v. Sternberg, 111 Cal. 11, 43 Pac. 201; People v. Silva, 121 Cal. 668, 54 Pac. 146.

[55] Kauffman v. Maier, 94 Cal. 269, 29 Pac. 481, 18 L. R. A. 124; People v. Van Horn, 119 Cal. 323, 51 Pac. 538; People v. Rodley, 131 Cal. 240, 63 Pac. 351; People v. Buckley, 143 Cal. 375, 77 Pac. 169; People v. Ruiz, 144 Cal. 251, 77 Pac. 907; People v. Wardrip, 141 Cal. 229, 74 Pac. 744 (wherein People v. Sanders, 114 Cal. 216, 46 Pac. 153, and People v. Newcomer, 118 Cal. 263, 50 Pac. 405, are explained); Goss v. Stieger etc. Works, 148 Cal. 155, 82 Pac. 681; and see Smith v. Whittier, 95 Cal. 279, 30 Pac. 529. And cases in note 54.

place of other and better evidence which appears to have been suppressed is to be distrusted.[56] The only question in reference to this subject, aside from the form of the instruction to be given in each case, is, whether the case is a proper one. It would be manifestly out of place, and misleading, to give the instruction relative to the testimony of an accomplice in a case where there was no accomplice; or with reference to oral admissions where there was no evidence of such admissions. If it is a proper case, the instruction must be given in such general terms that it cannot be said to express an opinion, either directly or inferentially as to the credibility of any particular witness, or as to the truth of any particular testimony.[57]

It has been held that a successful objection to the introduction of incompetent evidence does not warrant an instruction to the jury to the effect that "it is a presumption of law that evidence willfully suppressed would be adverse if produced," or the instruction authorized by subdivision 7 of section 2061, Code of Civil Procedure, that if weaker and less satisfactory evidence is offered, when it appears that stronger and more satisfactory was within the power of the party, the evidence offered should be viewed with distrust. An objection to the competency of a physician to testify as to the condition of his patient is not "suppression of evidence" or "production of weak evidence," and cannot be treated as such in instructions to the jury.[58]

A correct statement by the court of the theory of the prosecution or the defense is not a statement of facts within the inhibition of the Constitution.[59]

§ 122. The Judge Should not Charge the Jury Concerning Principles of Law Which have No Application to the Evidence in the Case, or to the Issues Raised by the Pleadings.—Instructions, as is above shown, should be general, and not confined to the

[56] People v. Cuff, 122 Cal. 589, 55 Pac. 407.

[57] See People v. Cuff, 122 Cal. 589, 55 Pac. 407, as to the caution to be exercised in general in giving the instructions provided for in section 2061, Code of Civil Procedure; and see People v. Patterson, 124 Cal. 102, 56 Pac. 882; and People v. Rodley, 131 Cal. 240, 63 Pac. 351; People v. Arlington, 131 Cal. 231, 63 Pac. 347; People v. Lonnen, 139 Cal. 634, 73 Pac. 586; also Thomas v. Gates, 126 Cal. 1, 58 Pac. 315; and see Kauffman v. Maier, 94 Cal. 269, 29 Pac. 481, 18 L. R. A. 124.

[58] Estate of Carpenter, 94 Cal. 406, 29 Pac. 1101; Thomas v. Gates, 126 Cal. 1, 58 Pac. 315.

[59] People v. Worden, 113 Cal. 569, 45 Pac. 844.

testimony on one side or the other of the case; otherwise, the jury are apt to think the court suspicious of the testimony against which its instructions are directed;[1] at the same time, it is not to be overlooked that each party is entitled to have the jury instructed, upon the theory that his evidence may be believed by them.[2] Instructions are for the purpose of enabling the jury to apply the proper principles of law to the facts of the case, when they shall have determined such facts. The judge cannot know beforehand how the jury will find the facts, and therefore it is proper that he should instruct the jury sufficiently to enable them to know the law applicable to any view they may take of the evidence. But instructions which have no application to any view that can be taken of the evidence can serve no useful purpose, and should not be given, whether they be correct as abstract propositions or not.[2a] The duty of the trial judge in this respect was thus expressed by the supreme court in People v. Manning:[2b]

"The trial court should only give such instructions as are applicable to the evidence in the case. The court is not required, nor would it be proper, to give instructions applicable to some theory that might be advanced, but which theory is entirely outside of the case, as shown by the evidence."

And such is the rule that has been repeatedly announced from the earliest cases. Thus in Fowler v. Smith,[2c] Murray, J., said:

"The instructions asked for on this point were wholly irrelevant. If there had been any proof, however slight, it would have been the duty of the court to give to the jury the law applicable to such testimony; but it is not incumbent upon the court to instruct the jury upon mere abstract questions of law, irrelevant to the case, and serving only to bewilder and mislead them from the true issue to be determined."

So in People v. Sanchez,[2d] Sanderson, C. J., said:

"No instruction should be given to a jury which is not predicated upon some theory logically deducible from at least some

[1] See cases cited in note 57 of the preceding section.

[2] Sperry v. Spaulding, 45 Cal. 544; Renton-Holmes & Co. v. Monnier, 77 Cal. 449, 19 Pac. 820; Hunt v. Elliott, 77 Cal. 588, 20 Pac. 132; Buckley v. Silverberg, 113 Cal. 673, 45 Pac. 804.

[2a] In Marriner v. Dennison, 78 Cal. 202, 20 Pac. 386, it was suggested that the instructions must also conform to the issues raised by the pleadings. In this connection the query is suggested: Is it error to refuse an instruction which conforms to evidence improperly admitted, but not to the issues raised by the pleadings?

[2b] 146 Cal. 100, 79 Pac. 856.

[2c] 2 Cal. 39.

[2d] 24 Cal. 17.

portion of the testimony. Such instructions are only calculated to confuse and mislead the jury, and ought not to be given."

So in Conlin v. S. F. & S. J. R. R. Co.:[3]

"If the instructions were not pertinent to any issue in the cause, they were properly refused, even though it were conceded that the propositions of law which they embody were correct in the abstract."

So in People v. Best:[4]

"An instruction may be sound as an abstract proposition of law, yet have no application to the facts of the case as disclosed by the evidence. In such case the court may, and properly should, refuse the instruction. No instruction should ever be given, unless there is some evidence before the jury to which it is applicable upon some rational theory logically deducible from such evidence."

In People v. Atherton,[4a] the court said:

"Obviously if a hypothetical instruction be given to a jury, the hypothesis assumed as its basis should be one which finds some support in the evidence adduced at the trial; for if the hypothesis be one entirely beyond and without the evidence, and wholly unsupported by it, the tendency of the instruction would be to mislead the jury."

The rule announced in the foregoing cases is undoubtedly correct; and it is uniformly held that it is not error to refuse an instruction which is not applicable to the evidence in the case,[5] or to

[3] 36 Cal. 404.
[4] 39 Cal. 690.
[4a] 51 Cal. 495.
[5] The rule as to irrelevant instructions has been either applied or upheld in argument in the following cases:
Arizona: Ewing v. United States, 11 Ariz. 1, 89 Pac. 593.
California: Benham v. Rowe, 2 Cal. 387, 56 Am. Dec. 342; People v. Roberts, 6 Cal. 214; People v. March, 6 Cal. 543; People v. Williams, 32 Cal. 280; Tompkins v. Mahoney, 32 Cal. 231; People v. Williams, 43 Cal. 344; Bowers v. Cherokee Bob, 45 Cal. 495; People v. Davis, 47 Cal. 93; People v. Gilbert, 60 Cal. 108; People v. Strange, 61 Cal. 496; People v. Cochran, 61 Cal. 548; Hirschberger v. Strauss, 64 Cal. 272, 28 Pac. 235; Dreyfuss v. Tompkins, 64 Cal. 448, 2 Pac. 30; People v. Bourke, 66 Cal. 455, 6 Pac. 89; People v. Daniels, 70 Cal. 521, 11 Pac. 655; Gulf etc. Co. v. State etc. Co., 70 Cal. 586, 12 Pac. 473; Shepherd v. Jones, 71 Cal. 223, 16 Pac. 711; Hill v. Finigan, 77 Cal. 267, 11 Am. St. Rep. 279, 19 Pac. 494; Comptoir d'Escompt v. Dresbach, 78 Cal. 15, 20 Pac. 28; Razzo v. Varni, 81 Cal. 289, 22 Pac. 848; Scott v. Wood, 81 Cal. 398, 22 Pac. 871; Murray v. White, 82 Cal. 119, 23 Pac. 35; White v. Merrill, 82 Cal. 14, 22 Pac. 1129; Knight v. Pacific etc. Co. (Cal.), 34 Pac. 868; People v. Divine, 95 Cal. 227, 30 Pac. 378; Stevens v. Railroad Co., 100 Cal. 554, 35 Pac. 165; Williams v. Southern Pacific Co., 110 Cal. 457, 42 Pac. 974; People v. Oldham, 111 Cal. 648, 44 Pac. 312; In re Calkins, 112 Cal. 296, 44 Pac. 577; People v. Thompson, 115 Cal. 160, 46 Pac. 912; People v. Gleason, 122 Cal.

370, 53 Pac. 123; Nofsinger v. Goldman, 122 Cal. 609, 55 Pac. 425; George v. Los Angeles Ry. Co., 126 Cal. 357, 77 Am. St. Rep. 184, 58 Pac. 819, 46 L. R. A. 829; People v. Brown, 130 Cal. 591, 62 Pac. 1072; Wahlgren v. Market Street Ry. Co., 132 Cal. 656, 62 Pac. 308, 64 Pac. 993; People v. Ward, 134 Cal. 301, 66 Pac. 372; Peters v. McKay & Co., 136 Cal. 73, 68 Pac. 478; Jones v. Goldtree Bros., 142 Cal. 383, 77 Pac. 939; In re Budan's Estate, 156 Cal. 230, 104 Pac. 442; Valente v. Sierra etc. Co., 158 Cal. 412, 111 Pac. 95; Alaska etc. Co. v. Standard etc. Co., 158 Cal. 567, 112 Pac. 454; Sullivan v. Morton etc. Co., 13 Cal. App. 35, 108 Pac. 895.

Colorado: Allen v. Eldridge, 1 Colo. 287; Gibbs v. Wall. 10 Colo. 153, 14 Pac. 216; Williams v. Mellor, 12 Colo. 1, 19 Pac. 839; Jackson v. Ackroyd, 15 Colo. 583, 26 Pac. 132; Johnson v. Jones, 16 Colo. 138, 26 Pac. 584; Empson etc. Co. v. Vaughn, 27 Colo. 66, 59 Pac. 749; Denver etc. Co. v. Peterson, 30 Colo. 77, 69 Pac. 578; Denver etc. Co. v. Buffehr, 30 Colo. 27, 69 Pac. 582; Davis v. Shepherd, 31 Colo. 141, 72 Pac. 57, 22 Morr. Min. Rep. 575; McMillen v. Ferrum etc. Co., 32 Colo. 38, 105 Am. St. Rep. 64, 74 Pac. 461; Walsh v. Jackson, 33 Colo. 454, 81 Pac. 258; Farmer v. Hughes, 38 Colo. 318, 88 Pac. 191; Denver etc. Co. v. Walters, 39 Colo. 301, 89 Pac. 815; San Miguel etc. Co. v. Stubbs, 39 Colo. 359, 90 Pac. 842; Colorado etc. Co. v. Nichols, 41 Colo. 272, 92 Pac. 691, 20 L. R. A., N. S., 215; Reynolds v. Hart, 42 Colo. 150, 94 Pac. 14; Rimmer v. Wilson, 42 Colo. 180, 93 Pac. 1110; Rude v. Sisack, 44 Colo. 21, 96 Pac. 976; Coors v. Brock, 44 Colo. 80, 96 Pac. 963; Rio Grande etc. Co. v. Campbell, 44 Colo. 1, 96 Pac. 986; Liebhardt v. Gibbs, 46 Colo. 613, 106 Pac. 6; Idaho etc. Co. v. Colorado etc. Co. (Colo.), 111 Pac. 553; Rice v. Van Why (Colo.), 111 Pac. 599; Burnham v. Jackson, 1 Colo. App. 237, 28 Pac. 250; Fisk v. Greeley etc. Co., 3 Colo. App. 319, 33 Pac. 70; Denver etc. Co. v. Robinson, 6 Colo. App. 432, 40 Pac. 840; Fireman's Fund etc. Co. v. Barker, 6 Colo. App. 535, 41 Pac. 513; Chapman v. Sargent, 6 Colo. App. 458, 40 Pac. 849; Helvetia etc. Co. v. Allis Co., 11 Colo. App. 264, 53 Pac. 242; Edmundson v. Preville, 12 Colo. App. 73, 54 Pac. 394; Colorado etc. Co. v. Messemer, 12 Colo. App. 361, 55 Pac. 611; Beck v. Trimble, 14 Colo. App. 195, 59 Pac. 412; Gray v. Sharpe, 17 Colo. App. 139, 67 Pac. 351; Stevens v. Walton, 17 Colo. App. 440, 68 Pac. 834; Bowling v. Chambers, 20 Colo. App. 113, 77 Pac. 16.

Idaho: Johnson v. Fraser, 2 Idaho, 371, 18 Pac. 48; Holt v. Spokane etc. Co., 3 Idaho, 703, 35 Pac. 39; Tarr v. Oregon etc. Co., 14 Idaho, 192, 125 Am. St. Rep. 151, 93 Pac. 957; Fleener v. Oregon etc. Co., 16 Idaho, 781, 102 Pac. 897.

Montana: Purtle v. Casey, 11 Mont. 229, 28 Pac. 305; Bullard v. Smith, 28 Mont. 387, 72 Pac. 761; Bank v. Carroll, 35 Mont. 302, 88 Pac. 1012; Howie v. California Brewery Co., 35 Mont. 264, 88 Pac. 1007; Judith etc. Co. v. Williams, 36 Mont. 25, 91 Pac. 1061; Mitchell v. Henderson, 37 Mont. 515, 97 Pac. 942; Power v. Turner, 37 Mont. 521, 97 Pac. 950; Hagerty v. Montana etc. Co., 38 Mont. 69, 98 Pac. 643, 25 L. R. A., N. S., 356; Poor v. Madison etc. Co., 41 Mont. 236, 108 Pac. 645; Townsend v. Butte, 41 Mont. 410, 109 Pac. 969.

New Mexico: Meyer v. Black, 4 N. M. 190, 352, 16 Pac. 620; Lincoln etc. Co. v. Hendry, 9 N. M. 149, 50 Pac. 330; Cowles v. Hagerman, 15 N. M. 600, 110 Pac. 843.

Oklahoma: Bank v. Garnett, 21 Okl. 200, 95 Pac. 755; Bank v. Walworth, 22 Okl. 878, 98 Pac. 917; Kingfisher Bank v. Johnson, 22 Okl. 228, 98 Pac. 343; Fort Smith etc. Co. v. Collins, 26 Okl. 82, 108 Pac. 550; Fort Smith etc. Co. v. Benson, 26 Okl. 246, 109 Pac. 77; Finch v. Brown, 27 Okl. 217, 111 Pac. 391.

Oregon: Mark v. Schwartz, 14 Or. 177, 12 Pac. 253; Stanley v. Smith, 15 Or. 505, 16 Pac. 174; Roberts v. Parrish, 17 Or. 583, 22 Pac. 136; Woodward v. Oregon etc. Co., 18 Or. 289, 22 Pac. 1076; Solomon v. Cress, 22 Or. 177, 29 Pac. 439; Turner v.

the issues raised by the pleadings.[5a] In order to justify the submission of any question of fact to a jury, the proof must be sufficient to raise more than a mere conjecture or surmise that the fact is as alleged. It must be such that a rational, well-constructed mind can reasonably draw from it the conclusion that the fact exists, and when the evidence is not sufficient to justify such an inference, the court may properly refuse to submit the question to the jury.[5b]

But it frequently happens that judges give such instructions, and then it becomes necessary to determine whether the judgment ought to be reversed on account of the instruction. And in this regard the test is, not whether the instruction was erroneous, but whether it was misleading. The giving of such instructions is seldom otherwise than misleading, if for no other reason, because the jury are apt to think that they are really based upon evidence

Lacy, 37 Or. 158, 61 Pac. 342; Emison v. Owyhee etc. Co., 37 Or. 577, 62 Pac. 13; Carson v. Lauer, 40 Or. 269, 65 Pac. 1060; Stieger v. Fronhofer, 43 Or. 178, 72 Pac. 693; Williamson v. North Pacific Co., 43 Or. 337, 73 Pac. 7; Ringue v. Oregon etc. Co., 44 Or. 407, 75 Pac. 703; La Grande etc. Co. v. Shaw, 44 Or. 416, 72 Pac. 795, 74 Pac. 919; Duff v. Willamette etc. Co., 45 Or. 479, 78 Pac. 363, 668; Anderson v. Oregon etc. Co., 45 Or. 211, 77 Pac. 119; Pacific etc. Co. v. North Pacific etc. Co., 46 Or. 194, 80 Pac. 105.

Utah: Holt v. Pearson, 12 Utah, 63, 41 Pac. 560; Beaman v. Martha Washington Co., 23 Utah, 139, 63 Pac. 631; Downey v. Gemini etc. Co., 24 Utah, 431, 91 Am. St. Rep. 798, 68 Pac. 414; Fritz v. Western Union etc. Co., 25 Utah, 263, 71 Pac. 209; Edd v. Union etc. Co., 25 Utah, 293, 71 Pac. 215; Matthews v. Daly etc. Co., 27 Utah, 193, 75 Pac. 722; Belnap v. Widdison, 32 Utah, 246, 90 Pac. 393; Smith v. Ogden etc. Co., 33 Utah, 129, 93 Pac. 185; Bank v. Peterson, 33 Utah, 209, 126 Am. St. Rep. 817, 93 Pac. 566; Herndon v. Salt Lake City, 34 Utah, 65, 131 Am. St. Rep. 827, 95 Pac. 646; Smith v. Clark (Utah), 106 Pac. 653; Sargent v. Union Fuel Co. (Utah), 108 Pac. 928; Tyng v. Constan-Loraine etc. Co. (Utah), 108 Pac. 1109.

Washington: Frost v. Ainslie etc. Co., 3 Wash. 241, 28 Pac. 354; Martin v. Union etc. Co., 13 Wash. 275, 43 Pac. 53; Einseidler v. Whitman Co., 22 Wash. 388, 60 Pac. 1122; Traver v. Spokane etc. Co., 25 Wash. 225, 65 Pac. 284; Darrow etc. Co. v. Breyman, 32 Wash. 234, 73 Pac. 363; Towle v. Stimson etc. Co., 33 Wash. 305, 74 Pac. 471; Washington etc. Works v. McNaught, 35 Wash. 10, 76 Pac. 301; Young v. O'Brien, 36 Wash. 570, 79 Pac. 211; Harris v. Washington etc. Co., 49 Wash. 345, 95 Pac. 84; Snell v. Jones, 49 Wash. 582, 96 Pac. 4; Behling v. Seattle etc. Co., 50 Wash. 150, 96 Pac. 954; Dunkin v. Hoquiam, 56 Wash. 47, 105 Pac. 149; Hale v. Crown etc. Co., 56 Wash. 236, 105 Pac. 480; Cook v. Danaher etc. Co., 61 Wash. 118, 112 Pac. 245.

Wyoming: Gilland v. Union Pacific Co., 6 Wyo. 185, 43 Pac. 508.

[5a] See note 2a, *supra;* and see In re Ruffino, 116 Cal. 304, 42 Pac. 127.

[5b] Janin v. London and San Francisco Bank, 92 Cal. 14, 27 Am. St. Rep. 82, 27 Pac. 1109, 14 L. R. A. 320; In re Calkins, 112 Cal. 296, 44 Pac. 577; Estate of Nelson, 132 Cal. 182, 64 Pac. 294, and cases therein cited.

actually given, but overlooked by them.[5c] Nevertheless, unless the instruction is misleading it will not be regarded as a ground for reversing the judgment, or for a new trial. An abstract instruction may be erroneous, but if the court can see that it did not mislead the jury, the judgment will not be disturbed.[6] But if the instruction was erroneous and may have misled the jury, a new trial will be granted.[7] And even if the instruction be correct as an abstract proposition, but may have misled, a new trial will be granted.[8] The test, therefore, is as above stated, whether or not the instruction was misleading. And it is obvious that this must depend in great measure upon the particular circumstances of each case. It may be said, however, that an instruction which suggests to the jury, or sets prominently before their minds, a theory which has no foundation in the evidence, ought to be held to be misleading. Instances of reversals for such instructions are to be found in the reports. Thus in Mendelsohn v. Anaheim Lighter Co.,[9] the cause of action was for injury to goods in the custody of defendant as a common carrier. The judge instructed the jury that if they believed the defendant injured the goods wantonly and maliciously, they might give punitive damages. The evidence, however, had no tendency to show that the defendant company authorized the malicious acts of its agents, and under the decisions the malice of the agents was not the malice of the principal. The instruction was held to be misleading, and the judgment was reversed. So in Slaughter v. Fowler,[10] which was an action of ejectment, the plaintiff rested his right to recover wholly upon the prior possession of his grantor, and upon certain proceedings taken to acquire the land from the state of California. These proceedings, however,

[5c] See People v. Maughs, 149 Cal. 253, 86 Pac. 187.

[6] Satterlee v. Bliss, 36 Cal. 489. If an instruction be erroneous and have application to the evidence, the judgment must necessarily be reversed; but if the erroneous instructions have no application to the evidence, the judgment will not be disturbed, unless the jury may have been misled. That is the difference between the two cases. And see Hill v. Finigan, 77 Cal. 267, 11 Am. St. Rep. 279, 19 Pac. 494; George v. Los Angeles Ry. Co., 126 Cal. 357, 77 Am. St. Rep. 184, 58 Pac. 819, 46 L. R. A. 829; People v. Smith, 105 Cal. 676, 39 Pac. 38.

[7] Powers v. Wheatley, 45 Cal. 113; Slaughter v. Fowler, 44 Cal. 195; Whitman v. Steiger, 46 Cal. 256; People v. Devine, 95 Cal. 227, 30 Pac. 878; People v. Maughs, 149 Cal. 253, 86 Pac. 187.

[8] Hirshberg v. Strauss, 64 Cal. 272, 28 Pac. 235; Comptoir d'Escompt v. Dresbach, 78 Cal. 15, 20 Pac. 23; In re Calkins, 112 Cal. 296, 44 Pac. 577; People v. Gleason, 122 Cal. 370, 55 Pac. 123; and look at Estate of Holbert, 57 Cal. 257; People v. Monahan, 59 Cal. 389.

[9] 40 Cal. 657.

[10] 44 Cal. 195.

were ruled out, and so the plaintiff's case rested wholly upon the prior possession of his grantor. There was nothing whatever in the case in regard to the right of either party to pre-empt under the laws of the United States. The judge, however, instructed the jury as follows: "A party who at the time of his entry upon public lands was the owner of three hundred and twenty acres of land in any state or territory of the United States could not pre-empt land." This under the circumstances was considered misleading, and the judgment was reversed. So in Powers v. Wheatley,[11] which was an action for breach of promise of marriage, the judge instructed the jury that if the defendant had undertaken to rest his defense, in whole or in part, upon the bad character of the plaintiff, and had failed in his proof, they could consider that in aggravation of damages. There was, however, nothing in the evidence which amounted to an attempt in that direction; and the supreme court reversed the judgment on account of the giving of the instruction, saying: "It set prominently before the minds of the jury an element which was really nonexistent in the case, and left them at liberty to make it an ingredient in the assessment of damages. But were this otherwise, it is not a correct proposition of law." So in Hanks v. Naglee,[12] which was an action of a similar character, there was no proof that the seduction was after the promise to marry; on the contrary, the plaintiff herself testified that the agreement to yield herself was made in advance when there was no promise to marry. But the court charged as follows: "If the defendant, taking advantage of the promise under which she [the plaintiff] was acting has had illicit relations, and has seduced the plaintiff, that is another element proper for the jury to consider." This was held to be misleading, and the judgment was reversed.[13]

[11] 45 Cal. 113.

[12] 54 Cal. 51, 35 Am. Rep. 67.

[13] See, also, Sargent v. Linden Mining Co., 55 Cal. 204, 206; Shuggart v. Lycoming Ins. Co., 55 Cal. 408. Where the judge gives an instruction not applicable to the evidence, it is questionable whether it ought not always (except in rare cases of pure inadvertence) to be held misleading; for it is not to be presumed that the judge would give such an instruction unless he thought it applicable, and to hold that it could not have misled because as a matter of fact it was not applicable is to hold that the jury knew better, and took a clearer view of the evidence, than the judge did. Every practitioner of any experience has had occasion to notice how often a jury will go off on mistaken views of the law even when clearly explained to them. And it is questionable whether it is safe to assume that they corrected the judge's mistake.

It matters not, in the application of the above principles, that the court seeks, by the obnoxious instruction, to cover the whole, instead of a portion only, of the case at bar.

The giving of hypothetical instructions, long drawn out, embracing the entire theory of the case, sometimes including most of the evidence, has been often condemned. Such instructions are not of themselves error; but they may be so, and are not to be commended. With reference to an *omnibus* instruction of this description in the case of People v. Dixon,[14] Garoutte, J., for the court, said:

"It is not calculated to enlighten the jury upon the law which should guide them in their deliberations in the jury-room, and as a general rule such instructions furnish ample grounds for the reversal of judgments in criminal cases."

Again, under the guise of instructing the jury as to the legal principles applicable to the case, trial judges sometimes, though, it is to be noted, rarely, read to them opinions of the appellate courts. It is a custom more honored in the breach than in the observance, and when such opinions are mere abstract expressions of legal principles, having none, or the remotest, application to the question at issue before the jury, the action of the trial judge cannot be too much condemned. In such cases it is the practice to apply the above rules strictly. But if the opinion really contains a correct statement of the law, and is clearly applicable to the case at bar, it will not be regarded as error.[15] In People v. McNabb,[16] where the judge read an opinion of the court to the jury stating at the time that that case "was in many respects like the one at bar," the supreme court said:

[14] 94 Cal. 255, 29 Pac. 504. See, also, In re Spencer, 96 Cal. 448, 31 Pac. 453.

[15] Cousins v. Partridge, 79 Cal. 224, 21 Pac. 745; In re Spencer, 96 Cal. 448, 31 Pac. 453.

[16] 79 Cal. 419, 21 Pac. 843. In this instance, the particular case read to the jury was People v. Munn, 65 Cal. 211, 3 Pac. 650, where the appellant had been convicted of murder in the second degree, and the supreme court held that the facts did not warrant his conviction for a higher offense than manslaughter. Mr. Justice Sharpstein, who delivered the opinion in the McNabb case, said: "And it seems to us that the object of the court in reading the opinion in that case to the jury in this case was to impress on their minds that the defendant, in this case, should not be convicted of any higher offense than manslaughter, and not, as appellant's counsel contends, that he should be convicted of manslaughter."

And it was this conclusion, and the probability that the defendant had been benefited rather than prejudiced by the reading of the opinion, that led the court to affirm the judgment against McNabb.

"Whether this statement was correct we have not the means of verifying, as the evidence is not before us. The reading of that case had better have been omitted. The practice of reading cases to juries is a dangerous one, and we advise against it."

So also it is the habit of some trial judges to give instructions copied from the reports, statements of principles of law deemed appropriate in the particular cases where they occur, but never intended to acquire, by constant use, the force of legal maxims. It does not follow that an instruction upon a point of law in one case is always and everywhere a correct enunciation of the law. And the same thing is true with respect to the enunciation of a principle of law in some other form. Principles of law applicable to the facts of one case may not be applicable to the facts of another. In this connection, the supreme court in Pearce v. Boggs [17] said:

"There is no rule better settled than that the opinion of a court is always to be read in connection with the facts of the case in which it is given, and it may often occur that in its opinion it will use expressions, either by way of argument or illustration, which are correct in their application to the case before it, but would be inapplicable in many other cases. For this reason it is not always proper to give to a jury an instruction upon a principle of law couched in language taken from an opinion in the reports. Jurors are apt to be misled by instructions upon mere abstract principles of law. They deal only with facts, and instructions to them should be directed to those facts, and should be rather in the concrete than in the abstract. Abstract principles of law which point an opinion or an exceptional rule may be very misleading to a jury."

[17] 99 Cal. 340, 33 Pac. 906. The instruction in this case was as follows:

"I instruct you that what constitutes a delivery of personal property by the vendor to the vendee depends upon the character of the property sold and the circumstances of each particular case, and for the purpose of a delivery it is not necessary that the property should pass into the actual possession of the vendee; therefore, when it is so situated that the vendee is entitled to and can rightfully take possession thereof at his pleasure, he is considered as having actually received it as the statute requires."

As an illustration of the danger of transplanting, as it were, this language and giving it the form of an instruction in another case, it is to be noted that immediately following this excerpt is found the following sentence:

"Accordingly, it has been held if the vendor of goods in the care and keeping of a third person directs him to deliver them to the vendee, *and the party holding the goods on notice and application of the vendee assents to retain the goods for him*, it is a delivery sufficient to transfer the title and to satisfy the statute."

So in Etchepare v. Aguirre,[17a] the supreme court said: "It is true that the language of the fourth instruction requested by plaintiff was extracted from the opinion of Mr. Justice McKee in Williams v. Lerch, 56 Cal. 330, but the language extracted is only a part of what was said by Mr. Justice McKee in connection with the facts of that case, which were materially different from the fact in this case."

§ 123. The Judge must not Give Contradictory Instructions.—The whole charge is to be construed together, and that construction is to be adopted which will harmonize the different parts if possible.[1] But as was said by Crockett, J., delivering the opinion in Brown v. McAllister,[2] "where the instructions on a material point are contradictory, it is impossible for the jury to decide which should prevail, and it is equally impossible after the verdict to know that the jury was not influenced by that instruction which was erroneous, as the one or the other must necessarily be where the two are repugnant."

So in Sappenfield v. Main Street R. R. Co.,[2a] the court said:

"The error in giving the foregoing instruction was not obviated by the instruction subsequently given at the instance of the defend-

[17a] 91 Cal. 288, 25 Am. St. Rep. 180, 27 Pac. 668, 929.

[1] See section 131, *post*.

[2] 39 Cal. 573.

[2a] 91 Cal. 48. And see:

California: Clark v. McElvy, 11 Cal. 154, 3 Morr. Min. Rep. 254; People v. Campbell, 30 Cal. 312; People v. Valencia, 43 Cal. 552; People v. Anderson, 44 Cal. 65; McCreery v. Everding, 44 Cal. 284; Estate of Cunningham, 52 Cal. 465; Chidester v. C. P. Ditch Co., 53 Cal. 56; Bank of Stockton v. Bliven, 53 Cal. 708; People v. Wong Ah Ngow, 54 Cal. 151, 35 Am. Rep. 69; Black v. Sprague, 54 Cal. 266; People v. Messersmith, 57 Cal. 575; Aguirre v. Alexander, 58 Cal. 21; People v. Simons, 60 Cal. 72; People v. Bush, 65 Cal. 129, 3 Pac. 590; Harrison v. Spring Valley etc. Co., 65 Cal. 376, 4 Pac. 381; Monroe v. Cooper (Cal.), 6 Pac. 378; Agnew v. Kimball (Cal.), 9 Pac. 91; Haight v. Vallet, 89 Cal. 245, 23 Am. St. Rep. 465, 26 Pac. 897; People v. Thomson, 92 Cal. 506, 28 Pac. 589; People v. Marshall, 112 Cal. 422, 44 Pac. 718; People v. Pearne, 118 Cal. 154, 50 Pac. 376; People v. Fellows, 122 Cal. 233, 54 Pac. 830; People v. Westlake, 124 Cal. 452, 57 Pac. 465; Lemasters v. Southern Pacific Co., 131 Cal. 105, 63 Pac. 128; People v. Maughs, 149 Cal. 253, 86 Pac. 187; Rathbun v. White, 157 Cal. 248, 107 Pac. 309.

Colorado: Nuckolls v. Gaut, 12 Colo. 361, 21 Pac. 41; San Miguel etc. Co. v. Stubbs, 39 Colo. 359, 90 Pac. 842; Thunborg v. Pueblo, 45 Colo. 337, 101 Pac. 399; Arnett v. Huggins, 18 Colo. App. 115, 70 Pac. 765.

Idaho: Holt v. Spokane etc. Co., 3 Idaho, 703, 35 Pac. 39; Giffen v. Lewiston, 6 Idaho, 231, 55 Pac. 545.

Montana: Kelly v. Cable Co., 7 Mont. 70, 14 Pac. 633.

Oklahoma: Payne v. McCormick etc. Co., 11 Okl. 318, 66 Pac. 287.

Oregon: Bank v. Woodell, 38 Or. 294, 61 Pac. 837, 65 Pac. 520; Neis v. Whitaker, 47 Or. 517, 84 Pac. 699;

ant, wherein the law applicable to the case was properly presented. The jury could not determine which of the two propositions was correct. They were bound to accept all the propositions that the court instructed them upon as a correct statement of the law by which they were to be guided, and if the several statements are inconsistent or contradictory, it is impossible to tell which was adopted by them in reaching their verdict."

Where, however, there are two separate and distinct causes of action in a single complaint, there may be instructions applicable to one cause of action contradictory to those of the other cause of action, without error.[3]

§ 124. Modification of Instructions Requested.—It seems to have been at one time supposed that it was incumbent upon the court to either give or refuse an instruction as asked, without altering the sense, although it might change the phraseology.[1] This doctrine was distinctly repudiated in Boyce v. Cal. Stage Co.,[2] in which case Sanderson, C. J., delivering the opinion, said: "It is the duty and province of the judge to expound the law, and it is his right and privilege, in doing so, to select and make use of such language and illustration, as in his judgment is best calculated to explain the same, and render it clear to the comprehension of the jury. Upon him the law imposes the duty, and he may determine the manner of its performance. Counsel may propose such instructions as their wisdom may suggest, and submit them to the judge; but beyond this they have no legal right to dictate to the judge either the form or the substance. If in the opinion of the judge such instructions are defective in form or expression, or erroneous in law, he may at his election modify them in either particular, and give them to the jury in their modified form, or he may refuse to give them altogether. If error be assigned upon such instruction, the test question is not, Did the judge *modify* the instruction? On the contrary, the test is the same as in other cases, and is to be applied to the instruction in its modified form; and if it appear that the instruc-

Morehouse Co. v. Weister Co. (Or.), 107 Pac. 470.

Utah: Konold v. Rio Grande etc. Co., 21 Utah, 379, 81 Am. St. Rep. 693, 60 Pac. 1021.

Washington: Gray v. Washington etc. Co., 30 Wash. 665, 71 Pac. 206; Sweeney v. Seattle, 57 Wash. 678, 107 Pac. 843.

[3] Clowdis v. Fresno Co., 118 Cal. 315, 62 Am. St. Rep. 238, 50 Pac. 373.

[1] See Conrad v. Lindley, 2 Cal. 173; Russell v. Amador, 3 Cal. 400; Jamson v. Quivey, 5 Cal. 490.

[2] 25 Cal. 460.

tion as modified correctly states the law, no error has intervened. This court passes upon instructions, so far as they are given, in the form in which they were received by the jury; and the fact that they were prepared by counsel, and before given modified by the court, cannot be regarded as error *per se*, or as having any bearing upon the question of error." The same doctrine was laid down in People v. Dodge,[3] in which case Sawyer, J., delivering the opinion, said: "The prisoner is entitled to have an instruction or charge upon every point of law material to the case, and necessary for the information of the jury; and to have the law fully, clearly, and fairly stated. When an instruction asked is correct in principle, pertinent to the case, and expressed in clear and explicit language not liable to be misunderstood, the court should undoubtedly give it. But we know of no rule of law which requires the court to present the law in the precise language and arrangement selected by counsel, without change, subtraction, or addition. It is very easy for ingenious counsel to so frame a proposition as to state the rule of law correctly, and yet to convey to the jury, who only hear it read once, a very erroneous impression; or to stop far short of the whole principle proper to be stated. It would be manifestly improper to give such an instruction to the jury without comment or explanation. The views expressed in Boyce v. California Stage Company, 25 Cal. 460, apply to criminal as well as in civil cases."

But although the court *may* modify the instruction, it is not bound to do so. If an instruction requested be partly correct and partly incorrect, the court is not compelled to pick out the correct parts and give them, but may refuse the whole.[4]

[3] 30 Cal. 448. See, also, King v. Davis, 34 Cal. 100; People v. Davis, 47 Cal. 93; People v. Hall, 94 Cal. 595, 30 Pac. 7. And see People v. Cowgill, 93 Cal. 596, 29 Pac. 228; People v. Barney, 114 Cal. 554, 47 Pac. 41.

[4] Smith v. Richmond, 19 Cal. 476; Preston v. Keys, 23 Cal. 193; Ellis v. Tone, 58 Cal. 289; Williamson v. Tobey, 86 Cal. 497, 25 Pac. 65.

The provisions of other codes with respect to special instructions vary widely in some instances, and with one or two exceptions, are not the same as that of California. Section 1409, Revised Statutes of Arizona, is as follows: "Either party may, before the charge is given, present to the court, in writing, such instructions as he desires to have given to the jury, and for this purpose a reasonable time therefor shall be given; the court shall pass on the same, and either give or refuse the same as asked." It would thus appear that instructions specially requested must be either given or refused as asked, and that they cannot be modified; but the point is an open one.

Section 4385, Revised Codes of Idaho, is identical with that of California quoted in the text. Section 6746, Revised Codes of Montana, subdivision 5, provides for the giving of instructions on the request of the parties, in the following language: "The

The foregoing constitutes the result of the decisions under the old Practice Act, which contained no special provision on the subject. The Code of Civil Procedure embodied the result of the decisions in a section, as follows:

"Sec. 609. Where either party asks special instructions to be given to the jury, the court must either give such instructions as requested, or refuse to do so, or give the instruction with a modification, in such manner that it may distinctly appear what instructions were given in whole or in part."

It is believed that this section does not change the pre-existing rules.

court shall pass upon the objections to the instructions requested and also those proposed to be given by the court, and shall either give each instruction as requested or positively refuse to do so, or give the instruction requested with a modification." Section 2994, Compiled Laws of New Mexico, provides for instructions to be given upon request of the parties, and section 2995 provides that such instructions may be given "as demanded," or "with a modification." Section 7021, Revised Codes of North Dakota, contains the following provisions: ". . . . Either party may request instructions to the jury. And all instructions asked for by the counsel shall be given or refused by the court without modification or change, unless modified or changed by consent of counsel asking the same." Section 339, Rem. & Bal. Wash. Code (section 4993, Bal. Code), provides that "either party may request such instructions as he deems material to the case," but nothing is said about modification, or as to the giving or refusing of the same. Section 132, Lord's Oregon Laws, which deals with the subject of the charge of the court, contains no provision as to the giving of instructions upon the request of the parties. Section 4499, Compiled Statutes of Wyoming, subdivision 7, provides for the giving of special instructions on the request of the parties, much in the same phraseology used in the California code, and provides that "the court shall either give such instructions as requested, or positively refuse to do so; or give the instructions with modifications."

The general rule, which may be said to govern in all cases, without regard to the jurisdiction, requires the court to give the instruction asked, if appropriate and proper, and a correct instruction, unless it has been given already, or is covered by another instruction, couched in more general terms; but it need not be given in the exact language made use of by counsel. Thus it has been held to be error to refuse an instruction not covered by another, if it is applicable to the case. Last Chance etc. Co. v. Ames, 23 Colo. 167, 47 Pac. 382; Marsh v. Cramer, 16 Colo. 331, 27 Pac. 169. So in Walling v. Warren, 2 Colo. 434, it was held that a party could not complain if a requested instruction, though not given in the exact words, is given in substance; and in Columbia etc. Co. v. Hawthorne, 3 Wash. Ter. 353, 19 Pac. 25, it was held that a requested instruction might be given in a differently numbered one.

A requested instruction should be given without modification, if applicable, rather than others of a more general nature. State v. McCann, 16 Wash. 249, 47 Pac. 443, 49 Pac. 216. But the court is not bound to give an instruction in the language as requested, even though it be correct, but may use different language. Veseley v. Engelkemeier, 10 Okl. 290, 61 Pac. 924. On the other hand, the court is not bound to modify an instruction, though partly right, if not entirely correct, and it is sufficient

§ 125. Repetition of Instructions.—The parties have a right to have the jury fully instructed on every material point in the case. But they have no right to have prominence given to any particular point by having the instructions repeated; and, therefore, the refusal of an instruction, correct in itself and applicable to the evidence, but substantially given in another portion of the charge, is not error. Thus in People v. Strong,[1] Currey, C. J., delivering the opinion, said: "But, the principles which are inculcated by these requested instructions are clearly set forth in others given, and in the general charge of the court to the jury. If upon examination of the instructions given we see that all in substance which the defendant asked for and was entitled to was fully and fairly submitted to the jury, we cannot presume he was injured by the refusal of the court to reiterate the same thing even though submitted in a different form." So in People v. Ah Chung,[2] Morrison, C. J., delivering the opinion, said: "It may be remarked here that as a general rule it is not the duty of the *nisi prius* court to state the law to the jury more than once, neither is it the duty of such court to make the closing argument in behalf of the defendant in a criminal case by giving a multiplicity of instructions,

ground for refusal that an instruction cannot be given without modification. Garlick v. Bowers, 66 Cal. 122, 4 Pac. 1138; Friedman v. Weisz, 8 Okl. 392, 58 Pac. 613; Howe v. West Seattle etc. Co., 21 Wash. 594, 59 Pac. 495; Croft v. N. W. etc. Co., 20 Wash. 175, 55 Pac. 42; Blackmore v. Neale, 15 Colo. App. 49, 60 Pac. 952; Condie v. Rio Grande etc. Co., 34 Utah, 237, 97 Pac. 120; Allen v. Shires, 47 Colo. 439, 107 Pac. 1072; Evans v. Oregon etc. Co. (Utah), 108 Pac. 638; Gill v. Schneider, 48 Colo. 382, 110 Pac. 62; Frederick v. Hale, 42 Mont. 153, 112 Pac. 70.

The court may, if it chooses, modify an instruction that is partly right and partly wrong (Rangenier v. Seattle etc. Co., 52 Wash. 401, 100 Pac. 842); and if, as modified, it is in substance as requested, the party requesting cannot complain that the same words are not used (Gottstein v. Seattle etc. Co., 7 Wash. 424, 35 Pac. 133); but an instruction must be wholly correct or its refusal cannot be successfully assigned as error. Sanders v. Cline, 22 Okl. 154, 101 Pac. 267.

Again, stating the proposition differently, if an offered instruction is correct in legal effect, and clearly applicable, it is error to refuse to give it; but the court may, in its discretion, modify such an instruction, and give it in substance. Conrad v. Graham Co., 54 Wash. 641, 132 Am. St. Rep. 1137, 103 Pac. 1122; Burch v. Southern Pacific Co. (Nev.), 104 Pac. 225.

The following decisions illustrate the above principles: Jenkins v. Tynon, 1 Colo. App. 133, 27 Pac. 893; King v. Rea, 13 Colo. 69, 21 Pac. 1084; Bingham v. Lipman, 40 Or. 363, 67 Pac. 98; Hickey v. Rio Grande etc. Co., 29 Utah, 392, 82 Pac. 29; Smith v. Michigan etc. Co., 43 Wash. 402, 86 Pac. 652; Ramm v. Hewitt etc. Co., 49 Wash. 263, 94 Pac. 1081; Gibson v. Doyle etc. Co. (Utah), 106 Pac. 512; Harris v. Brown's Bay etc. Co., 57 Wash. 8, 106 Pac. 152; Speight v. Rocky Mountain Co. (Utah), 107 Pac. 742; Hall v. North West etc. Co., 61 Wash. 352, 112 Pac. 369.

[1] 30 Cal. 151.

[2] 54 Cal. 398.

slightly varied in phraseology, but amounting to the same thing in substance. It is the duty of the court to deal fairly with the defendant, and to that end it should state the principles of law applicable to the case clearly, distinctly, and intelligibly; and when that has been done the court has fully discharged its duty."

So in Estate of McKenna,[2a] upon the subject of repetition of instructions, it was said:

"Both sides prepared instructions on the law applicable to the issues, and the court contented itself with confining its charge to the giving of such of them as it deemed correct. It refused one requested by contestants, defining what constituted a sound and disposing mind, which it is claimed should have been given. But, as the instructions of contestants which were given, as likewise those of proponent, fully and clearly enlightened the jury on that point, no complaint will lie because the court did not accumulate definitions on the subject."

So in People v. Smith,[2b] where, with reference to the refusal of the court to give instructions, the court said:

"As the record, however, shows that the instructions given by the court of its own motion embraced the same principles of law contained in the instructions asked by the defendant, he has no valid ground of complaint that the instructions tendered by him embodying the same principles were refused."

So in People v. Carson;[2c]

"It is clear from the record that some of the instructions tendered by the appellant and refused by the court were substantially contained in other instructions given by the court, hence, appellant has no ground of complaint as to their refusal."

This principle applies alike to civil and criminal cases.[3]

[2a] 143 Cal. 580, 77 Pac. 461.

[2b] 151 Cal. 619, 91 Pac. 511.

[2c] 155 Cal. 164, 99 Pac. 970.

[3] The rule as to repetition of instructions received support in the following cases:

Arizona: Greene v. Hereford, 12 Ariz. 85, 95 Pac. 105; Title etc. Co. v. Nichols, 12 Ariz. 405, 100 Pac. 825; Southern Pacific Co. v. Hogan (Ariz.), 108 Pac. 240; Southern Pacific Co. v. Svensden (Ariz.), 108 Pac. 262.

California: Fairchild v. California Stage Co., 13 Cal. 599; People v. Graham, 21 Cal. 261; People v. Strong, 30 Cal. 151; People v. Dick, 32 Cal. 213; People v. Williams, 32 Cal. 280; People v. Murray, 45 Cal. 137; People v. Davis, 47 Cal. 93; People v. Ah Chung, 54 Cal. 398; Siemers v. Eisen, 54 Cal. 418; Phenix M. & M. Co. v. Lawrence, 55 Cal. 143, 13 Morr. Min. Rep. 261; People v. Ramirez, 56 Cal. 533, 38 Am. Rep. 73; People v. Hope, 62 Cal. 291; People v. Gray, 66 Cal. 271, 5 Pac. 240; Dufour v. C. P. R. R. Co., 67 Cal. 319, 7 Pac. 769; Bullard v. Stone, 67 Cal. 477, 8 Pac. 17; People v. Treadwell, 69 Cal. 226, 10 Pac. 502; People v. Pacheco, 70 Cal.

It was formerly held in criminal cases that although it was not incumbent upon a judge to give the same instruction twice, yet that

473, 11 Pac. 761; People v. McCoy, 71 Cal. 395, 12 Pac. 272; People v. Bush, 71 Cal. 602, 12 Pac. 781; People v. Giancoli, 74 Cal. 642, 16 Pac. 510; People v. Madden, 76 Cal. 521, 18 Pac. 402; People v. Doane, 77 Cal. 560, 20 Pac. 84; People v. O'Brien, 78 Cal. 41, 20 Pac. 359; Castagnino v. Balletta (Cal.), 21 Pac. 1097; People v. Swalm, 80 Cal. 46, 13 Am. St. Rep. 96, 22 Pac. 67; De Noon v. Morrison, 83 Cal. 163, 23 Pac. 374, 16 Morr. Min. Rep. 33; Fox v. Harvester etc. Co., 83 Cal. 333, 23 Pac. 295; People v. Adams, 85 Cal. 235, 24 Pac. 629; Richards v. Travelers' Ins. Co., 89 Cal. 170, 23 Am. St. Rep. 455, 26 Pac. 762; People v. Cowgill, 93 Cal. 596, 29 Pac. 228; People v. Douglass, 100 Cal. 1, 34 Pac. 490; People v. Roney, 100 Cal. 376, 34 Pac. 862; Kahn v. Brilliant (Cal.), 35 Pac. 309; Stevens v. Railroad Co., 100 Cal. 554, 35 Pac. 165; O'Rourke v. Vennekohl, 104 Cal. 254, 37 Pac. 430; People v. Neary, 104 Cal. 373, 37 Pac. 943; Higgins v. Williams, 114 Cal. 176, 45 Pac. 1041; Tonini v. Cevasco, 114 Cal. 266, 46 Pac. 103; People v. Barney, 114 Cal. 554, 47 Pac. 41; Verdelli v. Gray's Harbor etc. Co., 115 Cal. 517, 47 Pac. 364, 778; O'Brien v. Ballou, 116 Cal. 318, 48 Pac. 130; Wise v. Wakefield, 118 Cal. 107, 50 Pac. 310; People v. Elliott, 119 Cal. 593, 51 Pac. 955; People v. Burns, 121 Cal. 529, 53 Pac. 1096; Clark v. Bennett, 123 Cal. 275, 55 Pac. 908; People v. Benc, 130 Cal. 159, 62 Pac. 404; Cook v. Los Angeles etc. Co., 134 Cal. 279, 66 Pac. 306; Harrington v. Los Angeles Ry. Co., 140 Cal. 514, 98 Am. St. Rep. 85, 74 Pac. 15; In re McKenna's Estate, 143 Cal. 580, 77 Pac. 461; Davis v. Diamond etc. Co., 146 Cal. 59, 79 Pac. 596; Cody v. Market Street Ry. Co., 148 Cal. 90, 82 Pac. 666; People v. Cook, 148 Cal. 334, 83 Pac. 43; Henderson v. Los Angeles Traction Co., 150 Cal. 689, 89 Pac. 976; Central Pacific Co. v. Feldman, 152 Cal. 303, 92 Pac. 849; People v. Davis, 1 Cal. App. 8, 81 Pac. 716, 88 Pac. 1101; People v. Olsen, 1 Cal. App. 17, 81 Pac. 676; Bowen v. Sierra Lumber Co., 3 Cal. App. 312, 84 Pac. 1010; Lanigan v. Neely, 4 Cal. App. 760, 89 Pac. 441; Giacomini v. Pacific Lumber Co., 5 Cal. App. 218, 89 Pac. 1059; Wistrom v. Redlick Bros., 6 Cal. App. 671, 92 Pac. 1048; Fleischhauer v. Fabens, 8 Cal. App. 30, 96 Pac. 17; Braly v. Fresno etc. Co., 9 Cal. App. 417, 99 Pac. 400; People v. Baldocchi, 10 Cal. App. 42, 101 Pac. 28; Klein v. Atchinson, 12 Cal. App. 285, 107 Pac. 147; Roberts v. Sierra etc. Co., 14 Cal. App. 180, 111 Pac. 519, 527.

Colorado: Kansas etc. Co. v. Ward, 4 Colo. 30; Gaynor v. Clements, 16 Colo. 209, 26 Pac. 324; Farmer v. Phelps, 18 Colo. 126, 31 Pac. 768; Davis v. Shepherd, 31 Colo. 141, 72 Pac. 57, 22 Morr. Min. Rep. 575; Vindicator etc. Co. v. Firstbrook, 36 Colo. 498, 86 Pac. 313, 10 Ann. Cas. 1108; Colorado Midland Co. v. Snider, 38 Colo. 351, 88 Pac. 453; Bailey v. Carlton, 43 Colo. 4, 95 Pac. 542; Rio Grande etc. Co. v. Boyd, 44 Colo. 119, 96 Pac. 781; Denver etc. Co. v. Bacon, 44 Colo. 166, 96 Pac. 974; Denver etc. Co. v. Martin, 44 Colo. 324, 98 Pac. 836; Fidelity etc. Co. v. Colorado etc. Co., 45 Colo. 443, 103 Pac. 383; Colorado Midland Co. v. Brady, 45 Colo. 203, 101 Pac. 62; Mahler v. Beishline, 46 Colo. 603, 105 Pac. 874; Bonnet v. Foote, 47 Colo. 282, 107 Pac. 252; Allen v. Shires, 47 Colo. 439, 107 Pac. 1072; Greeley etc. Co. v. Von Trotha, 48 Colo. 12, 108 Pac. 985; Colorado Springs Co. v. Allen, 48 Colo. 4, 108 Pac. 990; Gutshall v. Cooper, 48 Colo. 160, 109 Pac. 428; Doty v. Heizer, 48 Colo. 490, 111 Pac. 67; Denver etc. Co. v. Howe (Colo.), 112 Pac. 779; A. Westman Co. v. Park, 2 Colo. App. 545, 31 Pac. 945; Beck v. Trimble, 14 Colo. App. 195, 59 Pac. 412; Baldwin v. Central Savings Bank, 17 Colo. App. 7, 67 Pac. 179; Denver etc. Co. v. Rush, 19 Colo. App. 70, 73 Pac. 664; Catlin etc. Co. v. Euster, 19 Colo. App. 117, 73 Pac. 846.

Idaho: North v. Woodland, 12 Idaho, 50, 85 Pac. 215, 6 L. R. A., N. S., 912; Younie v. Blackfoot etc. Co., 15 Idaho, 56, 96 Pac. 193; Roseborough v. Whittington, 15 Idaho, 100,

when it was requested a second time, the judge must state as his reason for refusing it, that it had been already given, and that if

96 Pac. 437; Maloney v. Winston, 18 Idaho, 757, 111 Pac. 1086.

Montana: Largey v. Mantel, 26 Mont. 264, 67 Pac. 114; Paxton v. Woodward, 31 Mont. 195, 107 Am. St. Rep. 416, 78 Pac. 215, 3 Ann. Cas. 546; Gallick v. Bordeaux, 31 Mont. 328, 78 Pac. 583; Hagerty v. Montana etc. Co., 38 Mont. 69, 98 Pac. 643, 25 L. R. A., N. S., 356; Longpre v. Big Blackfoot etc. Co., 38 Mont. 99, 99 Pac. 131; Montague v. Hanson, 38 Mont. 376, 99 Pac. 1063.

Nevada: State v. Anderson, 4 Nev. 265; State v. McLane, 15 Nev. 345; Murphy v. Southern Pacific Co., 31 Nev. 120, 101 Pac. 322; Burch v. Southern Pacific Co. (Nev.), 104 Pac. 225.

New Mexico: Pearce v. Strickler, 9 N. M. 467, 54 Pac. 748; Cunningham v. Springer, 13 N. M. 259, 82 Pac. 232; Schmidt v. Southwest etc. Co., 15 N. M. 232, 107 Pac. 677.

Oklahoma: Sovereign Camp etc. v. Welch, 16 Okl. 188, 83 Pac. 547; Higgins v. Street, 19 Okl. 45, 92 Pac. 153, 13 L. R. A., N. S., 398, 14 Ann. Cas. 1086; Citizens' Bank v. Garnett, 21 Okl. 220, 95 Pac. 755; Dunlap v. Flowers, 21 Okl. 600, 96 Pac. 643; Coalgate Co. v. Hurst, 25 Okl. 588, 107 Pac. 657; Finch v. Brown, 27 Okl. 217, 111 Pac. 391.

Oregon: Roth v. Northern Pacific Co., 18 Or. 205, 22 Pac. 842; Bank v. Blum, 27 Or. 215, 41 Pac. 659; Lieuallen v. Mosgrove, 37 Or. 446, 61 Pac. 1022; Stamper v. Raymond, 38 Or. 16, 62 Pac. 20; Boyd v. Portland etc. Co., 40 Or. 126, 66 Pac. 576, 57 L. R. A. 619; Crossen v. Grandy, 42 Or. 282, 70 Pac. 906; Anderson v. Oregon etc. Co., 45 Or. 211, 77 Pac. 119; Barnes v. Leidigh, 46 Or. 43, 79 Pac. 51; Pacific etc. Co. v. North Pacific etc. Co., 46 Or. 194, 80 Pac. 105; Baines v. Coos Bay etc. Co., 49 Or. 192, 89 Pac. 371; McGregor v. Oregon etc. Co., 50 Or. 527, 93 Pac. 465, 14 L. R. A., N. S., 668; Galvin v. Brown, 53 Or. 598, 101 Pac. 671; Donohoe v. Portland etc. Co. (Or.), 107 Pac. 964.

Utah: Martin v. Hill, 3 Utah, 157, 2 Pac. 62; Cunningham v. Union Pacific Co., 4 Utah, 206, 7 Pac. 795; Reddon v. Union Pacific Co., 5 Utah, 344, 15 Pac. 262; Scoville v. Salt Lake City, 11 Utah, 60, 39 Pac. 481; Konold v. Rio Grande etc. Co., 21 Utah, 379, 81 Am. St. Rep. 693, 60 Pac. 1021; Fritz v. Western Union Co., 25 Utah, 263, 74 Pac. 209; Spiking v. Consolidated etc. Co., 33 Utah, 313, 93 Pac. 838; Herndon v. Salt Lake City, 34 Utah, 65, 131 Am. St. Rep. 827, 95 Pac. 646; Davidson v. Utah etc. Co., 34 Utah, 249, 97 Pac. 124; Wall etc. Co. v. Continental etc. Co., 36 Utah, 121, 103 Pac. 242; Morris v. Oregon etc. Co., 36 Utah, 14, 102 Pac. 629; Evans v. Oregon etc. Co. (Utah), 108 Pac. 638; Holt v. Nielson (Utah), 109 Pac. 470.

Washington: Spokane etc. Co. v. Hoefer, 2 Wash. 45, 26 Am. St. Rep. 842, 25 Pac. 1072, 11 L. R. A. 689; Brown v. Porter, 7 Wash. 327, 34 Pac. 1105; Curry v. Catlin, 12 Wash. 322, 41 Pac. 53; Carstens v. Stetson etc. Co., 14 Wash. 643, 45 Pac. 313; Einseidler v. Whitman Co., 22 Wash. 388, 60 Pac. 1122; Fleischner v. Beaver, 21 Wash. 6, 56 Pac. 840; Howay v. Going etc. Co., 24 Wash. 88, 64 Pac. 135, 85 Pac. 942, 6 L. R. A., N. S., 49; Wolf v. Hemrich etc. Co., 28 Wash. 187, 68 Pac. 440; Moran etc. Co. v. Snoqualmie etc. Co., 29 Wash. 292, 69 Pac. 759; Roberts v. Port Blakeley etc. Co., 30 Wash. 25, 70 Pac. 111; Von Tobel v. Stetson etc. Co., 32 Wash. 683, 73 Pac. 788; Towle v. Stimson Mill Co., 33 Wash. 305, 74 Pac. 471; Morrison v. Northern Pacific Co., 34 Wash. 70, 74 Pac. 1064; Go Fun v. Fidalgo etc. Co., 37 Wash. 238, 79 Pac. 797; Curtis v. Barber etc. Co., 44 Wash. 334, 87 Pac. 345; Hanstad v. Canadian Pacific Co., 44 Wash. 505, 87 Pac. 832; Noren v. Larson etc. Co., 46 Wash. 241, 89 Pac. 563; Ranous v. Seattle etc. Co., 47 Wash. 544, 92 Pac. 382; Ramm v. Hewitt etc. Co., 49 Wash. 263, 94 Pac. 1081; Heinzerling v. Agen, 49 Wash. 647, 96 Pac. 223; Olsen v. Tacoma etc. Co., 50 Wash. 128, 96 Pac. 1036; Engelker v. Seattle etc. Co., 50 Wash. 196, 96 Pac. 1039; Duskey v. Green Lake etc. Co., 51 Wash. 145, 98 Pac. 99; Akin v. Bradley etc. Co., 51 Wash. 658, 99 Pac. 1038; Kinnane v. Conroy,

he failed to so state, the judgment would be reversed.[4] The reason given for the ruling was that unless such statement was made, the jury would be apt to be confused by hearing the instructions refused. Possibly when these decisions were rendered it was the practice to request instructions orally. But for some time it has been the almost universal practice to request instructions in writing; and in Waldie v. Doll[5] it is said that it is improper to request instructions in such a manner that the jury can hear them before they are passed upon by the court. Most of the superior courts have rules upon the subject. It is manifest that where the instructions are requested in writing the reason above given does not apply. No mention of the cases above cited appears to have been made in subsequent decisions. But in People v. Ramirez[6] the point was made and overruled, McKee, J., saying: "The omission to mark the instructions refused, because they had been given already, if an error, is an immaterial one, which could not prejudice the defendant." The rule does not appear to have ever been asserted in any civil case.

Although instructions need not be repeated, it has been said that in criminal cases it is better to repeat them if desired.[7] But there

52 Wash. 651, 101 Pac. 223; Passage v. Stimson etc. Co., 52 Wash. 661, 101 Pac. 239; Gage v. Springston etc. Co., 53 Wash. 108, 101 Pac. 501; Spencer v. Arlington, 54 Wash. 259, 103 Pac. 30; State v. Superior Court, 55 Wash. 64, 104 Pac. 148; Johnson v. Caughren, 55 Wash. 125, 104 Pac. 170; Soderburg v. Wells, 57 Wash. 281, 106 Pac. 751; Weed v. Foster, 58 Wash. 675, 109 Pac. 123; Tecklenberg v. Everett etc. Co., 59 Wash. 384, 109 Pac. 1036; In re Westlake Avenue, 60 Wash. 549, 111 Pac. 780; Merrill v. Stevens, 61 Wash. 28, 112 Pac. 353.

It is not error to give the converse of a proposition already given. Clark v. Carlisle etc. Min. Co., 5 N. M. 323, 21 Pac. 356.

It is not error to refuse an instruction when one more favorable covering the same ground has already been given. De St. Aubin v. Field, 27 Colo. 414, 62 Pac. 199; Atchison etc. Co. v. Cahill, 11 Colo. App. 245, 52 Pac. 1111; Duncan v. Borden, 13 Colo. App. 481, 59 Pac. 60; Osborne v. Phenix etc. Co., 23 Utah, 428, 64 Pac. 1103.

As a corollary of the rule that where the general instruction covers the proposition a special instruction will not be given, it has been held that an instruction dealing with the issue in the abstract will not or need not be given when an instruction in the concrete has already been given. Condie v. Rio Grande etc. Co., 34 Utah, 237, 97 Pac. 120.

[4] People v. Hurley, 8 Cal. 390; People v. Ramirez, 13 Cal. 172; People v. Williams, 17 Cal. 142; People v. Douglass, 100 Cal. 1, 34 Pac. 490.

[5] 29 Cal. 555. See, also, People v. Kelly, 28 Cal. 423.

[6] 56 Cal. 533, 38 Am. Rep. 73; and see People v. Douglass, 100 Cal. 1, 34 Pac. 490.

[7] In People v. Lachamais, 32 Cal. 433, Sanderson, J., delivering the opinion, said: "We have held that it was not error to refuse to give an instruction, though unobjectionable in all respects, where the jury have been already instructed fully upon the point to which the instruction is directed; but we have done so with reluctance,

must necessarily be some limit to this. Where the instruction given fully and fairly states the law applicable to the facts in the case, and the requested instruction can have no other effect than to lend an unwarranted emphasis to the principle of law, or to the facts upon which it rests, it can hardly be said that the defendant has been deprived of any of his fundamental rights, or that his right to a fair trial has been in any wise abridged by the refusal of the court to repeat its instructions. On the other hand, if the instruction given is couched in brief, general, or colorless phraseology in comparison with the instruction asked and refused, and the latter contains nothing more than a correct statement of the law, it is manifest that the defendant has been prejudiced by such refusal.[8] It cannot be said, in such a case, that there is any such repetition as the courts had in mind when the rule has been applied.

§ 126. Time for Requesting Instructions.—It seems to be settled that a party must present his instructions in time to permit the judge to examine them, and that if he does not do so they may be refused. This was held in Anderson v. Parker.[1] In that case, at the conclusion of the trial, which occupied several days, the defendant's counsel handed to the judge fifty-eight written instructions covering some twenty pages of manuscript. The judge remarked that he had no time to examine them, and charged the jury without reference to the requested instructions. The supreme court affirmed the judgment, and Terry, J., delivering the opinion, said: "Some of the instructions asked are undoubtedly proper, and would have been given except under the circumstances of the case. We think if counsel desired that such a number of instructions should be given, it was at least his duty to have presented them to

and we have repeatedly suggested that the court in such cases ought to give the instruction, and not take the chances of this court looking at the matter in the same light. (People v. King, 27 Cal. 507, 87 Am. Dec. 95; People v. Williams, *supra*.) Suppose the result to be that the law is twice stated, it does no harm. No harm would be done if it was stated three times. On the contrary, it might in many cases result in good. What appears plain and easy of comprehension to bench and bar does not always appear so to those who occupy the jury-box. It would be strange if it did. The better and safer course is for the court never to refuse an instruction asked on behalf of a defendant in a criminal case, to which there is no valid objection, and district attorneys ought never to object to such instructions." See, also, People v. Strong, 30 Cal. 151; People v. Murray, 41 Cal. 66.

[8] See People v. Cook, 148 Cal. 334, 83 Pac. 43.

[1] 6 Cal. 197.

the court before or during the argument in the cause, in order that the judge might have arrived at a knowledge of their contents, and be able advisedly to give or refuse them. As this was not done, it was not, we conceive, incumbent on the judge to stop the progress of the cause, and keep the jury in their box until he should be able to investigate the various legal propositions contained in the instructions." It may be affirmed from this case, as well as upon principle, that the party cannot be allowed to keep back his instructions until it is too late for the judge to properly examine them. But beyond this the cases are somewhat conflicting. Most of the trial courts have rules requiring the parties to hand in their instructions before the argument commences. There is some doubt as to whether such a rule would be upheld if the judge had time to examine the instructions, as will appear from the following examination of the decisions.

In People v. Sears,[2] the defendant, at the conclusion of the argument, asked for two instructions which were neither long nor complicated. The judge refused to give them "for the reason that the rule of court required written instructions to be handed to the court before the argument of the case commenced." The supreme court held that the instructions were erroneous, and that it was immaterial whether the reason assigned by the judge for refusing them was good or bad. But in relation to such reason Baldwin, J., delivering the opinion, said: "The court had a right to make the rule for its own government, and that of counsel; and we see nothing in this case to show any such unjust and injurious operation of it as to induce us to interfere, if we could do so in any case, to reverse a judgment because it had been enforced in a particular instance. It is true that injustice may be done a defendant in some cases by refusing to consider instructions because not offered before the argument, since such instructions may be necessary in consequence of the propositions or argument of the prosecuting attorney. In such cases the court should either give the instructions of defendant or make such explanations of its own as would put the law correctly before the jury." It is to be observed of this case that the principal ground for sustaining the action of the court below was that the instructions did not correctly state the law; and in addition that the supreme court distinctly recognized the fact that

[2] 18 Cal. 635.

in many cases such a rule might operate unjustly, but does not say whether in such case it would interfere.

The subsequent case of Waldie v. Doll,[3] however, distinctly decides the validity of the rule in question. Neither the record nor the report of the case shows the precise time in which the instructions were required by the rule to be presented. It is probable, however, that the rule was that the instructions should be presented before the commencement of the argument. The report shows that the instructions, two in number, were not presented within the time required by a rule of court, and refused by the judge for that reason, and because they were not correct in point of law. The supreme court affirmed the judgment, and Currey, C. J., delivering the opinion, said: "These requested instructions were refused for two reasons, as stated by the judge in writing, as follows: 'First, that the same are not law; and second, that under the rule of court they are not asked in time.' If either of the reasons assigned by the judge for refusing to instruct the jury as requested be valid, the refusal cannot be alleged as error. Without saying whether the requested instructions were good law or otherwise, we think the court was justified in rejecting them because they were not submitted as required by a rule of the court. (People v. Sears, 18 Cal. 635.)"

So far the cases cited are in support of the validity of the rule requiring counsel to submit their instructions before the commencement of the argument. But the power of the court to make such a rule was questioned in a very forcible *dictum* in People v. Williams.[4] The rule in question in that case required the counsel having the opening argument to submit such instructions as he intends to ask to opposite counsel in advance of the argument of the latter, and required the counsel having the reply to submit his instructions in advance of the closing argument on the other side. The judge refused an instruction asked by the defense on the ground that it was not presented as required by the rule. In relation to this Sanderson, J., delivering the opinion of the majority of the court, said: "Had there been any plausible ground for an instruction on the question of venue, we should feel inclined to hold that the court erred in refusing to give the instruction which was requested upon that subject. A court may undoubtedly regulate

[3] 29 Cal. 555.
[4] 32 Cal. 280; but see dissenting opinion of Sawyer, J.

the order of its business by rules which do not conflict with law, or do not impair the legal rights of parties, but it may well be doubted whether a rule of the character of the one under review may not in many cases work injustice if strictly adhered to. Independent of rules, a party would have a right to submit his instructions at any time before the jury leave the box. Counsel are better advised after hearing the argument than they can be before, and are therefore better prepared to frame their instructions at the close of the argument than at any previous stage of the trial. Counsel have a right to shape their instructions so as to rebut the theories of the other side as well as advance their own, and it may sometimes happen that they cannot do this to their entire satisfaction until after such theories have been fully presented; and it may therefore well be doubted, under all the circumstances, whether a rule which requires counsel to submit their instructions in advance of the argument, or while it is in progress, if it is to be strictly adhered to, has anything to recommend it. It is true that certain general instructions involving matters of definition and the like can be readily prepared before the argument, but the more valuable and useful part of the charge—that which deals directly with the particular facts of the case and the opposing theories of counsel—cannot; besides, the former is generally prepared and given by the court of its own motion, while the latter receives, or should receive, the especial attention of counsel. It will rarely fail to happen that subjects for instruction not previously thought of will be suggested or occur to counsel pending the argument or after its close; and as one of the objects of giving instructions is to present the law of the case fully, and not partially, it would hardly be consistent with that object to reject matters of perhaps vital importance merely because they did not occur to counsel at or before a given stage in the proceedings, and if such was the case here, we should feel inclined to hold it error, as being an abuse of discretion. Rules of court should be framed in furtherance of justice; but they may sometimes, if strictly adhered to, work the other way. They are always under the control of the court, and if there is any reason to apprehend the latter result, they should be made to yield to the superior calls of justice."

In People v. Demasters,[5] where the trial judge was asked to give an instruction upon the "degrees" of the offense charged, in

[5] 105 Cal. 669, 39 Pac. 35.

accordance with the provisions of section 1159, Penal Code, and refused to do so, on the ground, as stated, that a rule of court required a party who desired instructions given to present them to the court before argument, and "that it did not like to take chances on giving an instruction on the spur of the moment," the supreme court, in reversing the judgment and order, said:

"The court erred in not instructing the jury as requested. Section 1127 of the Penal Code provides: 'In charging the jury the court must state to them all matters of law necessary for their information.' Section 1159 of the Penal Code provides: 'The jury may find the defendant guilty of any offense, the commission of which is necessarily included in that with which he is charged, or of an attempt to commit the offense'; and a charge of an assault with intent to commit mayhem, murder, robbery, or any offense involving violence to the person, necessarily includes the assault. The rule of court referred to may be proper and beneficial as a *general* rule, and, when applied to doubtful and controverted questions of law, ought to be usually adhered to; but, as was said in Pickett v. Wallace, 54 Cal. 148: 'Rules of court are but a means to accomplish the ends of justice, and it is always in the power of the court to suspend its own rules, or except a particular case from their operation whenever the purposes of justice require it.' The instruction desired by defendant was one usually given by courts of their own motion. If the court had overlooked it and counsel had not called the attention of the court to the omission, a different question would be presented; but in this case the observance of the rule operated to subvert its object, viz., to promote the purposes of justice."

In People v. Silva,[8a] counsel for defendant, in the course of his argument to the jury, and again before the court finished its instructions to the jury, asked for an instruction as to the testimony of an accomplice under section 2061, Code of Civil Procedure, and the request was refused on the ground that the request had not been handed up to the court in writing before the argument, as required by the rules of the court. In reversing the judgment and order, the court said:

"The rule of court that instructions requested by a party must be given to the court, in writing, before the argument begins, is eminently proper. Its purpose is to give to the court an opportu-

[8a] 121 Cal. 668, 54 Pac. 146.

nity to determine the correctness and propriety of the instruction, and thus prevent errors and promote justice; but when the strict observance of the rule would operate to defeat or impede justice, it is always in the power of the court to suspend the rule, and it is its duty to do so. The request here made did not come within the reason or the spirit of the rule, and should have been granted. It was in the language of the code and the occasion was proper."

It will be noted that the last two cases cited presented occasions when it was the duty of the court below to give the instructions asked for without a request, and that in one, at least (People v. Demasters), it was intimated that otherwise a different rule would have been applicable. The only other utterance upon the subject to be found is the passing remark of McKinstry, J., in Robinson v. W. P. R. R. Co.,[5b] that "with respect to written instructions prepared by counsel the court can protect itself from the consequences of a hasty perusal and adoption of them by a rule providing that they shall be submitted to counsel on the other side and be presented for approval and settled before the argument begins."

In this condition of the authorities, if one might venture an opinion, it would be that such a rule as the one above considered ought not always to be upheld, and that the true question, in cases where instructions are refused because not presented at a given stage of the trial, is, Had the court sufficient time to properly examine them? This question would depend very much upon the circumstances of the particular case, such as the time which the judge actually had, the length and complexity of the instructions, and the nature of the legal proposition involved. Manifestly no one is in a better situation to decide whether sufficient time was allowed for the examination of the instructions than the judge himself, and his decision upon the question would be disturbed only for an abuse of discretion.

Even if the rule that the court may require instructions to be presented before the argument, without reference to the question of opportunity for their examination is to prevail, it would not apply to cases submitted without argument.[6]

[5b] 48 Cal. 409.

[6] Tinney v. Endicott, 5 Cal. 102. Statutory provisions fix both the time for giving instructions generally and the time for requesting instructions specially, with respect to the closing of the testimony and the making of the argument, so that there need be no real difficulty. Section 1407, Revised Statutes of Arizona (section 198, Civil Practice), provides for the delivery of the charge of the

Section 614, Code of Civil Procedure, provides for the request by the jury, after they have retired, in case of disagreement, of further instructions upon any point of law involved in the case. The court may, at such time, confine itself to instructions upon the particular point suggested, or it may, in its discretion, go beyond the same. Such instructions will be governed by the same rules as instructions given in the regular way.[7]

§ 127. Exceptions to Erroneous Instructions.—Errors in instructions are "errors in law occurring at the trial,"[1] and as such the language of the seventh subdivision has heretofore required that they be excepted to. Accordingly, it has always been held that instructions, however erroneous, would not be ground for a new trial unless excepted to.[2] So if an instruction was given with a modification, such modification was required to be excepted to.[3] It was no excuse that the trial had been conducted by a person not versed in the law, and it was held that the failure of such a person to except to the ruling of the court as to instructions to the

court "before the argument"; and section 1409 (section 200, Civil Practice) provides that "either party may, before the charge is given, present to the court, in writing, such instructions as he desires to have given to the jury." The same (last noted) section also provides that "for this purpose, a reasonable time therefor shall be given." This means, of course, a reasonable time after the close of the testimony, since instructions cannot, in any case, be given before that juncture.

Section 132, Lord's Oregon Laws, fixes the time for the general charge at the conclusion of the argument. Section 339, Rem. & Bal. Code (section 4993, Bal. Code), provides for the court's charge at the conclusion of the testimony, and prior to the argument, and that the requested instructions shall be given at the same time. Section 4499, Compiled Statutes of Wyoming, contains similar provisions.

In Flint v. Nelson, 10 Utah, 261, 37 Pac. 479, it was held that requests for instructions are too late when asked after the charge to the jury has been delivered.

[7] People v. McKay, 122 Cal. 628, 55 Pac. 594.

See section 39, *ante*, note 1, for corresponding provisions of other codes.

[1] See section 101, *ante;* and look at sections 100 and 107, *ante*.

[2] See Maeris v. Bicknell, 7 Cal. 261, 68 Am. Dec. 257; Holverstot v. Bigby, 13 Cal. 43; Collier v. Corbett, 15 Cal. 183; Wilkinson v. Parrott, 32 Cal. 102; McCoy v. California Pacific R. R. Co., 40 Cal. 532, 6 Am. Rep. 623; Russell v. Dennison, 45 Cal. 337; Chester v. Bower, 55 Cal. 46; Clark v. His Creditors, 57 Cal. 639; Sierra etc. Water Co. v. Baker, 70 Cal. 572, 8 Pac. 305, 11 Pac. 654; Lynn v. Southern Pacific Co., 103 Cal. 7, 36 Pac. 1018, 24 L. R. A. 710; Merguire v. O'Donnell, 103 Cal. 50, 36 Pac. 1033; Garoutte v. Williamson, 108 Cal. 135, 4 Pac. 35, 413; Williams v. Southern Pacific Co., 110 Cal. 457, 42 Pac. 974; Anderson v. Hinshaw, 110 Cal. 682, 43 Pac. 389; Bryant v. Broadwell, 140 Cal. 490, 74 Pac. 33; Story v. Nidiffer, 146 Cal. 549, 80 Pac. 692; Randall v. Freed, 154 Cal. 299, 97 Pac. 669; Fleischauer v. Fabens, 8 Cal. App. 30, 96 Pac. 17.

[3] Lightner v. Menzel, 35 Cal. 452.

jury was fatal.[3a] So, it was held, an instruction not excepted to became the law of the case on appeal.[3b] No particular form of exception was required.[4] But the portion of the charge excepted to must have been specifically pointed out as hereinafter explained; and the exception must have been addressed to the court and not as an aside to the reporter.[5]

By an amendment to the code, adopted in 1907,[5a] the necessity of taking an exception to an order "modifying, giving, or refusing to give, in whole or in part, an instruction to the jury," was dispensed with, and in Randall v. Freed,[6] it was plainly intimated that the amendment would be held effective for the purpose. It is to be noted, however, that the amendment applies only to section 647, Code of Civil Procedure. The question has not been decided or even raised, as to the effect of the amendment upon subdivision 7 of section 657, where errors in law occurring at the trial are required to be excepted to, if it is desired to use them as ground for a new trial. If it is held that exceptions to rulings upon instructions are to be dispensed with in all respects, it is obvious that the decisions cited in this and the following sections are to be regarded as nugatory as authority in the future. Until such ruling is adopted, the question must be regarded as still open.[7]

§ 128. Exceptions to the Judge's Charge must be Specific.—It will be convenient to consider, first, the existence of the rule and the cases in which it applies, and, second, what is a sufficient compliance with it.

1. *Existence of the Rule, and When It Applies.*—The rule itself is well settled. In the case of Rider v. Edgar[1] the presiding justice of department one, delivering the opinion, said: "It is the established rule that exceptions to the oral charge of the court below must be specific, and point out the particular portions of the charge claimed to be objectionable. (Sill v. Reese, 47 Cal. 294, and cases there cited.) The rule is equally applicable where, as in this case, counsel shall subsequently claim that all the propositions laid

[3a] Randall v. Freed, 154 Cal. 299, 97 Pac. 669.

[3b] Lynn v. Southern Pacific Co., 103 Cal. 7, 36 Pac. 1018, 24 L. R. A. 710.

[4] Section 648, California Code of Civil Procedure.

[5] Coleman v. Gilmore, 49 Cal. 340.

[5a] Section 647, California Code of Civil Procedure, amended 1907 (Stats. 1907, p. 715).

[6] 154 Cal. 299, 97 Pac. 669.

[7] See note 3, section 119, *ante*.

[1] 54 Cal. 127.

down in the charge are objectionable. This rule is one of practice which must apply without exception. It follows that we cannot inquire whether the court below erred in respect to the whole or any portion of the oral charge."

The rule laid down in this case is entirely in accord with the decisions.[2] But it applies only to the oral charge of the judge, and not to written instructions given or refused. The reason of the rule is that in the course of an oral charge a judge will often fall into errors and inaccuracies which he would readily correct were his attention called to them; the counsel, being listeners, are much more apt to notice such errors than the person speaking; and it is manifestly in furtherance of justice that an opportunity should be afforded the judge of correcting any error into which he may have inadvertently fallen. But there is not the same chance of inadvertence when the judge has the written instructions before the charge begins. In such case he has opportunity to weigh and reflect upon them, and his action upon them may fairly be presumed to have been deliberate, and not inadvertent. Accordingly, it has been held that it is sufficient if the party states generally that he excepts to the written instruction (designating it), which he claims to be erroneous. Such an exception will be good, although the instruction designated embraces several legal propositions. In this regard Rhodes, J., delivering the opinion in Shea v. P. & B. V.

[2] Payne v. Treadwell, 16 Cal. 220; Hicks v. Coleman, 25 Cal. 122, 85 Am. Dec. 103; Sill v. Reese, 47 Cal. 294; Robinson v. W. P. R. R. Co., 48 Cal. 409; Brown v. Kentfield, 50 Cal. 129; Rogers v. Mahoney, 62 Cal. 611; Dixon v. Allen, 69 Cal. 527, 11 Pac. 179; Cockrill v. Hall, 76 Cal. 192, 18 Pac. 318; Frost v. Grizzly etc. Co., 102 Cal. 525, 36 Pac. 929; Bernstein v. Downs, 112 Cal. 197, 44 Pac. 557; Gray v. Eschen, 125 Cal. 1, 57 Pac. 664; Wales v. Pacific etc. Co., 130 Cal. 521, 62 Pac. 932, 1120. Under this rule the following were deemed sufficiently excepted to: Rogers v. Mahoney, 62 Cal. 611; Bernstein v. Downs, 112 Cal. 197, 44 Pac. 557; Wales v. Pacific etc. Co., 130 Cal. 521, 62 Pac. 932, 1120. See, also, Sukeforth v. Lord, 87 Cal. 399, 25 Pac. 497, where the particular exception was held sufficient to the special charge there in question, but it was said it would perhaps have not been held sufficient to the general charge of the court. See Joyce v. White, 95 Cal. 236, 30 Pac. 524, where the court held the specification of error in the statement on motion for new trial insufficient. In a subsequent case it seems to have been mistaken as a ruling on the subject of exceptions to instructions. See Bernstein v. Downs, 112 Cal. 197, 44 Pac. 557.

The necessity for specific exceptions to instructions objected to as erroneous was clearly outlined in People v. Hart, 10 Utah, 204, 37 Pac. 330, where the authorities were collected, the court saying, "This rule is established in nearly every state in the Union, and the rule applies to civil as well as criminal cases." The rule was subsequently changed by statute, however, in most of the states referred to in the citations attached.

R. R. Co.,[8] said: "The plaintiff makes the point that as the exception went to the whole instruction, and as the instruction contains several propositions, some of which are law, the exception is of no avail. The plaintiff's objection cannot be sustained. It has been the constant practice of this court to entertain an exception to an instruction given at the request of one of the parties, though it be composed of several legal propositions. The rule in that respect is not the same as it is in the case of an exception to the charge of the court. In the latter case the party excepting must point out the portion of the charge to which objection is made; but if a party procures the court to give an instruction which is composed of several legal propositions the opposite party is not required to particularly specify the proposition which he deems objectionable. Whether the distinction is well founded or not it is sufficient to say that such is the long-established practice of this court."

Upon the principle of the foregoing case, and upon the reason upon which the exception to the rule is founded, it would seem that in the case of written instructions it is sufficient for the party to state generally that he excepts to the giving of each written instruction given at the request of his opponent, and to the refusal of each written instruction requested by himself, without designating any particular written instruction. But no case has been found which goes to this length. In the case above quoted it appeared from the record that the party had designated a particular written instruction, although he had not specified the particular proposition contained in such instruction. Whether the rule would be carried to the extent above mentioned cannot be answered in the absence of a decision. But if not, there is still a distinction between the oral charge and instructions requested in writing, viz., that in the former case it is necessary to point out the particular proposition excepted to, while in the latter it is sufficient to designate a particular instruction, although it may consist of a number of propositions.

2. *What Exceptions to an Oral Charge are Sufficient.*—The rule requires that the party should point out the particular portion of the charge to which he excepts. A statement in the record

[8] 44 Cal. 414; look at Robinson v. W. P. R. R. Co., 48 Cal. 409. Also see Cavallaro v. Texas etc. Co., 110 Cal. 348, 52 Am. St. Rep. 94, 42 Pac. 918; Williams v. Casebeer, 126 Cal. 77, 58 Pac. 380.

that the defendant "excepted to all of said charge" does not show a specific exception;[4] and the specific pointing out must be actually done. It is not sufficient for the party to merely *say* that he does it. Thus where the exception was stated to have been reserved in this way: "The defendant's counsel excepted to the said charge to the jury, and specifically to each and every portion thereof," it was held to be insufficient.[5]

All that is necessary, however, is that the precise portion of the charge should be pointed out. It is not necessary for the counsel to state the reasons why he considers such portion objectionable. This seems to have been decided in Rogers v. Mahoney.[6] The action was for malicious prosecution, and the exception was "to that part of the charge about probable cause," reciting the first sentence of the part referred to. This was held to be sufficient, the court saying: "The exception to the portion of the charge objected to was sufficiently specific under the rule laid down in Hicks v. Coleman, 25 Cal. 146 [85 Am. Dec. 103]; Sill v. Reese, 47 Cal. [294] 348; and Robinson v. Railroad Co., 48 Cal. 409. The whole charge cannot be excepted to generally. The exception should be sufficiently specific to call the attention of the court to the alleged error. Here the counsel excepted 'to that part of the charge about probable cause,' reciting the first sentence employed by the court in treating that subject. We think this was enough." In this case it will be observed that the court does not expressly say that it is not necessary to state the reasons why the portion excepted to is considered erroneous; but the exception held to be sufficient simply points to a particular portion of the charge without stating any reason whatever, and that could not have been sufficient had a statement of reasons been necessary.[7] It is not necessary that the record should show the precise language in which an exception to a charge was taken. A statement that the party "duly excepted" will be construed to mean that he took his exceptions in the proper manner.[8]

[4] Payne v. Treadwell, 16 Cal. 220. See, also, Brown v. Kentfield, 50 Cal. 129.

[5] Page v. Lynch, 8 Pac. C. L. J. 497.

[6] 62 Cal. 611; and see Frost v. Grizzly Bluff Co., 102 Cal. 525, 36 Pac. 929.

[7] See subdivision (a) below.

[8] McCreery v. Everding, 44 Cal. 246; Bowman v. Cudworth, 31 Cal. 148; Sukeforth v. Lord, 87 Cal. 399, 25 Pac. 497; Cavallaro v. Texas etc. Co., 110 Cal. 348, 52 Am. St. Rep. 94, 42 Pac. 918.

As will be observed, there are several differences between the course above pointed out and the procedure which obtains in relation to evidence. These differences and the reasons thereof are as follows:

(*a*) The rule that exceptions to instructions must be specific is not the same as the rule that objections to evidence must be specific. In the first place an objection to the admissibility of evidence is, as already shown,[9] an objection before decision, while an exception to an instruction is an objection after a decision. In the next place, the requirement that objections to evidence shall be specific means that the party must state *why* he objects; or, in other words, that he shall state (concisely and in ultimate language) the legal principles he relies on.[10] But the requirement that exceptions to a charge must be specific means merely that the party must designate or point out the particular portion to which he objects; in other words, that he must state, not why he excepts, but what he excepts to. The reason of this difference is that a ruling upon the admissibility of evidence is merely an order that the evidence be admitted or rejected, as the case may be. It is not a statement of the legal principles involved, and unless the party were required to state such principles, they would not necessarily be adverted to at all. But a charge is itself a statement of the legal principles involved, and there is nothing left for the party to do but to designate the particular part of the charge which he objects to. Nothing more could be required of him except to state the contrary of the principles laid down by the judge, which would be useless, or to make an argument as to its correctness which would be out of place.

(*b*) An exception to an instruction corresponds to a great extent to an *exception* to the admission or rejection of evidence.[11] But there is this difference between them, viz., that in taking an exception to the admission or rejection of evidence, it is sufficient for the party to simply state that he excepts, or takes or reserves an exception, without specifying what he excepts to, while in excepting to a charge it is necessary to point out the particular portion excepted to. The reason of this difference is that rulings upon the admissibility of evidence are made one at a time; each ruling is separate and distinct from every other; and the

[9] See section 103, *ante*.
[10] See section 105, *ante*.
[11] See section 107, *ante*.

exception must be taken at the time and before any other ruling is made. It is manifest that an exception so taken is not applicable to any other ruling, and could not possibly be understood to apply to anything else than the ruling to which it is taken. In such case there is no necessity for specifying what the party excepts to, that feature being apparent on the face of the proceedings. But a charge consists of many propositions blended together, and the party cannot be allowed to interrupt the judge with his exceptions, but must wait until the whole charge is finished. Manifestly, there are many things to which a general exception could apply; and if at the conclusion of the charge the party merely says that he takes or reserves an exception, it cannot be known to what particular proposition he has reference, and the attention of the judge would not be called to what might be the result of mere inadvertence. He is therefore required to point out specifically what portion of the charge he objects to.

(c) In the case of evidence the party, as has been shown, must first object to the admissibility of the evidence, and then except to the ruling upon his objection. But as was said by Belcher, J., delivering the opinion in McCreery v. Everding,[12] it is not necessary in the case of a charge to first object and then except. An exception after the charge is finished is all that is necessary. The reason of this difference is this: If no objection be taken to the admission of evidence there is no decision in regard to it, and therefore there is nothing to which an exception can be taken; for an exception "is an objection upon a matter of law *to a decision.*"[13] But in the case of a charge each proposition laid down is in effect a decision upon a question arising out of the evidence; consequently there is no necessity for a previous objection, as in the case of evidence; only an exception is required.[14]

[12] 44 Cal. 246. The learned justice said: "If the exception be to an instruction given by the court, it is quite unnecessary that the record should show an objection by counsel with the reasons for such objection, and then an order of the court overruling the objection, followed by the words, 'we except,' etc. No such formal mode of proceeding is generally observed at *nisi prius*, and we see no good to arise from its adoption."

[13] Section 546, California Code of Civil Procedure; look at People v. Torres, 38 Cal. 141.

[14] The following cases illustrate the rules as to exceptions in the various states outside of California:

An exception to a general charge without pointing out the particular in which the error consists will be insufficient. This is the general rule. Keith v. Wells, 14 Colo. 321, 23 Pac. 991; Wray v. Carpenter, 16 Colo. 271, 25 Am. St. Rep. 265, 27 Pac. 248; Patrick v. Skoman, 1 Colo. App. 323, 29 Pac. 21; Edwards v. Smith, 16 Colo. 529, 27 Pac. 809; Holman v. Boston etc. Co., 8 Colo. App. 282, 45 Pac. 519; Willard v. Williams, 10

§ 129. Exceptions and Objections—Time for Taking.—As stated above, the amendment of 1907 to section 647, Code of Civil Procedure, clearly dispenses with the necessity for an exception to a ruling on an instruction, which formerly existed, as a prerequisite to review on appeal; and it is probable that an exception is no longer required under the seventh subdivision of section 657 of the Code of Civil Procedure, to obtain a review by motion for new trial.

Section 188 of the old Practice Act was as follows:

"An exception is an objection taken at a trial to a decision upon a matter of law, whether such trial be by jury, court, or referees, and whether the decision be made during the formation of a jury, or in the admission of evidence, or in the charge to a jury, or at

Colo. App. 140, 50 Pac. 207; Hoyt v. Macon, 2 Colo. 502; McFeters v. Pierson, 15 Colo. 201, 22 Am. St. Rep. 388, 24 Pac. 1076; Jacobs v. Mitchell, 2 Colo. App. 456, 31 Pac. 235; Kansas etc. Co. v. Ward, 4 Colo. 30; Mason v. Sieglitz, 22 Colo. 320, 44 Pac. 588; Schmidt v. Stecker, 3 Colo. 273; Denver v. Hyatt, 28 Colo. 129, 63 Pac. 403; Ruby etc. Co. v. Prentice, 25 Colo. 4, 52 Pac. 210; Denver etc. Co. v. Pulaski etc. Co., 11 Colo. App. 41, 52 Pac. 224; Adams Ex. Co. v. Aldridge, 20 Colo. App. 74, 77 Pac. 6; Schollay v. M. W. Co., 17 Colo. App. 126, 67 Pac. 182; Bradbury v. Alden, 13 Colo. App. 208, 57 Pac. 490; Denver etc. Co. v. Young, 30 Colo. 349, 70 Pac. 688; Rice v. Williams, 18 Colo. App. 330, 71 Pac. 433; Big Hatchet etc. Co. v. Colvin, 19 Colo. App. 405, 75 Pac. 605; Scott v. Astoria etc. Co., 43 Or. 26, 99 Am. St. Rep. 710, 72 Pac. 594, 62 L. R. A. 543;

This may be said to be a fair expression of the rule in other jurisdictions where exceptions are required. See, generally, the following: Nickum v. Gaston, 24 Or. 380, 33 Pac. 671, 35 Pac. 31; Bell v. Washington etc. Co., 8 Wash. 27, 35 Pac. 405; Dunham v. Holloway, 3 Okl. 244, 41 Pac. 140; Sexton v. School District, 9 Wash. 5, 36 Pac. 1052; Hamilton v. Great Falls etc. Co., 17 Mont. 334, 42 Pac. 860, 43 Pac. 713; Lichty v. Tannatt, 11 Wash. 37, 39 Pac. 260; Scoville v. Salt Lake City, 11 Utah, 60, 39 Pac. 481; People v. Berlin, 10 Utah, 39, 36 Pac. 199; Lowe v. Salt Lake City, 13 Utah, 91, 57 Am. St. Rep. 708, 44 Pac. 1050; Meeker v. Gardella, 1 Wash. 139, 23 Pac. 837; McKinstry v. Clark, 4 Mont. 370, 1 Pac. 759; Gum v. Murray, 6 Mont. 10, 9 Pac. 447; Woods v. Berry, 7 Mont. 195, 14 Pac. 758; Griswold v. Boley, 1 Mont. 545; Black v. Lewiston, 2 Idaho, 254, 276, 13 Pac. 80; Langford v. Jones, 18 Or. 307, 22 Pac. 1064; Maling v. Crummey, 5 Wash. 222, 31 Pac. 600; Snyder v. Viola etc. Co., 2 Idaho, 771, 26 Pac. 127; Marks v. Tomkins, 7 Utah, 421, 27 Pac. 6; Murray v. Murray, 6 Or. 17; Salomon v. Cress, 22 Or. 177, 29 Pac. 439; McDonough v. Great Northern Co., 15 Wash. 244, 46 Pac. 334; Anderson v. Harper, 30 Wash. 378, 70 Pac. 965; Glaser v. Glaser, 13 Okl. 389, 74 Pac. 944; Beaman v. Martha Washington Co., 23 Utah, 139, 63 Pac. 631; Wilson v. Sioux etc. Co., 16 Utah, 392, 52 Pac. 626; McAllister v. Long, 33 Or. 368, 54 Pac. 194; Haun v. Rio Grande etc. Co., 22 Utah, 346, 62 Pac. 908; Rush v. Spokane etc. Co., 23 Wash. 501, 63 Pac. 500; Allend v. Spokane etc. Co., 21 Wash. 324, 58 Pac. 244; Ross v. Saylor, 39 Mont. 559, 104 Pac. 864; Ryan v. Curlew etc. Co., 36 Utah, 382, 104 Pac. 218; Carroll v. Washington etc. Co., 56 Wash. 467, 105 Pac. 1026; Coffey v. Seattle, 59 Wash. 686, 109 Pac. 202; Gerber v. Etna etc. Co., 61 Wash. 184, 112 Pac. 272.

any other time from the calling of the action for trial to the rendering of the verdict or decision."[1]

As was said in St. John v. Kidd,[2] this section does not in terms fix the precise time at which the exception must be taken. But as has been stated, the object of requiring the party to take a specific exception is to call the judge's attention to what is claimed to be erroneous, so as to afford him an opportunity to correct the result of inadvertence. The correction must of course be made to the jury, and consequently cannot be made after they have retired, unless they be called back, which is undesirable for many reasons. Accordingly, the construction given to the above section was that the exception should be taken before the retirement of the jury. In Letter v. Putney[3] the exceptions were not taken until after the rendition of the verdict. They were held to have been too late, and the court said: "A party cannot first take his chances of a verdict, upon instructions given or refused without exception, and then afterward except to the action of the court upon a motion for new trial. Had he made his objections at the proper time the court might have ruled differently." In Collier v. Corbett[4] the court refused to examine the correctness of instructions, because they "were not excepted to at the time they were given or refused"; but the report does not show the precise time at which the exceptions were taken. In the subsequent case of Hicks v. Coleman,[5] Sawyer, J., delivering the opinion, "took occasion to remark" that exceptions to a charge should be taken "at the time of the trial, in order that the judge may have an opportunity, before the jury retires, to correct any error he may have inadvertently fallen into in drawing up the charge in the hurry and perplexities of the trial." In view of these cases it may be said that under

[1] Laws of 1851, p. 80.

Sections 1457 and 1463, Revised Statutes of Arizona, are sufficient authority for dispensing with formal exceptions to rulings upon instructions in that jurisdiction. So, also, does section 6784 of the Revised Code of Montana, in that state. Section 132, Lord's Oregon Laws, provides that the charge of the court shall be in writing and filed with the clerk; and section 172 dispenses with exceptions to rulings which are a part of the record. This would seem to dispense with the necessity of exceptions to rulings upon instructions. Subdivision 4 of section 339, Rem. & Bal. Code of Washington (section 4993, Bal. Code), provides that exceptions to instructions may be taken at any time prior to the hearing of the motion for a new trial.

[2] 26 Cal. 263, 4 Morr. Min. Rep. 454.

[3] 7 Cal. 423.

[4] 15 Cal. 183.

[5] 25 Cal. 122, 85 Am. Dec. 103. See, also, St. John v. Kidd, 26 Cal. 263, 4 Morr. Min. Rep. 454; and see Phelps v. Mayer, 15 How. (U. S.) 160, 14 L. ed. 643. See, also, Sharp v. Hoffman, 79 Cal. 404, 21 Pac. 846.

the old Practice Act the rule was that exceptions to a charge must be taken before the retirement of the jury. Section 646 of the Code of Civil Procedure, which corresponds to the section above quoted, provides, among other things, that: "The exception must be taken at the time the decision is made."[6] This establishes beyond question the rule which obtained under the old Practice Act. In Mallet v. Swain[7] the exceptions were taken immediately after the retirement of the jury. They were held to be too late, and Myrick, J., delivering the opinion of department two, said: "The statute requires that an exception be taken at the time of the ruling. This was not done. It was not error, therefore, for the court to refuse to note an exception at a subsequent time. There was ample time after the ruling, and before the jury retired to have taken an exception."

The rule, however, should not be extended beyond its object. If the instruction be such that the judge would not have changed it had exception been made before the jury retired, it is in his discretion to allow one afterward. This was held under the old Practice Act in St. John v. Kidd above cited. In that case the exception was taken after the retirement of the jury, but before the rendition of the verdict, and was allowed by the judge. On appeal Sanderson, C. J., delivering the opinion, said: "The one hundred and eighty-eighth section of the Practice Act thus defines an exception: 'An exception is an objection taken at the trial to a decision upon a matter of law, whether such trial be by jury, court, or referees, and whether the decision be made during the formation of the jury, or in the admission of evidence, or in the charge to a jury, or at any other time from the calling of the action for trial to the rendering of the verdict or decision.' This section does not in terms fix the precise time at which an exception must be taken, but it implies, we think, that the exception should be taken at the time the ruling is made; that is to say, before any further steps are taken or progress made in the trial, and in time to enable the opposite party or the court, as the case may be, to

[6] The section adds "except as provided in section 647." This latter section provides that the verdict, and certain other matters (not exceptions to instructions), shall be deemed to have been excepted to. Section 646, as quoted in the text, was enacted in 1876. But the section as first adopted contained equivalent language.

[7] 56 Cal. 171. And see Garoutte v. Williamson, 108 Cal. 140, 41 Pac. 35, 413, where it appeared that the exceptions were not taken until after the jury had retired to consider of their verdict, and it was held too late.

remedy the objection, if it be deemed a substantial one. The question is doubtless one which rests very much in the discretion of the court below, and which the district courts might regulate by a rule, as provided in the twenty-eighth section of the Judiciary Act. In the present case the court below allowed the exceptions, and we think it was not error to do so, and had the court refused to do so, we should have been of the same opinion."

There seems to be no good reason why the rule above laid down should not apply under the Code of Civil Procedure, at least to the extent in which it was applied in St. John v. Kidd; that is to say, that the judge may, in his discretion, allow the exception after the jury have retired, and before they have rendered their verdict. Probably the exception could be allowed at any time before the termination of the trial. Whether it could be allowed afterward may admit of some doubt. The question cannot be satisfactorily answered in the absence of a decision upon it.

§ 130. Exceptions to Instructions cannot be Reviewed if the Record Does not Show What the Evidence was, Except in the Case of an Instruction Given, Which is Erroneous in Every Conceivable State of the Evidence.—As will be hereafter shown,[1] every legitimate presumption is in favor of the judgment of the court below. Under this rule, if the evidence given at the trial be not in the record, it will be presumed that instructions given were justified by the evidence, and that instructions refused, even if correct in themselves, had no application to the evidence. The rule is well settled. With respect to instructions *given* it was first laid down in People v. McCauley.[2] In that case the instructions and exceptions were brought up without the evidence. Bennett, J., delivering the opinion, said: "The correctness or incorrectness of the charge to the jury cannot be determined without the court having before it the testimony from which alone can be seen the applicability of the charge. Instructions are always given with reference to the facts proved to the jury, and an instruction that would be perfectly sound in one case might be unsound in another. The propositions laid down by the court are all correct in certain cases; whether they fitted this case cannot be ascertained from the record. If the appellant desired to show that they were incorrect, he should have spread upon the record the testimony, or the facts in rela-

[1] Section 285, *post*.

[2] 1 Cal. 379.

tion to which the law was laid down by the court." The same doctrine was asserted and acted upon in subsequent cases.[3] In relation to *refusals* to instruct, the rule was laid down in Nelson v. Lennon,[4] in which case Terry, C. J., delivering the opinion, said: "In this case appellant assigns as error the refusal of the court to give certain instructions, but the record contains no statement of the evidence to show that the instructions asked had any relation to the facts proven. In White v. Wentworth, 3 Cal. 426 [White v. Abernathy], we held 'all intendments must be in favor of sustaining the judgment of courts of original jurisdiction, and to disturb such judgments it is not sufficient that error may have intervened, but it must be affirmatively shown by the record. Therefore the naked directions of a court, unaccompanied with any statement of facts, cannot satisfy us of substantial error, although some of the directions may not be in consonance with the rules of law. They may be in reference to the facts merely abstract, or only detrimental to the party not complaining of error, or totally inapt to mislead the jury.' This rule applies with much greater force to the refusal of the court to give instructions." The rule has been applied in subsequent cases.[5]

The rule suffers no exception in the case of refusals to instruct. But it is manifest that it is possible for the judge to announce propositions which would not be correct under any circumstances. And in such case it could not be presumed that evidence was given which warranted the instructions. Accordingly, it has been held that where instructions given are erroneous under every conceivable state of the evidence, exceptions to them will be sustained, although none of the evidence is in the record. Thus in People v.

[3] People v. Baker, 1 Cal. 403; White v. Abernathy, 3 Cal. 426; People v. Quincy, 8 Cal. 89; Nelson v. Mitchell, 10 Cal. 92; Beckman v. McKay, 14 Cal. 250; People v. Arnold, 15 Cal. 476; People v. Bonney, 19 Cal. 426; People v. Donahue, 45 Cal. 321; People v. Whitney, 53 Cal. 420; People v. Torres, 38 Cal. 141; Hinkle v. S. F. & N. P. R. R., 55 Cal. 627, 5 Morr. Min. Rep. 645; People v. Strong, 46 Cal. 302; People v. Williams, 75 Cal. 306, 17 Pac. 211; Carpenter v. Ewing, 76 Cal. 487, 18 Pac. 432; People v. O'Leary, 77 Cal. 30, 18 Pac. 856; People v. Olsen, 80 Cal. 122, 22 Pac. 125; People v. Donguli, 92 Cal. 607, 28 Pac. 782; Harris v. Barnhart, 97 Cal. 546, 32 Pac. 589; People v. Mendenhall, 135 Cal. 344, 67 Pac. 325; People v. Allen, 144 Cal. 298, 77 Pac. 948; People v. Wong Fook Sam, 146 Cal. 114, 79 Pac. 848.

[4] 10 Cal. 49.

[5] People v. Best, 39 Cal. 690; Brown v. Kenfield, 50 Cal. 129; People v. Smith, 57 Cal. 131; People v. Brotherton, 47 Cal. 388; Baldwin v. Bornheimer, 48 Cal. 433; People v. Gilbert, 60 Cal. 108; People v. Herbert, 61 Cal. 544; Harris v. Barnhart, 97 Cal. 546, 32 Pac. 589; Frost v. Grizzly Bluff Co., 102 Cal. 525, 36 Pac. 929.

Levison,[6] the judgment was reversed for the giving of a certain instruction, although the evidence was not brought up. And Baldwin, J., delivering the opinion, said: "It is true there is no statement in this case. But where the instructions are erroneous under any and every state of facts, then this court will review them. For it follows as necessarily that the court erred to the prejudice of the defendant when there is no statement as when one exists. If, however, the instructions may be correct under any supposed state of facts, as the appellant must show affirmative error, we presume in favor of the judgment below." This case has been followed in all subsequent ones relating to the matter.[7] It is to be observed in this regard, that where instructions given are erroneous under every conceivable state of the evidence, it may be presumed, in the absence of the evidence, that they were mere abstract propositions, having no relation to the case. Such would have to be the presumption under the rule that all legitimate presumptions must be made in support of the judgment. But as has been stated, an abstract instruction may be misleading, and if so will be ground for reversal.[8] And as will be shown hereafter,[9] if error be made to appear, injury from it is presumed, unless the contrary can be gathered from the record. So that in the absence of the evidence it must be presumed that an instruction which is erroneous in any conceivable state of the evidence misled the jury.

It is also to be observed that there are other modes of indicating what the evidence was than by a statement of it *in haec verba*. A brief statement of what it tended to prove is sufficient in most cases to point the instructions, and is preferable from its simplicity and conciseness. And upon the same principle, if it can be gathered from any portion of the record what was the character of the evidence, it is sufficient. Thus in People v. Dick,[10] none of the evidence was brought up, but the record showed that the judge in charging the jury assumed that "the evidence implicating or tending to implicate the defendant in the crime of which he was accused was of a circumstantial kind, and elaborated the subject of circumstantial evidence at great length before the jury"; but

[6] 16 Cal. 98, 76 Am. Dec. 505.

[7] People v. King, 27 Cal. 507, 87 Am. Dec. 95; People v. Dick, 32 Cal. 213; People v. Dick, 34 Cal. 663; People v. Torres, 38 Cal. 141; People v. Padillia, 42 Cal. 535; People v. Long, 39 Cal. 694; People v. Boney, 19 Cal. 426.

[8] See section 122, *ante*.

[9] See section 287, *post*.

[10] 32 Cal. 213.

refused two instructions asked by the defendant upon the subject, which were sound as legal propositions, and ought to have been given if they related to any portion of the evidence. The supreme court held that it sufficiently appeared that the instructions had relation to the evidence, and Currey, C. J., delivering the opinion, said: "It is not in all cases necessary, in order to ascertain that a fatal error has been committed, that the evidence should be before the court of review. If the action of the court of which complaint is made be manifestly erroneous under any and every conceivable state of facts, or under the facts and circumstances of the case *as they seemed to have been assumed by the court* that tried the cause, this court will not hesitate to review such action, notwithstanding the evidence may not be brought before us."

§ 131. How Instructions are to be Construed.—All the parts of a charge must be construed together. If, taken as a whole, the charge was substantially correct and could not have misled the jury, the judgment will not be disturbed.[1] In this regard Rhodes,

[1] The rule requiring the entire charge to be construed together, and isolated errors therein to be disregarded, if upon the whole charge it could be said that no prejudicial error had been committed, is of practically universal application, as will appear from the following partial list of decisions in which it was applied or sustained:

California: Carrington v. Pacific Mail S. S. Co., 1 Cal. 475; People v. Dennis, 39 Cal. 625; Livermore v. Stine, 43 Cal. 274; People v. Cleveland, 49 Cal. 577; People v. Nelson, 56 Cal. 77; Ellis v. Tone, 58 Cal. 289; People v. Morine, 61 Cal. 367; Wilson v. Southern Pacific Co., 62 Cal. 164; People v. McDowell, 64 Cal. 467, 3 Pac. 124; People v. Tomlinson, 66 Cal. 344, 5 Pac. 509; People v. McCurdy, 68 Cal. 576, 10 Pac. 207; People v. Kernaghan, 72 Cal. 609, 14 Pac. 566; People v. Lee Sare Bo, 72 Cal. 623, 14 Pac. 310; People v. Flynn, 73 Cal. 511, 15 Pac. 102; Hanscomb v. Drullard, 79 Cal. 234, 21 Pac. 736; Monaghan v. Rolling Mill Co., 81 Cal. 190, 22 Pac. 590; People v. Alsemi, 85 Cal. 434, 24 Pac. 810; People v. Ah Jake, 91 Cal. 98, 27 Pac. 595; Swain v. Fourteenth Street R. R., 93 Cal. 179, 28 Pac. 829; People v. Bruggy, 93 Cal. 476, 29 Pac. 26; Doty v. O'Neil, 95 Cal. 244, 30 Pac. 526; People v. Etting, 99 Cal. 577, 34 Pac. 237; Stephenson v. Southern Pacific Co., 102 Cal. 143, 34 Pac. 618, 36 Pac. 407; People v. Fehrenbach, 102 Cal. 394, 36 Pac. 678; Nichol v. Laumeister, 102 Cal. 658, 36 Pac. 925; People v. Anderson, 105 Cal. 32, 38 Pac. 513; People v. Leonard, 106 Cal. 302, 39 Pac. 617; People v. Gibson, 106 Cal. 458, 39 Pac. 864; People v. Wallace, 109 Cal. 611, 42 Pac. 159; People v. Shaughnessy, 110 Cal. 598, 43 Pac. 2; People v. Worden, 113 Cal. 569, 45 Pac. 844; People v. Armstrong, 114 Cal. 570, 46 Pac. 611; People v. Gleason, 122 Cal. 370, 55 Pac. 123; Portland Co. v. Murphy, 130 Cal. 649, 63 Pac. 70; People v. Jackson, 138 Cal. 462, 71 Pac. 566; Wilhelm v. Donegan, 143 Cal. 50, 76 Pac. 713; People v. Weber, 149 Cal. 325, 86 Pac. 671; Hamlin v. Pacific Electric Co., 150 Cal. 776, 89 Pac. 1109; Gomez v. Scanlan, 155 Cal. 528, 102 Pac. 12; Boin v. Spreckels, 155 Cal. 612, 102 Pac. 937; Parkin v. Grayson etc. Co., 157 Cal. 41, 106 Pac. 210; Big Three etc. Co. v. Hamilton, 157 Cal. 130, 137 Am. St. Rep. 118, 107 Pac. 301; Valente v. Sierra etc. Co., 158 Cal. 412, 111 Pac. 95; People v. Davis, 1 Cal. App. 8, 81 Pac. 716, 88 Pac. 1101; De Witt v. Floreston etc. Co., 7 Cal. App. 774, 96 Pac. 397.

Colorado: Union etc. Co. v. Rocky Mountain Bank, 2 Colo. 565; Thatcher

J., delivering the opinion in Bradley v. Lee,[2] said: "It seldom occurs that a single instruction, given for the purpose of present-

v. Rockwell, 4 Colo. 375; Finerty v. Fritz, 6 Colo. 136; Coleman v. Davis, 13 Colo. 98, 21 Pac. 1018; Dozenbeck v. Raymer, 13 Colo. 451, 22 Pac. 787; Simonton v. Rohm, 14 Colo. 51, 23 Pac. 86; Doherty v. Morris, 17 Colo. 105, 28 Pac. 85; De St. Aubin v. Field, 27 Colo. 414, 62 Pac. 199; Beals v. Cone, 27 Colo. 473, 83 Am. St. Rep. 92, 62 Pac. 948, 20 Morr. Min. Rep. 591; Davis v. Shepherd, 31 Colo. 141, 75 Pac. 57; McCormick v. Parriott, 33 Colo. 382, 80 Pac. 1040; Bailey v. Carlton, 43 Colo. 4, 95 Pac. 542; Denver etc. Co. v. Martin, 44 Colo. 324, 98 Pac. 836; Keefer v. Amicone, 45 Colo. 110, 100 Pac. 594; Denver etc. Co. v. Wright, 47 Colo. 336, 107 Pac. 1074; Grimes v. Greenblatt, 47 Colo. 495, 107 Pac. 1111; Gill v. Schneider, 48 Colo. 382, 110 Pac. 62; Idaho etc. Co. v. Colorado etc. Co. (Colo.), 111 Pac. 553; Denver etc. Co. v. Howe (Colo.), 112 Pac. 779; Hurd v. Atkins, 1 Colo. App. 449, 29 Pac. 528; Curr v. Handley, 3 Colo. App. 54, 31 Pac. 939; Pickett v. Handy, 9 Colo. App. 357, 48 Pac. 820; Hindree v. McPhee, 11 Colo. App. 398, 53 Pac. 389; Denver etc. Co. v. Martine, 12 Colo. App. 299, 55 Pac. 743; Ames v. Patridge, 13 Colo. App. 407, 58 Pac. 341; Blackman v. Edsall, 17 Colo. App. 429, 68 Pac. 790; Colorado Springs etc. Co. v. May, 20 Colo. App. 204, 77 Pac. 1093.

Idaho: Whitney v. Cleveland, 13 Idaho, 558, 91 Pac. 176; Tarr v. Oregon etc. Co., 14 Idaho, 192, 125 Am. St. Rep. 151, 93 Pac. 957; Barrow v. Lewis Co., 14 Idaho, 698, 95 Pac. 682; Just v. Idaho etc. Co., 15 Idaho, 639, 133 Am. St. Rep. 140, 102 Pac. 381; Anderson v. Great Northern Co., 15 Idaho, 513, 99 Pac. 91.

Montana: Hamilton v. Great Falls Co., 17 Mont. 334, 42 Pac. 860, 43 Pac. 713; Stephens v. Elliott, 36 Mont. 92, 92 Pac. 45; Harrington v. Butte, 36 Mont. 478, 93 Pac. 640; Frederick v. Hale (Mont.), 112 Pac. 70.

Nevada: Christensen v. Floriston etc. Co., 29 Nev. 552, 92 Pac. 210.

Oklahoma: Chicago etc. Co. v. Johnson, 25 Okl. 760, 107 Pac. 662; Great Western etc. Co. v. Davidson etc. Co., 26 Okl. 626, 110 Pac. 1096.

Oregon: Smitson v. Southern Pacific Co., 37 Or. 74, 60 Pac. 907; Bank v. Woodell, 38 Or. 294, 61 Pac. 837, 65 Pac. 520; Cederson v. Oregon etc. Co., 38 Or. 343, 62 Pac. 637, 63 Pac. 763; Wadhams v. Inman-Poulsen Co., 38 Or. 143, 63 Pac. 11; La Grande etc. Co. v. Shaw, 44 Or. 416, 72 Pac. 795, 74 Pac. 919; Beadle v. Paine, 46 Or. 424, 80 Pac. 903; Ridings v. Marion Co., 50 Or. 30, 91 Pac. 22.

Utah: Anderson v. Daly, 16 Utah, 28, 50 Pac. 815; McCornick v. Mining Co., 23 Utah, 71, 63 Pac. 820; Downey v. Gemini, 24 Utah, 431, 91 Am. St. Rep. 798, 68 Pac. 414; Olsen v. Oregon etc. Co., 24 Utah, 460, 68 Pac. 143; Morgan v. Mammoth etc. Co., 26 Utah, 174, 72 Pac. 688; Rogers v. Rio Grande etc. Co., 32 Utah, 367, 125 Am. St. Rep. 876, 90 Pac. 1075; Gimnich etc. Co. v. Sorensen, 34 Utah, 109, 96 Pac. 121; Neesley v. Southern Pacific Co., 35 Utah, 259, 99 Pac. 1067; Cromeenes v. San Pedro etc. Co. (Utah), 109 Pac. 10.

Washington: Seattle etc. Co. v. Seattle, 6 Wash. 101, 32 Pac. 1058; Cameron v. Union etc. Line, 10 Wash. 507, 39 Pac. 128; Burns v. Woolery, 15 Wash. 134, 45 Pac. 894; Carstens v. Earles, 26 Wash. 676, 67 Pac. 404; Bell v. Spokane etc. Co., 30 Wash. 508, 71 Pac. 31; Gray v. Washington etc. Co., 30 Wash. 665, 71 Pac. 206; Hart v. Seattle etc. Co., 37 Wash. 424, 79 Pac. 954; Wikstrom v. Preston Hill Co., 48 Wash. 164, 93 Pac. 213; Barclay v. Puget Sound etc. Co., 48 Wash. 241, 93 Pac. 430, 16 L. R. A., N. S., 140; Portland etc. Co. v. Clarke Co., 48 Wash. 409, 93 Pac. 1083; Gage v. Springston etc. Co., 53 Wash. 108, 101 Pac. 501; St. John v. Cascade Co., 53 Wash. 193, 101 Pac. 833; Haskins v. Seattle etc. Co., 53 Wash. 184, 101 Pac. 836; Sudden v. Morse, 55 Wash. 372, 104 Pac. 645; Wiemann v. Jackman etc. Co., 57 Wash. 682, 107 Pac. 844; Olmstead v. Olympia, 59 Wash. 147, 109 Pac. 602; Caywood v. Seattle etc. Co., 59 Wash. 566, 110 Pac. 420; Shaw v. Woodland Co., 61 Wash. 56, 111 Pac. 1070; Coffer v. Erickson, 61 Wash. 559, 112 Pac. 643; Myhra v. Chicago etc. Co. (Wash.), 112 Pac. 939.

[2] 38 Cal. 362, 4 Morr. Min. Rep. 470. It was said in one case that "an

ing the law upon a point arising upon more than one fact, contains all the qualifications and provisos that would be necessary if no other instruction were given; but it is always intended that such instructions should be read, together with the other instructions upon the same point, or those involving a consideration of the same facts." So in People v. Doyell,[3] McKinstry, J., delivering the opinion, said: "If without straining any portion of the language it harmonizes as a whole, and fairly and correctly presents the law bearing on the issues tried, we will not disturb the judgment because a separate instruction does not contain all the conditions and limitations which are to be gathered from the entire text." So in People v. Kennedy,[4] Thornton, J., delivering the opinion of department two, said: "To arrive at the meaning of such directions, we must look to all the directions given to the jury by the court. The meaning of the court below cannot be fairly arrived at by a partial view of what the jury was told was the law by which they should be governed."

So in People v. Turcott[4a] the court held that "the sentences or separate parts of a charge should be read in connection with the context, and the instructions as a whole, and if, when so read, it appears that the jury was correctly instructed, the judgment will not be reversed because there is an apparent conflict between isolated sentences." So in Stephenson v. Southern Pacific Co.,[4b] it was held that "instructions are to be read and considered as a whole, and the fact that when taken separately some of them may fail to enunciate in precise terms, and with legal accuracy, propositions of law, does not necessarily render them erroneous; but it is sufficient if all the instructions taken together, and not being inconsistent with each other, or confusing, shall give to the jury a fair and just notion of the law on the point discussed." So in Murray v. White[4c] it was said: instructions are unobjectionable when they are sufficiently full, and considered together state the law of the case clearly and correctly, and not unfairly to the appellant. So in Doty v. O'Neil[4d] it was said:

instruction should be complete in itself." See Forsyth v. Bower, 54 Cal. 639.

[3] 48 Cal. 85. See, also, People v. Welch, 49 Cal. 174; People v. Nelson, 56 Cal. 77.

[4] 55 Cal. 201.

[4a] 65 Cal. 126, 3 Pac. 461. See, also, People v. Clark, 84 Cal. 573, 24 Pac. 313.

[4b] 102 Cal. 143, 34 Pac. 618, 36 Pac. 407. See, also, Feliz v. Feliz, 105 Cal. 1, 38 Pac. 521.

[4c] 82 Cal. 119, 23 Pac. 35.

[4d] 95 Cal. 244, 30 Pac. 526.

"In an action to recover the possession of personal property, involving a question of actual and continued change of possession, under the statute of frauds, where it is claimed by the defendant, upon appeal, that the instructions for plaintiff tended to mislead the jury to infer that merely constructive possession of the property was sufficient to uphold a transfer of the property to the plaintiff, as against an attaching creditor, the jury could not be misled, where the instructions taken together as a whole preclude such inference, and where it appears that even if the instructions objected to were not sufficiently definite as to the nature of the possession required, those given at the request of the defendant supplied the defect, and were not inconsistent therewith." So in People v. Tarm Poi,[4e] where there was a general statement in the charge that a defendant charged with murder might establish any fact essential to his defense, as *alibi*, by a preponderance of evidence, such charge was held to be objectionable in itself, but not injurious to defendant when there was a specific charge, relative to the defense of *alibi*, that if the evidence was sufficient, from the whole case, and a consideration of the entire testimony, to create a reasonable doubt as to whether the defendant was present at the time and place of the murder, he should be acquitted. So in People v. Chun Heong,[4f] with reference to the construction of instructions, the court said:

"We find that the court used language in its charge tending to confusion upon some points, but that the entire charge, construed together, is sufficiently accurate and free from substantial error,—at least error prejudicial to the defendant,—and conclude that the judgment must be affirmed."

So in Thomas v. Gates:[4g] "The whole charge should be taken together as the law of the case, and if it fairly and clearly states the law, it is not ground for reversal if there are verbal inaccuracies in the charge, or that isolated sentences and phrases are open to just criticism, but it is sufficient that the charge, regarded as an entirety, shows no substantial error."

So in People v. Besold [4h] the court said: "To determine whether or not the law was properly declared for the guidance of the

[4e] 86 Cal. 225, 24 Pac. 998. See, also, People v. Lattimore, 86 Cal. 403, 24 Pac. 1091, as to instructions as to *alibi* in general.

[4f] 86 Cal. 329, 24 Pac. 1021.

[4g] 126 Cal. 1, 58 Pac. 315.

[4h] 154 Cal. 363, 97 Pac. 871.

jury, we are to look, not at an isolated excerpt from the instructions, but to the charge as a whole."

It must be borne in mind, however, that although instructions may be qualified and supplemented by others, they must not be contradictory.[5]

Instructions must be construed with reference to the evidence in the case.[6]

§ 132. Miscellaneous Matters Relating to Instructions.—If the instructions be not brought up the supreme court will presume that the court below charged fully and correctly upon all the issues.[1] An erroneous instruction which produces no injury will not be ground for reversal.[2] Mere verbal criticism upon instructions will not be regarded.[3] If plaintiff be not entitled to recover upon the whole case, errors in instructions as to the defense will not be regarded.[4] Errors in instructions come within the general rule that if error be shown, injury from it will be presumed, unless the record show the contrary.[5]

It was formerly held that the jury must obey instructions even if erroneous, and that a verdict in disobedience to instructions would be "against law" and should be set aside for that reason.[6] But a contrary and saner view has been taken by the supreme court, and it is now settled that if it appear to the appellate tribunal that an instruction was erroneous, it will not disregard a verdict contrary to such erroneous instruction.[6a] It is not proper practice in requesting instructions to read the proposed instruc-

[5] See Davis v. Button, 78 Cal. 247, 18 Pac. 133, 20 Pac. 545; People v. Lee Chuck, 78 Cal. 317, 20 Pac. 719; Monaghan v. Pacific R. M. Co., 81 Cal. 190, 22 Pac. 590; People v. Hecher, 109 Cal. 451, 42 Pac. 307, 30 Cal. 403; Hanson v. Stinehoof, 139 Cal. 169, 72 Pac. 913; and see on the subject in general, section 123, *ante*. Also see People v. Ward, 105 Cal. 652, 39 Pac. 33.

[6] See Brummagin v. Bradshaw, 39 Cal. 24; People v. Graham, 21 Cal. 261.

[1] Garrison v. McGlockley, 38 Cal. 78; Tully v. Harloe, 35 Cal. 302, 95 Am. Dec. 102; Dawley v. Hovious, 23 Cal. 103.

[2] Hisler v. Carr, 34 Cal. 641; Bradley v. Lee, 38 Cal. 362, 4 Morr. Min. Rep. 470; Satterlee v. Bliss, 36 Cal. 489; and see section 286, *post*.

[3] Brooks v. Crosby, 22 Cal. 42; Phenix M. & M. Co. v. Lawrence, 55 Cal. 143, 12 Morr. Min. Rep. 261.

[4] Enright v. S. F. & S. J. R. R. Co., 33 Cal. 230; and see Hebrard v. Jefferson G. S. & M. Co., 33 Cal. 290, 5 Morr. Min. Rep. 270; Barth v. Clise, 12 Wall. 401, 20 L. ed. 393.

[5] McDougald v. Central R. R. Co., 63 Cal. 431. See, also, section 287, *post*.

[6] Emerson v. Santa Clara Co., 40 Cal. 543.

[6a] Loveland v. Gardner, 79 Cal. 317, 21 Pac. 766, 4 Pac. 395; Altoona etc. Co. v. Integral etc. Co., 114 Cal. 100,

tion in the presence of the jury.[7] A party cannot object to instructions requested by himself.[8] Instructions should not be numerous, and those given should be as simple and plain as possible, and cover the issues so that the jury fully understand them.[9] Instructions are for the enlightenment of the jury, and they should not be construed according to technical rules of law.[10] It is assumed that the jury understood the instructions when they contained a correct exposition of the law applicable to the case.[11]

45 Pac. 1047, 18 Morr. Min. Rep. 410; Edwards v. Wagner, 121 Cal. 376, 53 Pac. 821; O'Neill v. Thomas Day Co., 152 Cal. 357, 92 Pac. 856.

But see Murray v. Heinze, 17 Mont. 353, 42 Pac. 1057, 43 Pac. 714, and the cases there cited, which take the contrary view. Indeed, so long as it is made a ground for a new trial, it is not easy to see how the refusal of the jury to find in accordance with the instructions of the court can be regarded otherwise than as prejudicial. To hold as in the O'Neill v. Thomas case is to introduce a disturbing precedent into the entire law upon the subject.

In Schuyler v. Southern Pacific Co. (Utah), 109 Pac. 458, the court said: "It was the duty of the court to instruct the jury in matters of law; and the jury, as matter of duty, were bound to follow the instructions. Right or wrong, they were the law of the case for the jury to obey and follow. This they did not do."

[7] Waldie v. Doll, 29 Cal. 555; People v. Kelly, 28 Cal. 423.

[8] People v. Lopez, 59 Cal. 362; Harrison v. S. V. etc. Co., 65 Cal. 376, 4 Pac. 381; Sierra etc. Water Co. v. Baker, 70 Cal. 572, 8 Pac. 305, 11 Pac. 654; People v. Lon Yeck, 123 Cal. 246, 55 Pac. 984; People v. Holmes, 126 Cal. 462, 58 Pac. 917. And see Dawson v. Schloss, 93 Cal. 205.

[9] Estate of Keithley, 134 Cal. 9, 66 Pac. 5.

[10] People v. Bruggy, 93 Cal. 476, 29 Pac. 26.

[11] Henderson v. Los Angeles Traction Co., 150 Cal. 689, 89 Pac. 976.

CHAPTER XIX.

PAPERS ON WHICH THE MOTION MAY BE MADE.

§ 133. Scope of subject.
§ 134. Except when the motion is made on the minutes of the court, the record must be completed before the motion is heard and decided.

§ 133. The Motion may be Made in some cases upon affidavits, and in others upon a bill of exceptions, or a statement, or the minutes of the court. The cases in which these several kinds of moving papers are proper, the manner in which they are to be prepared, and their effect when settled, will be considered in the succeeding chapters.[1]

§ 134. Except Where the Motion is Made upon the Minutes of the Court, the Record must be Completed Before the Motion is Heard and Decided.—It will be convenient to divide this subject, and to consider the parts separately.

1. *The Rule and Its Application.*—Where the motion is made upon the minutes of the court it is to be heard and decided without any formal record. After the decision the grounds which were argued in support of the motion, together with so much of the evidence or other matter as may be necessary to explain such grounds, may be incorporated into a statement, which constitutes the record upon which the order may be reviewed. But in every other case the record upon the motion must be made up before

[1] For synopsis of statutory provisions see note 1, section 135, *post*. To the papers enumerated in the text may be added the *case* or *case-made* made use of in some states in connection with appeals and writs of error. While this paper is less a statement or bill of exceptions than a transcript or abstract of the record for purposes of review on appeal, and not intended for use at the hearing of the motion for new trial, it is noticed, prepared, presented, settled, engrossed, certified, etc., in accordance with rules of practice so nearly identical with those which prevail in connection with statements and bills of exceptions as to justify parallel treatment in the consideration of those papers. Wherever, therefore, in the succeeding chapters of this treatise, reference is made to statements and bills of exceptions, whether the same are prepared for use on review on appeal or on new trial motion, the paper designated "case" or "case-made" is also intended, in so far as such reference applies to the rules of practice governing the preparation, certification, etc., of those papers.

the motion is decided.[1] Otherwise the court would not be in a position to review its own action as to alleged errors, or as to whether the verdict is justified by the evidence, having no record either of errors or of the evidence.[1a] Moreover, such is the provision of the statute; and there is no provision (except where the motion is heard upon the minutes of the court) for making up the record after the decision upon the motion. The rule requiring the record to be complete before the motion is heard and decided is an absolute one, and cannot be disregarded. But the consequences of its nonobservance are different in different cases. If the motion be *granted* by the court below before the record is made up, the order granting the motion will be reversed.[2] This must necessarily be the case. For since there is no provision authorizing the making up of a record after the decision of the motion, and since the supreme court cannot derive its knowledge of the case otherwise than from a record, it cannot know what were the merits of the motion in the court below, nor whether it had any merits. Such being the case, the supreme court must either let all such orders stand or reverse them all; for there could be no more reason to reverse or affirm one than another. But to affirm all such orders would be equivalent in effect to declining to review them, and would leave the power of the court below to grant new trials entirely unchecked, and the party whose decision or verdict was set aside entirely without a remedy. The mere fact, therefore, that a new trial was granted by the court below without a record upon the motion is sufficient to call for a reversal of the order. But if the motion be *denied* without a record, the order denying it will be affirmed.[3] For the supreme court cannot know

[1] The text applies to civil cases only. It is otherwise in criminal cases. People v. Hewitt, 56 Cal. 117; People v. Fisher, 51 Cal. 319; People v. Ah Fat, 47 Cal. 631.

[1a] See Pereira v. City Savings Bank, 128 Cal. 45, 60 Pac. 524.

[2] Hill v. White, 2 Cal. 306; Hart v. Burnett, 10 Cal. 64; Budd v. Drais, 50 Cal. 120. See, also, cases where the record was not in time. The cases of Dickinson v. Van Horn, 9 Cal. 207, and Brady v. O'Brien, 23 Cal. 244, are in conflict with the rule. But these two cases are manifestly erroneous, and made no impression upon the practice.

[3] Linn v. Twist, 3 Cal. 89; Doyle v. Seawell, 12 Cal. 425; Smith v. Fagan, 17 Cal. 178, 1 Morr. Min. Rep. 87; Fee v. Starr, 13 Cal. 170; Visher v. Webster, 13 Cal. 58; McIntyre v. Willis, 20 Cal. 177; Hoadley v. Crow, 22 Cal. 265; Wilson v. Dougherty, 45 Cal. 34. Compare what is said in Thompson v. Connolly, 43 Cal. 636. The decision there was on the ground of a consent to the course taken. What is said in contravention of the principle above stated is mere *dictum*. In several cases where the motion was denied without a record the appeal has been dismissed. Cosgrove v. Johnson, 30 Cal. 509; Waggenheim v.

in this case any more than in the other what were the merits of the motion, and would be compelled either to reverse all such orders, or to let them all stand, there being no more reason to reverse or affirm one than another. But to reverse them all would be to leave out of account the negligence of the moving party, and to put it in his power to protract the litigation indefinitely. In the great majority of cases the absence of a record is caused by the negligence of the moving party; and it would not be in accordance with sound principles to allow him to take advantage of his own negligence to gain a reversal. And if the rule were otherwise than as above stated, all that the party against whom the case was decided would have to do in order to protract the litigation would be to make a motion for new trial without troubling himself to prepare a record in its support, and when it was denied, as it would have to be, take an appeal, and have a reversal on the ground of the absence of a record upon the motion, and repeat the process as often as it should be his pleasure to do so. The only practicable course, therefore, where the motion is denied without a record, is to affirm the order in all cases.[4]

Hook, 35 Cal. 216. A dismissal for such a cause is equivalent to an affirmance; but where the appeal is properly taken and perfected, it is more correct to affirm the order.

[4] Until the record on motion for new trial is made up the trial court is without jurisdiction to pass on the motion. This alone is a sufficient reason for the reversal of an order granting a new trial, and for the affirmance of an order refusing a new trial.

As to the early cases of Williams v. Gregory, 9 Cal. 76, and Dickinson v. Van Horn, 9 Cal. 207, see the observations in section 157, *post*. In the case of Lucas v. City of Marysville, 44 Cal. 210, the course taken seems to have been in violation of the rule above stated. In that case the motion for new trial was denied. The court below held that the parties had agreed to the statement as filed. The supreme court took a different view of the stipulation, and reversed the judgment on the ground that there was no settled statement. The report of the case does not show how the facts were presented to the supreme court. There seems to have been an appeal from an order denying the motion for new trial, and an appeal from an order refusing to settle the statement. The two appeals were separate, and the supreme court could not upon one appeal have looked at the record upon the other. And the statement in question could not have shown the facts, because it was complete before the facts occurred. The principles laid down were correct enough if the facts were before the court. But as above stated, it is not perceived how the facts upon which the decision was based were made to appear on the appeal from the order on motion for new trial. Inasmuch as the difficulty was not adverted to, and as the course taken by the majority of the court (Rhodes, J., dissented, and Belcher, J., expressed no opinion) is in conflict with the cases cited in note 3, and with the views stated in the text, it is thought that the course taken ought not to be followed. Possibly there may have been some stipulation as to what occurred in the court below.

However the earlier decisions may be regarded, those later follow the

2. *It is not a Matter of Practical Consequence in the Application of the Above Rule That the Moving Party was Without Fault.*—It makes no practical difference in the application of the general rule above explained that the decision of the motion before the completion of the record was not owing to the negligence of the moving party, or was against his protest. Whether the supreme court would affirm the order if it were made to appear that the moving party was without fault need not be speculated upon; for there is no mode provided by the statute in which the circumstances showing negligence, or the absence of it, can be made to appear *upon an appeal from the order upon the motion for new trial.*[5] Except where the motion is made upon the min-

principles laid down in the text unvaryingly. Thus in Sutton v. Symons, 100 Cal. 576, 35 Pac. 158, where the statement was stricken from the files, the order denying the motion for a new trial was affirmed. So in Symons v. Bunnell, 101 Cal. 223, 35 Pac. 770, where also the statement was stricken from the files, the supreme court held that the order denying the motion must be affirmed. So in Machado v. Kinney, 135 Cal. 354, 67 Pac. 331, where there was no statement, the order denying the motion was approved upon the authority of the first two cases, and of Henry v. Merguire, 106 Cal. 142, 39 Pac. 599, where the order granting a new trial was reversed, on the ground that there was no proper statement, the statement having been held to have been improperly settled.

As to criminal cases, what is said above (see note 1) applies solely to the hearing in the trial court, and it is not to be understood that a record may be dispensed with on an appeal in a criminal, any more than in a civil, case. The Penal Code makes ample provision for the making up of a bill of exceptions after the hearing of the motion (section 1174), and the want of such a record involves the appellant in the same kind of difficulty as the appellant in a civil case must meet. The appellate court is inclined to disregard technicalities in a criminal case, particularly where the life of the citizen is in issue, but no court, however well disposed toward the party it may be, can dispense with the necessity of a record. Thus in People v. Almendares, 136 Cal. 660, 69 Pac. 492, where the trial judge refused to settle a bill of exceptions because presented too late (notwithstanding the oft-expressed readiness of the supreme court to accept bills of exceptions in criminal cases, settled after the expiration of the statutory time), the supreme court affirmed the order refusing a new trial. It is true the court had before it the unsettled bill of exceptions, and said, in effect, that there was nothing therein to warrant any other action, even though it had been duly settled; but, it is believed, the same rule must have been followed in any event.

The following cases sustain the rule, holding to the necessity of settling and filing the statement before the hearing of the motion: Parrott v. Hot Springs, 9 S. D. 202, 68 N. W. 329; Plano etc. Co. v. Jones, 8 N. D. 315, 79 N. W. 338.

In the first of these cases the court held that the provisions of section 302, Code of Civil Procedure (see note 1, section 135, *post*), were mandatory. There must be a statement or a bill of exceptions, when the conditions referred to suggest the necessity for such a paper; or the motion must be upon the minutes, or upon affidavits, as the case requires; otherwise an order granting the motion cannot stand, or an order of denial must be affirmed.

[5] Such circumstances may be made to appear upon an independent motion to set aside the order on the motion for new trial, as explained in the next subdivision of this section.

utes of the court, it must be made upon a record which must be complete *before the decision of the motion.* Now, since the moving papers must be complete before the decision of the motion, they cannot possibly show the circumstances attending the decision, nor that there was any decision. The supreme court, therefore, cannot know from any legitimate record upon the motion, that there were any circumstances to take the case out of the operation of the rule above mentioned.[6] This seems clear upon principle and is not unsupported by authority. In Visher v. Webster[7] the noncompletion of the record was due to the fact that some of the instructions had been mislaid. The moving party asked the judge to delay the decision until the instructions could be found and the record completed. But the judge declined to do this and denied the motion for new trial. The order denying a new trial was affirmed by the supreme court, and Baldwin, J., delivering the opinion, said: "The judge must settle the statement. He is presumed to know what instructions he gave to the jury. The best evidence is undoubtedly the written charge; but if that is out of the way, other evidence, or his own memory may be resorted to to enable him to make known the instruction. But we cannot receive evidence otherwise than through the statement or the record, and if we could, the plaintiff has not furnished it." So in Hoadley v. Crow,[8] where the court below denied the motion for new trial before the record was completed, the order denying the motion was affirmed, and Norton, J., delivering the opinion, said: "The allegation that the judge omitted to settle a statement which was submitted to him cannot be taken as a substitute for the statement, nor does it constitute a reason for reversing the judgment. The necessary steps should have been taken to obtain a settlement of the statement."

3. *Practice Where the Judge Proceeds With the Hearing Before the Record is Completed.*—It rarely happens that the judge will proceed with the hearing of a motion for new trial before the completion of the record. But if such a thing should occur, as appears to have been the case in Visher v. Webster, and Hoadley v. Crow, above cited, then as said by Norton, J., in the latter case, the necessary steps should be taken to obtain a settlement of the

[6] Look at section 283, *post.*

[7] 13 Cal. 58. Compare Sais v. Sais, 49 Cal. 263.

[8] 22 Cal. 265.

record. The moving party may have a writ of mandate to compel the settlement of some record, if his proceedings for new trial were properly taken;[9] or if the judge refuse to allow an exception in accordance with the facts, application may be made to the supreme court for leave to prove the exception.[10] But if there be no time to take these steps, or if the judge have already *denied* the motion, it is useless for the moving party to proceed further with that motion until the order denying it be out of the way. For the order denying the motion must be affirmed on appeal under the rule stated in the beginning of the section. The only course for the moving party is to make an independent motion, upon affidavits showing the facts, to have the order denying the motion set aside. A proper showing can be made in that way, and in that way alone; and an appeal can be taken from the order refusing the motion to set aside, if it be refused. If, however, the motion for new trial be *granted*, then it behooves the other party to take some action in the matter. Two courses are open to him. He may appeal directly to the supreme court from the order granting a new trial, in which case the order must be reversed under the rule stated in the beginning of the section; or he may move the court below (upon affidavits) to set aside its order granting a new trial, as irregularly and improvidently made, and appeal from the order denying such motion if it be denied.

That such is the proper practice follows from the principles stated in the preceding portion of this section, viz., that if a new trial be denied without a proper record, the order must be affirmed in all cases, and if it be granted the order must be reversed in all cases. And the practice is sanctioned by the cases of Morris v. De Celis, and De Gaze v. Lynch. In Morris v. De Celis[11] the verdict was in favor of the defendant. The plaintiff commenced proceedings for new trial, and in due course a proposed statement and amendments were submitted to the judge for settlement. The judge took the matter of the settlement under advisement, and after some time, without any notice to the parties, and before the statement had been engrossed or certified, and without any sub-

[9] See section 155, *post*.

[10] See section 155, *post*.

[11] 41 Cal. 331. And see, also, Odd Fellows' Savings Bank v. Deuprey, 66 Cal. 168, 4 Pac. 1173; Whitney v. Superior Court, 147 Cal. 536, 82 Pac. 37; and see section 199, *post*, and particularly subdivision 2, and cases there cited. See, also, section 164, *post*, as to right of parties to be heard, and remedy for denial of that right.

mission of the motion, made an order granting a new trial. The defendant thereupon made a motion upon affidavits to set aside this order as improvidently made. The judge denied this motion, and at the same time made an order settling and certifying the statement *nunc pro tunc* as of a date prior to the order granting a new trial. The defendant then took an appeal from the order granting a new trial, and also from the order denying his motion to set aside. The supreme court did not act upon the former appeal; but it reversed the order denying the motion to set aside, and remanded the cause with directions to set aside the order granting the new trial, and for "further proceedings for the orderly determination of plaintiff's motion for a new trial." And Wallace, J., delivering the opinion, said:

"I think the court below should have sustained the motion to set aside the order granting the motion for a new trial. Even in view of what is recited in the order of September 5th, it is clear enough that the motion for new trial had never been submitted to the court for decision; and even if the court had, in the meantime, not only settled the statement, but had engrossed it, and certified and filed it as a correct statement, it should not have undertaken to determine the motion, until that motion had first been submitted for decision, and the parties afforded an opportunity to be heard on the motion if desired. The practice here pursued operated as a complete surprise upon the defendant, and if countenanced would be utterly subversive of the rights of parties litigant."

In the subsequent case of De Gaze v. Lynch,[12] the facts were not materially different from those of the foregoing case. The verdict was for the plaintiff. The defendant commenced proceedings for new trial, and in due course a statement was prepared and signed by the judge. But the judge signed it before it was engrossed, and the consequence was that it was a mere "skeleton statement," omitting many of the exhibits, etc., and equivalent to no statement at all. In this condition of affairs the motion was called for argument, but the counsel for defendant wishing for further time to prepare for the argument the motion went over. Subsequently, without any argument or submission of the motion, and without anything having been done to the skeleton statement, the judge made an order granting the motion. The

[12] 42 Cal. 362.

plaintiff thereupon made a motion, upon affidavits showing the facts, to set aside the order granting a new trial as improvidently made, and took an appeal from the order denying such motion, and also from the order granting a new trial. The supreme court reversed both orders, and Sprague, J., delivering the opinion, said:

"The statement on motion for a new trial had never been engrossed. It was but a skeleton statement with a simple reference to exhibits used in evidence on the trial, and instructions given and refused by the court, which were deemed essential and necessary to illustrate the grounds of the motion specified in the statement. The motion for a new trial was never actually or by fair implication submitted to the court for its decision. When the motion was called up by the plaintiff on the second day of June, and the court had intimated that the same must be overruled, plaintiff manifested a willingness to submit it without argument, but defendant declined, and insisted upon being heard in support of the motion. No argument was then had, nor was the motion then submitted, and for the court subsequently, on a change of its views in relation to the merits of the motion, to grant the same without notice to plaintiff, operated a surprise upon her, and practically denied her the privilege of being heard on the motion. (Morris v. De Celis, 41 Cal. 331.)"

These cases certainly lay down the principle that where the motion for new trial is passed upon before it is in a condition to be decided,—in other words, where the order is improvidently or inadvertently made,—it is proper to make a motion upon affidavits to set the order aside, and to appeal from the order denying the latter motion if it be denied. It is true that in the two cases above cited more stress seems to be laid upon the fact that there was no submission of the motion than upon the fact that there was no proper statement. But the decisions seem to fairly cover both points. And certainly if a motion to set aside be proper where there is a record but no submission, it is proper where there is neither a record nor a submission. Of course, as above stated, if the parties consent to a submission without a record, they cannot afterward complain that the consent was acted on.[18]

[18] See Thompson v. Connolly, 43 Cal. 636.

CHAPTER XX.

PAPERS ON WHICH THE MOTION MAY BE MADE—AFFIDAVITS.

§ 135. When the motion must be made on affidavits.
§ 136. Time within which affidavits must be filed and served.
§ 137. Extension of time for the moving party to file affidavits.
§ 138. Time to file counter-affidavits.
§ 139. Whether the moving party can file affidavits in reply.
§ 140. How affidavits used on the motion may be used on appeal from the order.

§ 135. When the Motion must be Made on Affidavits.—Section 658 of the Code of Civil Procedure as amended in 1874[1] is as follows:

"Sec. 658. When the application is made for a cause mentioned in the first, second, third, and fourth subdivision of the last section [that is to say, for irregularity, misconduct of the jury, accident or surprise, etc., newly discovered evidence], it

[1] As the California code was first enacted section 658 was as follows: "When the application is made for a cause mentioned in the fifth, sixth, and seventh subdivisions of the last section, it is made upon bills of exception on file; for any other cause it is made upon affidavit." In 1874, however, the section was amended so as to read as stated in the text. The corresponding provision of the old Practice Act remained unchanged from the time of its adoption in 1851 until the adoption of the code. It was as follows: "Sec. 194. When the application is made for a cause mentioned in the first, second, third, and fourth subdivisions of the last section, it shall be made upon affidavits; for any other cause it shall be made upon a statement prepared as provided in the next section." See Laws of 1851, p. 81.

Corresponding sections of the codes of other states, and the provisions thereof, are as follows:

Colorado: Section 219, Mills' Annotated Code, provides as follows: "On the argument of the motion for a new trial, reference may also be made to the pleadings, depositions and evidence and to the minutes of the court. If the application be made upon affidavits filed, the adverse party may use counter-affidavits on the hearings."

Idaho: Section 4440, Revised Codes. Same as California, except "an" instead of "the," second word, and phrase "upon the records, and files in the action," inserted after "either upon" and before "minutes of the court."

Montana: Section 6795, Revised Codes. "When the application is made for a cause mentioned in the third or fourth subdivision of the last section, it must be made upon affidavits; for a cause mentioned in the first or second subdivision it may be made upon a bill of exceptions or upon affidavits, or upon both; for any other cause it may be made, at the option of the moving party either upon the minutes of the court or upon a bill of exceptions."

Nevada: Section 3291, Cutting's Compiled Laws. "When the application is made for a cause mentioned in the first, second, third, and fourth

must be made upon affidavits; for any other cause it may be made at the option of the moving party, either upon the minutes of the court, or a bill of exceptions, or a statement of the case, prepared as hereinafter provided."

This section has not up to this time been changed. Its language is express that in certain cases the motion *must* be made upon affidavits. In the specified cases the motion cannot be made on other papers than affidavits.[2] But as a matter of course a

subdivisions of the last section, it shall be made upon affidavit; for any other cause, it shall be made upon a statement prepared as provided in the next section."

North Dakota: Section 7064, Revised Codes (Civil Procedure). "When the application is made for a cause mentioned in the first, second, third and fourth subdivisions of the preceding section, it must be made upon affidavit; for any other cause it may be made at the option of the moving party, either upon a statement of the case or upon the minutes of the court. On such hearing reference may be had in all cases to the pleadings and orders of the court on file; and when the motion is made on the minutes reference may also be had to any depositions, documentary evidence and stenographic report of the testimony or other papers used upon the trial."

Oklahoma: Section 5828, Compiled Laws. "The application must be by motion, upon written grounds, filed at the time of making the motion. The causes enumerated in subdivisions 2, 3, and 7, of section 5825, must be sustained by affidavits, showing their truth and may be controverted by affidavits."

Oregon: Section 177, Lord's Oregon Laws. "In all cases of motion for a new trial, the grounds thereof shall be plainly specified, and no cause of new trial not so stated, shall be considered or regarded by the court. When the motion is made for a cause mentioned in subdivisions 1, 2, 3, or 4 of section 174, it shall be upon affidavit, setting forth the facts upon which such motion is based."

South Dakota: Section 302, Code of Civil Procedure, is practically the same as the California code quoted in the text.

Utah: Section 3293, Compiled Laws (section 3401, Compiled Laws, 1898). "When the application is made for a cause mentioned in the first, second, third, or fourth subdivision of the last section, it must be made upon affidavit; for any other cause it may be made on the minutes of the court."

Washington: Section 401, Rem. & Bal. Code (section 5074, Bal. Code). "The motion for a new trial shall state the grounds or causes for which a new trial is asked, and if made for any of the causes mentioned in the first, second, third, or fourth subdivision of section 399, the facts upon which it is based may be shown by affidavit."

Wyoming: Section 4604, Compiled Statutes. "The application must be by motion, upon written grounds, filed at the time of making the motion; the causes enumerated in subdivisions two, three and seven, section 4601, must be sustained by affidavits or depositions, showing their truth, and may be controverted by affidavits or depositions, and for this purpose depositions may also be taken in the county where the action is pending."

[2] Beans v. Emanuelli, 36 Cal. 117; Benjamin v. Stewart, 61 Cal. 605; Dewey v. Frank, 62 Cal. 343; Bate v. Miller, 63 Cal. 233; Woods v. Jensen, 130 Cal. 200, 62 Pac. 473; Emeric v. Alvarado, 64 Cal. 529, 600, 2 Pac. 418; Cullen v. Glendora Water Co., 113 Cal. 503, 39 Pac. 769, 45 Pac. 822, 1047; Melde v. Reynolds, 120 Cal. 234, 52 Pac. 491; Saltzman v. Sunset Tel. etc. Co., 125 Cal. 501, 58 Pac. 169. Also Coleman v. Perry, 28 Mont. 1, 72 Pac. 42; Tague v. Caplice Co., 28 Mont. 51, 72 Pac. 297; King v. Pony G. M. Co., 28 Mont. 74, 72 Pac. 309; Whitmore v. Shiverick, 3 Nev. 288; Morris v. Hubbard, 14 S. D. 525, 86 N. W. 25; Lybarger v. State, 2 Wash. 552, 27 Pac. 449, 27 Pac. 1029.

motion for new trial can be made upon grounds which must be supported by affidavits, and upon other grounds which must be supported by a statement or bill of exceptions.

The use of affidavits for the presentation of grounds for new trial has its origin in necessity. With the exception of "any order of the court, or abuse of discretion by which either party," etc., it is not conceivable that any of the grounds specified in the first four subdivisions of section 657, Code of Civil Procedure, could be presented otherwise than by affidavit. As to the two here quoted, it is hardly conceivable that they can be presented by affidavit, or otherwise than by a reference to the court records. These last are also, by section 660, of the same code, available upon the presentation of the motion, by way of reference. However this may be, it is clearly necessity which rules in the determination of questions arising in this connection, the logical result being that no error may be assigned as an irregularity if it can be presented by the records of the court. No decision goes quite this far, but in Woods v. Jensen[8] the court said:

"Under sections 657 and 658 of the Code of Civil Procedure, 'irregularity in the proceedings of the court' must be 'made upon affidavits.' It is quite evident that this ground for a new trial is intended to refer to matters which an appellant cannot fully present by exceptions during the progress of the trial, and which therefore must appear by affidavit."

The converse of the proposition is, of course, equally true. Grounds for new trial, such as are set out in subdivisions 5, 6

[8] 130 Cal. 200, 62 Pac. 473.

The following cases illustrate what may be presented by affidavits: Wilson v. Waldron, 12 Wash. 149, 40 Pac. 740; Pincus v. Puget Sound etc. Co., 18 Wash. 108, 50 Pac. 930; Reeder v. Trader's National Bank, 28 Wash. 139, 68 Pac. 461; O'Toole v. Phoenix etc. Co., 39 Wash. 688, 82 Pac. 175; Brennan v. Seattle, 39 Wash. 640, 81 Pac. 1092; Dumontier v. Stetson etc. Co., 39 Wash. 264, 81 Pac. 693; Marvin v. Yates, 26 Wash. 50, 66 Pac. 131.

In King v. Pony etc. Co., 28 Mont. 74, 72 Pac. 309, it was held that when a new trial motion is based upon error in the exercise of the discretion of the trial court, it must, under the provisions of section 6795, Revised Codes, be made upon affidavits. See, also, to the same effect, Coleman v. Perry, 28 Mont. 1, 72 Pac. 42; Tague v. Caplice Co., 28 Mont. 51, 72 Pac. 297. So, misconduct of the jury in separating without authority, as a ground for a new trial, must, under the provisions of section 401, Rem. & Bal. Code of Washington (section 5074, Bal. Code), be shown by affidavits. Lybarger v. State, 2 Wash. 552, 27 Pac. 449, 1029. So, where the motion is based upon improper language of counsel in addressing the jury, affidavits must be made use of: Morris v. Hubbard, 14 S. D. 525, 86 N. W. 25.

and 7, of section 657, Code of Civil Procedure, that is to say, excessive damages, insufficiency of the evidence, and errors of law, cannot be presented by affidavits.[4] Thus, it has been held that an *ex parte* affidavit is not the proper mode for the presentation of errors in rulings on the admission of evidence, or errors in refusing to hear evidence in support of the averments of the pleadings, or in disregarding evidence actually presented. Such errors should appear by statement or bill of exceptions.[5] Nor is it proper to present erroneous instructions by affidavit. Such instructions are errors of law occurring at the trial, and should also be presented by bill of exceptions or statement.[6]

Whether oral testimony can be used in the stead of affidavits in support of a motion for a new trial has not been decided in this state. The question was alluded to but not determined in People v. Tucker[7] and People v. Sullivan,[8] in each of which cases the defendant, on the hearing of his motion, offered to supplement affidavits as to irregularity in the proceedings of the jury by oral evidence of the fact, and the court refused to permit the showing to be thus made. In both cases the supreme court held that, if oral testimony were legally admissible in aid or instead of affidavits, the matter was within the discretion of the court below, and, on that ground, refused to review the action of the trial court. But in both cases the supreme court declined to pass upon the question of the propriety of a resort to evidence presented otherwise than by affidavits.

In People v. Sullivan the court did, indeed, intimate its opinion that, in a proper case, the party moving for a new trial might base his motion upon oral evidence, or depositions where a witness as to the fact complained of should be unwilling to make his affidavit, and that a refusal of the trial court to permit this course to be followed might be an abuse of discretion, but the court was not called upon to, and did not, decide the point.

§ 136. Time Within Which Affidavits must be Filed and Served.—The provisions of the old Practice Act, which was never amended (in this regard) was that the moving party should file

[4] Santa Cruz etc. Co. v. Bowie, 104 Cal. 286, 37 Pac. 934; Southern Pacific Co. v. Superior Court, 105 Cal. 84, 38 Pac. 627; Pratt v. Pratt, 141 Cal. 247, 74 Pac. 742.

[5] Santa Cruz etc. Co. v. Bowie, 104 Cal. 286, 37 Pac. 934.

[6] Southern Pacific Co. v. Superior Court, 105 Cal. 84, 38 Pac. 627.

[7] 117 Cal. 229, 49 Pac. 134.

[8] 129 Cal. 557, 62 Pac. 101.

his affidavits upon the motion within five days after the notice of intention was given, but nothing was said about the service of the affidavits.[1] As the code was first adopted, the provision was that the affidavits should be filed and served within twenty-five days "after the verdict or decision."[2] One peculiarity of this system was that inasmuch as the notice of intention could be filed within thirty days after the verdict or decision, it might happen that the affidavits would be filed before the notice. But by the amendment of 1874 the provision of the code was that "if the motion is to be made upon affidavits, the moving party must, within ten days after serving the notice, or such further time as the court in which the action is pending, or a judge thereof, may allow, file such affidavits with the clerk, and serve a copy upon the adverse party, who shall have ten days to file counter-affidavits, a copy of which must be served upon the moving party."[3]

[1] The language of the act of 1851 was that "the party intending to move for a new trial shall give notice of the same within two days after the trial, and shall within five days after such notice, prepare and file with the clerk the affidavit required by the last section, or a statement of the grounds upon which he intends to rely. If no affidavit or statement be filed within five days after the notice, the right to move for a new trial shall be deemed waived." Laws of 1851, p. 81, sec. 195. So far as the time to file affidavits is concerned, the amendment of 1861 made no change except to give expressly the power of extending the time. Laws of 1861, p. 590. The subsequent amendments made no material change in respect to the time of filing affidavits. See Laws of 1863, p. 643; Laws of 1863–64, p. 246; Laws of 1865–66, p. 845.

[2] Section 659, California Code of Civil Procedure.

[3] Section 659, subdivision 1, California Code of Civil Procedure.

Colorado: Section 218, Mills' Annotated Code, provides that the motion must be filed in five days after verdict or notice of filing of report of referee, or announcement of decision of court. The affidavits in support thereof must accompany the motion.

Idaho: Section 4441, subdivision 1, Revised Codes. Same as California.

Montana: Section 6796, Revised Codes of Montana (act approved February 26, 1907, section 2), as follows: ". . . . If the motion is to be made upon affidavits, the moving party must, within ten days after serving the notice, or such further time as the court in which the action is pending, or a judge thereof, may allow, serve a copy of the affidavits upon the adverse party and file the affidavits with the clerk, and the adverse party shall have ten days, or such further time as he may be allowed, to file counter-affidavits, a copy of which must be served upon the moving party."

Nevada: Section 3292, Cutting's Compiled Laws (section 197, Civil Practice), is partly as follows: ". . . . Within *five* days after giving such notice the party shall prepare and file with the clerk the affidavit or statement required by the last section. A copy of the affidavit shall, on the same day, be served on the adverse party. If the application be made upon affidavits filed, the adverse party may use counter-affidavits on the hearing. Any counter-affidavit shall be filed with the clerk, and copies served on the moving party, at least two days previous to the hearing. The several periods of time limited may be enlarged by the written agreement of the parties, or upon good cause shown, by the court

With reference to the consequences of a failure of the moving party to file his affidavits within the time allowed by law, it will be seen that the old Practice Act always contained an express provision that such failure should operate as a waiver of the motion.[4] The code contains no express provision like this. But neither does it contain any provision that the failure to file a notice of intention in time shall operate as a waiver of the right to move, but that is the consequence of such failure, and it is believed that there can be no doubt but that if the affidavits were not filed in time the right to file them would be gone, and could

or the judge before whom the cause was tried. "

North Dakota: Section 7065, subdivision 1, Revised Codes. Practically the same as the California provision, except that no provision is made for filing. The language used suggests that this is the result of inadvertence. Thus, as to counter-affidavits: " , who shall have ten days to serve counter-affidavits, a copy of which must be served upon the moving party. " Is it to be understood from this that both the original and a copy shall be served, or does the first *serve* really displace *file?* The time for serving the affidavits in chief is fixed at thirty, instead of ten, days, as in the case of California; and counter-affidavits, ten days.

Oklahoma: No statute.

Oregon: Section 175, Lord's Oregon Laws, requires the affidavits upon which the motion is to be made to be filed with the motion itself; that is, within one day after entry of judgment, "or such further time as the court may allow"; and counter-affidavits must be filed within one day thereafter, with the same provisions as to extension.

South Dakota: Section 303, Code of Civil Procedure (subdivision 1), is substantially the same as the North Dakota section, above described, except that the time for serving affidavits in chief is fixed at *twenty*, instead of thirty, days. Counter-affidavits, within ten days.

Utah: Section 3295, subdivision 1, Compiled Laws (section 3402, subdivision 1, Revised Statutes of 1898), is as follows: "If the motion is to be made upon affidavits, the moving party must, within five days after serving the notice, file such affidavits with the clerk, and serve a copy upon the adverse party, who shall have five days to file counter-affidavits, a copy of which must be served upon the moving party."

Washington: Section 402, Rem. & Bal. Code (section 5075, Bal. Code), is partly as follows: " If the motion is to be made upon affidavits, the moving party must, within two days after serving the motion, or such further time as the court in which the action is pending, or the judge thereof may allow, file such affidavits with the clerk, and serve a copy thereof upon the adverse party, who shall have two days to file counter-affidavits, or such further time as the court may allow, a copy of which must be served upon the moving party."

Wyoming: No statute.

[4] See Laws of 1851, p. 81, and amendments cited in note 1 above. The cases in reference to the failure of the moving party to file his proposed statement in time are numerous. See section 145, *post.* But those in reference to a failure to file the affidavits in time are few and unsatisfactory. In Whipley v. Dewey, 17 Cal. 314, the moving party failed to file any affidavits within five days, and the order granting a new trial was reversed. But the court seemed to rest its judgment upon the fact that in the meanwhile there had been an adjournment of the term. In Howe v. Briggs, 17 Cal. 385, it seems to have been supposed that it was within the discretion of the court to allow an *additional* affidavit to be filed after the expiration of the time.

not be restored by order.[5] This was the view adopted by the supreme court in Estate of Kasson,[5a] where the notice of intention was filed December 24, 1900, and the affidavits appear not to have been filed until the 6th of the following April. The court said: "The affidavits, therefore, were not filed within the time prescribed by the code,—to wit, within ten days after said notice."

Where the affidavits are not filed in time, the practice is somewhat simpler than where the statement or bill of exceptions is not proposed in time.[6] The indorsement of filing shows whether they were within the time allowed by the statute, and the "orders of court on file,"[7] or any stipulation on file may be referred to, to see whether any extension was granted. If the affidavits were not in time, that is a reason for denying the motion.

Inasmuch as the respondent has no earlier opportunity to object that the affidavits were not filed in time, it is sufficient that he raises the point at the hearing of the motion.[8] Upon the point as to whether objection that service is not in time must be made when the affidavits are served, no decision is to be found. On principle, however, it would seem that there should be no distinction in this regard between affidavits and the statement.

§ 137. Extension of Time for the Moving Party to File Affidavits.—Up to 1861 there was no express provision in the statute allowing extensions of the time prescribed in which to file the affidavits or statement, and no decision has been found upon the statute as it stood before that year. But by the amendment of 1861 the power to grant such extensions was given to the judge.[1] In 1863 the section was amended so as to expressly confer the power to grant such extensions upon the court commissioner as well as upon the judge, but no other change was made with reference to extensions.[2] No further change was made in this par-

[5] Look at Clark v. Crane, 57 Cal. 629; and see section 145, *post*.

[5a] 141 Cal. 33, 74 Pac. 436.

[6] As to the practice in such cases, see section 146, *post*.

[7] See section 660, California Code of Civil Procedure.

[8] Heine v. Treadwell, 72 Cal. 217, 13 Pac. 503.

[1] The language of the amendment in this regard was as follows: "And he shall, within five days after giving such notice, *or within such further time*, not exceeding twenty days, as the court or judge thereof may by order grant, prepare, and file, etc. If no affidavit or statement be filed within five days after the notice, or within such further time as the parties may agree upon, or the court or judge thereof may by order grant, the right to move for a new trial shall be deemed waived." See Laws of 1861, p. 590, sec. 195.

[2] Laws of 1863, p. 643.

ticular until the adoption of the Code of Civil Procedure. As the code was first enacted, the section in relation to the filing of the affidavits on motion for new trial did not provide for the extension of the time,[3] as did the corresponding section of the old Practice Act. But as amended in 1874,[4] the provision of the code is that the moving party must file his affidavits "within ten days after serving the notice, or such further time as the court in which the action is pending, or a judge thereof may allow." Since that time no changes have been made in this respect.

The judge may therefore extend the time allowed by statute in which the moving party is to file his affidavits. It is to be observed that section 659, although it allows an extension, does not prescribe how long such an extension may be. It was formerly a question as to whether the time that might be allowed under the authority of this section was not really limited by the provisions of section 1054 of the code, which gives and limits the power to grant extensions in general.[5] It has been distinctly held, however, that the provisions of subdivision 1 of section 659 of the Code of Civil Procedure are independent of the limitations prescribed in section 1054, the provisions of the latter as to the limitation of thirty days having no application to affidavits on motion for new trial.[6]

§ 138. Time to File Counter-affidavits.—The act of 1851 provided that counter-affidavits should be filed "one day at least

[3] Section 658, California Code of Civil Procedure, as first enacted.

[4] Section 659, subdivision 1, California Code of Civil Procedure.

[5] As amended in 1880, section 1054 is as follows: "When an act to be done, as provided in this code, relates to the pleadings in the action, or the undertakings to be filed, or the justification of sureties, or the preparation of statements, or of bills of exception, or of amendments thereto, or to the service of notices other than of appeal, the time allowed by this code may be extended, upon good cause shown, by the court in which the action is pending, or a judge thereof; but such extension shall not exceed thirty days without the consent of the adverse party." This says nothing about affidavits.

Section 218, Mills' Annotated Code of Colorado, permits an extension of the time to file the written motion for new trial, and the affidavits must accompany the motion.

See note 3, section 136, *ante*, as to extensions in systems of practice similar to California. In Oklahoma, Oregon and Wyoming, the affidavits must accompany the motion, as in the case of Colorado, but no specific provision is made for an extension of time, as in that state, and the requirements limit such extensions to cases where the ground of the motion is newly discovered evidence, and the movant could not with reasonable diligence have obtained it in time to make the motion at an earlier date.

[6] This was specifically held in Oberlander v. Fixen, 129 Cal. 690, 62 Pac. 254.

previous to the hearing."[1] No change was made in this until the adoption of the Code of Civil Procedure. As first enacted, the provision of the code was that the counter-affidavits should be filed within five days after the filing and service of the moving party's affidavits.[2] By the amendment of 1874,[3] it was provided that the moving party should serve his affidavits upon the adverse party "who shall have ten days to file counter-affidavits, a copy of which must be served upon the moving party." And so the statute stands at present.

It is to be noted that no express provision is made for extending this period of ten days, as in the case of the moving party, and it is not clear that section 1054 would empower the court to make such extension. There are cases in the reports where the trial court permitted the filing of counter-affidavits after the expiration of the statutory period, and the supreme court sustained the ruling, thus, in effect, granting an extension of time. But these cases rested upon a showing of inadvertence, and relief was asked under the provisions of section 473 of the Code of Civil Procedure. Thus in Spottiswood v. Weir[4] counter-affidavits were filed after the time limited in the code upon a showing that they had been prepared and served within the time, but that the filing had been omitted by oversight or mistake. So in Smith v. Whittier,[5] counter-affidavits were prepared in time, but through excusable neglect and inadvertence of the party's attorneys were not filed in time. In this, as in the first-cited case, the action of the trial court in relieving the adverse party of the effect of such inadvertence and excusable neglect was approved. The court, in the last-cited case, said:

" Matters presented in support of a claim of inadvertence and excusable neglect are so greatly within the discretion of the court to which they are addressed that unless there should appear to be an abuse of that discretion, we would not interfere with its action. The defendants were not entitled to a new trial on this ground unless the facts upon which it was based existed, and the time within which the plaintiff might controvert such affidavits is not made by the statute jurisdictional, or declared to

[1] Laws of 1851, p. 81, sec. 195.
[2] Section 658, California Code of Civil Procedure.
[3] Section 659, subdivision 1, California Code of Civil Procedure. See note 3, section 136, *ante*, as to time to file counter-affidavits in other states.
[4] 80 Cal. 448, 22 Pac. 289.
[5] 95 Cal. 279, 30 Pac. 529.

be a limitation upon the exercise of such right. It is only a rule of procedure, and in the absence of a statutory limitation, is subject to the equitable control of the court, and the court should disregard any error or defect in the proceedings, whenever a substantial right of the party is not affected."

A motion for new trial, based on affidavits, cannot be heard and considered prior to the expiration of the time allowed the adverse party to file or serve counter-affidavits.[6] Where such a hearing takes place, an order made pursuant thereto will be reversed, notwithstanding the fact that the order itself was not made until after counter-affidavits were in fact filed.[7]

§ 139. Whether the Moving Party can File Affidavits in Reply.—Neither the old Practice Act [1] nor the code [2] contains any permission to the moving party to file affidavits in reply to the affidavits of the opposing party. No case has been found upon the subject except Howe v. Briggs,[3] in which case the court below received an additional affidavit from the moving party. The only objection shown by the report to have been made to this by counsel was that this affidavit was "inadmissible because too late." The supreme court said with reference to the reception of the affidavit: "The court was not bound to receive this last affidavit, and should not have considered it unless some good reasons were shown." The question as to whether there was any authority for the filing by the moving party of affidavits in reply does not seem to have been considered, and the motion for new trial was denied by the judge, and his order was affirmed on appeal. The case, therefore, cannot have much weight upon the point. The right to file affidavits in reply as on other motions seems so highly necessary that it is difficult to account for the absence of a decision upon the question, except upon the hypothesis that it never occurred to practitioners that there was any difference in this respect between motions for new trial and other motions, and that the filing of affidavits in reply was usual in practice. But it is certainly well settled as to motions for new trial in general that no record is permissible except the one authorized by statute, and

[6] Peter v. Kalez, 11 Idaho, 553, 83 Pac. 526.

[7] Peter v. Kalez, 11 Idaho, 553, 83 Pac. 526.

[1] See section 195.

[2] See section 659, subdivision 1, California Code of Civil Procedure.

[3] 17 Cal. 385.

the statute does not expressly authorize affidavits in reply. As above stated, there is no decision upon this point.

§ 140. How Affidavits Used on the Motion may be Used on Appeal from the Order.—Affidavits used on the hearing of a motion for a new trial may, if properly authenticated or identified, be used on appeal from the order on such motion. The practice in this respect has undergone a radical change since the adoption of the code. Formerly the affidavits might be used on appeal without being incorporated in a statement or bill of exceptions, merely by being identified or authenticated by the indorsement of the trial judge. Under Rule XXIX of the supreme court, however, the identification must be by being incorporated in a bill of exceptions; except when the appeal is prosecuted under the new and alternative method; in which case, such affidavits may be included by the reporter in his transcript, prepared under the authority of section 953a of the California Code of Civil Procedure.[1]

As to the record on appeal from the order, see section 168, *post*. With reference to the subject of identification, see section 264, *post*.

[1] See Hibernia etc. Soc. v. Doran (Cal.), 118 Pac. 526, where it was held that on an appeal from an order on motion to change the place of trial, the appellant must follow the procedure outlined in sections 953a, 953b, and 953c, California Code of Civil Procedure, or that prescribed by Rule XXIX; and it was intimated that the same principle would control in all cases of appeals from orders where affidavits were used. The language of section 953a, above cited, would seem to be sufficiently general to justify such a conclusion.

As to the duty of the reporter in the preparation of the record under the new and alternative method, see Gjurich v. Fieg (Cal.), 117 Pac. 000.

CHAPTER XXI.

PAPERS ON WHICH THE MOTION MAY BE MADE—BILLS OF EXCEPTIONS.

§ 141. When the motion may be made upon a bill of exceptions.
§ 142. Preparation of bills of exceptions.

§ 141. When the Motion may be Made upon a Bill of Exceptions.—Under the old Practice Act the only kind of bills of exceptions were bills settled at the trial.[1] The office of these bills was to present questions as to errors in law on appeal from the judgment. They could not be used on appeal from orders,[2] or on motions for new trial. There seems to have been no good reason why they should not have been permitted to be used to present questions as to errors in law upon motion for new trial. But this was not authorized by the statute. Section 194, which prescribed the papers to be used on motion for new trial, was as follows:[3]

"Sec. 194. When the application is made for a cause mentioned in the first, second, third, and fourth subdivisions of the last section, it shall be made upon affidavit; for any other cause *it shall be made upon a statement,* prepared as provided in the next section."

This was the only provision specifying the papers to be used upon the motion. Papers not authorized by it could not be used.[4]

The provision of the Code of Civil Procedure in relation to the papers to be used on the motion is section 658, which as amended in 1874[5] is as follows:

[1] See sections 254, 256, *post.*

[2] People v. Doe, 45 Cal. 43; Caulfield v. Doe, 45 Cal. 221; Wetherbee v. Carroll, 33 Cal. 549. In Wetherbee v. Carroll, Sawyer, J., delivering the opinion, said: "If we have at any time considered points presented by what was designated as a bill of exceptions instead of a statement, as we have in one instance at least (Warden v. Mendocino Co., 32 Cal. 655), it was because no objection was made to it." And look at Bodley v. Ferguson, 25 Cal. 584.

[3] Laws of 1851, p. 81. This provision stood until the Code of Civil Procedure.

[4] As the code was first enacted it required motions for new trial on the ground of errors in law or insufficiency of the evidence to be made upon a bill of exceptions. And in Kelly v. Larkin, 47 Cal. 58, where the motion was made upon a statement, it was held that it ought to have been made upon a bill of exceptions, and the order granting the motion was reversed. But look at People v. Crane, 60 Cal. 279.

[5] As first enacted the code required the motion to be made in certain cases upon affidavits and in certain cases upon bills of exceptions. This provision was only in operation a short time.

"Sec. 658. When the application is made for a cause mentioned in the first, second, third, and fourth subdivisions of the last section, it must be made upon affidavits; for any other cause it may be made at the option of the moving party, either upon the minutes of the court, *or a bill of exceptions,* or a statement of the case, prepared as hereinafter provided."

This section sanctions the use of a bill of exceptions on motion for new trial. The code provides for two kinds of bills of exceptions, viz., bills settled at the trial under section 649, and bills settled after the trial under section 650. And inasmuch as the provision above quoted makes no distinction between them, it would seem that it applies to both. And subdivision 2 of section 659 [6] lends countenance to that construction.

§ 142. Preparation of Bills of Exceptions.—As stated in the preceding section, the motion for new trial may be made either upon a bill of exceptions settled at the trial under section 649 or settled afterward under section 650. Their preparation is the same when intended for use on motion for new trial as when intended for use on appeal from the judgment or from an order other than on motion for new trial, except as to the time in which the proposed bill must be served. Bills of exception under section 650, intended for use on appeal from the judgment, are required to be served "within ten days *after the entry of judgment,* if the action was tried with a jury, *or after receiving notice of the entry of judgment,* if the action were tried without a jury"; while bills of exceptions for use on motion for new trial have to be served within ten days *after the service of the notice of intention.* Now, since the notice of intention may be given either before or after the entry of judgment,[2] it is evident that there may be a difference in the time within which the proposed bill is to be served. In other respects the preparation is the same.

[6] That subdivision provides that "if the motion is to be made upon a bill of exceptions, and no bill has already been settled as hereinbefore provided, the moving party shall have the same time after service to prepare and obtain a settlement of a bill of exceptions as is provided after the entry of judgment, or after receiving notice of such entry by section 650, and the bill shall be prepared and settled in a similar manner. If a bill of exceptions has been already settled and filed when the notice of motion is given, such bill shall be used on the motion." (In effect July 1, 1874.)

[1] See section 257, subdivision 4, *post.*

[2] See section 16, *ante.*

Bills of exceptions are not recognized in all states as a means of presenting a motion for a new trial to the trial court; although such a paper may be utilized, with practical unanimity, in the presentation of the order on such a motion for review.[3] In some states, however, as in Montana, a bill is the exclusive method of such presentation, except as to those grounds which can only be presented by affidavit.[4]

[3] See section 3292, Cutting's Compiled Codes of Nevada; section 7065, Revised Codes of North Dakota; section 5828, Compiled Laws of Oklahoma; section 175, Lord's Oregon Laws; section 303, Code of Civil Procedure of South Dakota; section 3295, Compiled Laws of Utah; section 402, Rem. & Bal. Code of Washington (section 5075, Bal. Code). In most of these states a statement may be used in those cases where affidavits cannot, and in some cases the presentation is optional with the moving party, either on affidavits or a statement. In some states, as California, Idaho, Nevada, and the two Dakotas, the statement used is a statement on motion for new trial; in others it is either a statement of facts, of the case, or a case-made.

[4] See section 6796, Revised Codes of Montana, as to which see note 4, section 145, *post*. Also note 19a, section 157, *post*.

CHAPTER XXII.

PAPERS ON WHICH THE MOTION MAY BE MADE—STATEMENT OF THE CASE.

§ 143. When the motion may be made on a statement.
§ 144. Outline of proceedings to obtain a statement on motion for new trial.
§ 145. Time to serve proposed statement—Consequences of failure to serve in time—Waiver.
§ 146. Practice when the statement is not proposed in time.
§ 147. Extension of time to serve proposed statement.
§ 148. Time to propose amendments to proposed statement.
§ 149. Contents of statement—Specifications of error.
§ 150. Contents of statement—Specifications of particulars of insufficiency of evidence.
§ 151. Contents of statement—Evidence and other matter—How set forth.
§ 152. Presumption that statement contains all material evidence.
§ 153. Presentation of proposed statement and amendments for settlement.
§ 154. Settlement of statement.
§ 155. Compelling settlement—Proving exceptions.
§ 156. Engrossment of statement.
§ 157. Authentication of statement—Necessity for—By whom made—Waiver of—History of subject.
§ 158. Authentication by the judge—What is sufficient.
§ 159. Filing engrossed and certified statement.
§ 160. Amendment of statement after filing and authentication—Revocation of certificate.

§ 143. When the Motion may be Made on a Statement.—Section 194 of the old California Practice Act, which remained unchanged from 1851 until the adoption of the Code of Civil Procedure of the same state, was as follows:[1]

"Sec. 194. When the application is for a cause mentioned in the first, second, third, and fourth subdivisions of the last section it shall be made upon affidavit; for any other cause *it shall be made upon a statement* of the case, prepared as provided in the next section."

The corresponding section of the Code of Civil Procedure, as amended in 1874,[2] is as follows:

[1] Laws of 1851, p. 81.

[2] Under the code as first enacted no provision was made for statements. See note 1 to section 135, *ante*. And therefore where, after the code went into operation, a party moved for a new trial upon a statement, and the court below granted the motion, the

"Sec. 658. When the application is made for a cause mentioned in the first, second, third, and fourth subdivisions of the last section it must be made upon affidavits; for any other cause it may be made at the option of the moving party, either upon the minutes of the court, or a bill of exceptions, or a statement of the case prepared as hereinafter provided."

Under the code, therefore, where the motion is made upon the ground of excessive damages, or insufficiency of the evidence, or errors in law occurring at the trial, or upon all of these grounds, it may, at the option of the moving party, be supported either by a statement, or a bill of exceptions, or be made upon the minutes of the court.

§ 144. Outline of Proceedings to Obtain a Statement on Motion for New Trial.—The proceedings which must be taken to obtain a statement on motion for new trial are given in subdivision 3 of section 659 of the Code of Civil Procedure. The burden of preparing the statement is cast upon the moving party. Within a certain time after the service of the notice of intention, he must serve upon the successful party a draft of what he proposes as the statement in the case. If the successful party does not agree to the statement, he may, within a certain time, serve upon the moving party amendments to the proposed statement, specifying whatever additions and corrections he may have to make. The moving party must then, upon notice to the successful party, present the proposed statement and the proposed amendments to the judge, who must "settle" the statement by deciding the disputes between the parties as to what shall constitute the statement, and by striking out all redundant and useless matter, and must make the statement truly represent the case. After the statement is so settled, the moving party must engross the same; and the judge must then add his certificate of allowance. The engrossed and certified statement must then be filed with the clerk; and then the motion is ready to be heard. It may happen that the successful party is able to agree to the statement as proposed, in which case it is not necessary to propose amendments. But notwithstanding the assent of the parties, it is the duty of the

order was reversed. Kelly v. Larkin, 47 Cal. 58. Compare Hodgdon v. Griffin, 56 Cal. 610. For corresponding sections of other states, see note 1, section 135, *ante*.

judge to strike out all useless and redundant matter, and correct any inaccurate statement, and to make the statement truly represent the case.[1] In doing so, however, the judge must bear in mind that the statement which he is considering is to be used ultimately for the presentation of the merits of a case on appeal, a constitutional right, and, for this reason, he should construe his duty with a view to promoting rather than defeating this purpose. There should be no narrow construction in dealing with the subject.[2]

These several steps in the proceedings will be more fully treated of in the succeeding sections.

§ 145. Time to Serve Proposed Statement—Consequences of Failure to Serve It in Time—Waiver.—The statement must be served and filed within the prescribed time, and if it be not, and the defect be not waived, the right to have a statement is lost. These matters will be considered separately.

1. *Time to Serve the Proposed Statement.*—Section 195 of the act of 1851 required the party to *file* his proposed statement within five days after the giving of the notice of intention. There was no requirement that it should be served.[1] This section was many times amended.[2] But none of the amendments changed the provision in the respect mentioned. The Code of Civil Procedure made a change in the practice. Under the code, as amended in 1874,[3] the proposed statement is not required to be filed, but is required to be served. The provision is as follows:

"Sec. 659 (sub. 3). If the motion is to be made upon a statement of the case, the moving party must, within ten days after service of the notice, or such further time as the court in which the action is pending, or the judge thereof may allow, prepare a draft of the statement, and serve the same, or a copy thereof, upon

[1] For an outline of the proceedings to obtain a statement under the old Practice Act, see Cosgrove v. Johnson, 30 Cal. 509. See, also, section 195 of that act.

[2] See Douglas v. Southern Pacific Co., 151 Cal. 242, 90 Pac. 538.

[1] Laws of 1851, p. 81; and see Brundage v. Adams, 41 Cal. 619, 11 Morr. Min. Rep. 470.

[2] See Laws of 1861, p. 590; Laws of 1863, p. 643; Laws of 1863–64, p. 246; Laws of 1865–66, p. 845.

[3] Before 1874 the California code did not provide for any statements. It required motions for new trial to be made either on affidavits or bills of exceptions, which had to be served and filed "within twenty-five days after the verdict or decision is made." See section 658, as first enacted. This provision was in force but a short while.

the adverse party. If such proposed statement be not agreed to," etc.

Under the code, therefore, as it stands at present, the moving party has ten days [4] from the service of his notice of intention in which to serve his proposed statement. This period begins to run from the actual giving of the notice of intention, and not from the expiration of the time allowed therefor. Thus where the party gave his notice of intention before the expiration of the time allowed therefor, but failed to propose this statement within the requisite time thereafter, and within the ten days allowed for the giving of notice of intention, gave a second notice, and filed his proposed statement within five days thereafter, it was held that such statement was too late, and that it should have been given within five days after the first notice.[5]

2. *Consequences of Failure to Propose the Statement in Time.*— Under the old Practice Act there could be no doubt but that a failure to file the proposed statement in time operated as a waiver of the right to make the motion. Such was the express provision

[4] "The time within which any act provided by law to be done is computed by excluding the first day and including the last, unless the last day is a holiday, and then it is also excluded." Section 12, California Code of Civil Procedure.

For corresponding provisions of other states, see section 4441, subdivision 3, Revised Codes of Idaho, which contains practically the same language as that of California; section 3292, Cutting's Compiled Laws of Nevada (section 197, Civil Practice); section 7065, subdivision 3, Revised Codes of North Dakota; section 303, subdivision 3, Code of Civil Procedure of South Dakota; section 3295, subdivision 3, Compiled Laws of Utah, which is substantially the same as the California section (subdivision 3).

Section 1491, Revised Statutes of Arizona, provides for the preparation of a statement of facts "at any time during the term, or within the time stipulated, or within such reasonable time as shall be allowed by the court." But section 1478 provides that motions for new trial must be made within five days after rendition of judgment, or verdict, and section 1479 requires such motions to be determined within the term. The statements must, therefore, necessarily be made within an indefinite period of time, which rests largely in the discretion of the court.

Section 6796, Revised Codes of Montana, limits the hearing of new trial motions to affidavits and bills of exceptions. The provision as to bills of exceptions is identical with that of the California code. See section 659, subdivision 2; and see note 6, section 141, *ante*.

No provision is made in either Colorado, Oklahoma, Oregon, Washington, or Wyoming, for a record for use at the hearing of a motion for new trial, corresponding with the statement or bill of exceptions made use of in other states. The motion must, in the practice of each of these states, be made in writing, setting out the grounds for the same. No previous notice is required. Hence, the motion itself may be said to take the place of both the notice of intention and the statement or bill of exceptions, as to scope, contents, etc.

See note 19a, section 157, *ante*.

[5] Le Roy v. Rassette, 32 Cal. 171; Cottle v. Leitch, 43 Cal. 320.

of the statute. Section 195 of the act of 1851 provided that[6] "if no affidavit or statement be filed within five days after the notice, the right to move for a new trial *shall be deemed waived.*" This provision stood without material change[7] until the adoption of the Code of Civil Procedure. It was peremptory in its terms, and was always strictly enforced.[8] And although the time could be extended by order made before the expiration of the prescribed period, yet after that time no extension could be granted; for when the right to have a statement was lost it could not be restored by order,[9] even though such order was made *nunc pro tunc* as of a date prior to the expiration of the time.[10]

The Code of Civil Procedure contains no express provision, like that of the old Practice Act, to the effect that the failure to propose a statement in time operates as a waiver of the right to move for a new trial, or of the right to have a statement. But the omission was probably because such provision was considered unnecessary. There must be some point of time at which the verdict or decision ceases to be liable to attack. And if the expiration of the time prescribed by statute be not taken as such point the matter is left indefinite, which could not have been the intention of the lawmakers. Accordingly, it was held in Chase v. Evoy,[10a] that the failure to serve the proposed statement in time operated as a bar to the further prosecution of the motion, and that the judge was justified in dismissing it. Decisions under the code have followed this rule strictly, notwithstanding the absence of the express provision of the Practice Act as to waiver.[10b] So, also, the rule that

[6] Laws of 1851, p. 81.

[7] See Laws of 1861, p. 590; Laws of 1863, p. 643; Laws of 1863–64, p. 246; Laws of 1865–66, p. 845.

[8] Caney v. Silverthorne, 9 Cal. 67; Lafferty v. Brownlee, 11 Cal. 132; Mahoney v. Caperton, 15 Cal. 313; Easterby v. Larco, 24 Cal. 179; Munch v. Williamson, 24 Cal. 167; B. R. & A. W. Co. v. Boles, 24 Cal. 359, 4 Morr. Min. Rep. 592; De Castro v. Richardson, 25 Cal. 49; Jenkins v. Frink, 27 Cal. 337; Hegeler v. Henckell, 27 Cal. 491; Le Roy v. Rassette, 32 Cal. 171; Campbell v. Jones, 41 Cal. 515; Cottle v. Leitch, 43 Cal. 320; Mott v. Foster, 45 Cal. 72.

[9] So held of statements on appeal in Leech v. West, 2 Cal. 95.

[10] Hegeler v. Henckell, 27 Cal. 491.

[10a] 58 Cal. 348. In the consideration of all questions as to statements on motion for new trial, relative to their preparation, settlement, engrossment, etc., it is to be understood that bills of exceptions prepared for use on motion for new trial are subject to the same rules of procedure. As has been said, the two may be used interchangeably. See Higgins v. Mahoney, 50 Cal. 444; and look at section 17, *ante*.

[10b] Cooney v. Furlong, 66 Cal. 520, 6 Pac. 388; Bunnel v. Stockton, 83 Cal. 319, 23 Pac. 301; and see Jue Fook Sam v. Lord, 83 Cal. 159, 23 Pac. 225; Wheeler v. Karnes, 125 Cal. 51, 57 Pac. 893; and see, as to bills of exceptions, Stonesifer v. Armstrong, 86 Cal. 594, 25 Pac. 50; Visher v. Smith, 92 Cal. 60, 28 Pac.

governed under the Practice Act to the effect that the right to have a statement, once lost by failure to propose the same within the statutory time, could not be restored, has also been adopted in the decisions under the code.[10c] Indeed, it is difficult to conceive upon what ground a departure therefrom could be justified. The language requiring the proposal of a statement within a certain time is the same as that requiring the giving of notice of intention within a certain time; and it has been held that where the notice of intention is not given in time the right cannot be restored by order. This was held under the code in Clark v. Crane.[11] In that case, after the expiration of the time for giving the notice, the moving party obtained an order extending the time to give it. When the statement was presented for settlement the facts were brought to the attention of the judge, and he refused to settle it. The supreme court declined to issue a *mandamus* to compel the settlement, and Thornton, J., delivering the opinion, said:

"The party intending to move for a new trial has a period of ten days after the verdict of the jury, within which to file with the clerk and serve upon the adverse party a notice of his intention to make such motion. (Code Civ. Proc., sec. 659.) The language of the section is strong; it uses the words 'must within ten days' take this step. If he does not give such notice within the period above mentioned, his right to move is gone. The court or judge can extend the time under section 1054, above cited, but such extension must be granted within the period of ten days, or within such other period during which the right to give such notice is still alive. After the right to give such notice is gone, giving

94; Cameron v. Arcata etc. Co., 129 Cal. 279, 61 Pac. 955.

The rule as to the necessity of serving the statement on motion for new trial, and the bill of exceptions prepared for use on such motion, as well as the bill of exceptions prepared for use on appeal, and the case-made, intended for a similar purpose, has been uniformly sustained. Stickney v. Hanrahan, 7 Idaho, 424, 63 Pac. 189; Miller v. Hunt, 7 Idaho, 486, 63 Pac. 803; Hoehnan v. Drygoods Co., 8 Idaho, 66, 67 Pac. 796; Woodward v. Webster, 20 Mont. 279, 50 Pac. 791; Power v. Lenoir, 22 Mont. 169, 56 Pac. 106; Farleigh v. Kelly, 24 Mont. 369, 62 Pac. 685.

See note 7a, section 159, *post*. In Tull v. Anderson, 15 Nev. 426, the supreme court presumed that, inasmuch as the statement on motion for new trial had not been proposed or filed within the statutory time after notice, the trial court had for this reason refused to hear the motion on its merits, and the order denying the same was therefore affirmed.

[10c] Cooney v. Furlong, 66 Cal. 520; 6 Pac. 893, and see below as to waiver, and see section 147, *post*.

[11] 57 Cal. 629; look at Estate of Sbarbaro, 63 Cal. 5; and compare Thompson v. Lynch, 43 Cal. 482; B. R. & A. W. Co. v. Boles, 24 Cal. 359, 4 Morr. Min. Rep. 592; and see section 147, *post*.

further time could not be called an extension of the time, but it would be in effect reviving a right which no longer exists. In other words, when such right to give notice is gone there is really no period of time to extend. The time ends with the period which the law allows for giving such notice; and when such time ends, to hold that the court or judge can extend it would be to affirm that the court or judge can dispense with the requirements of the statute. We are all of opinion that the court properly held that the period of ten days having elapsed when the order of the 20th of December, 1880, was made, extending the time to give the notice of motion, it no longer had jurisdiction in the matter, and that the order was of no force or validity. (De Castro v. Richardson, 25 Cal. 49; Leech v. West, 2 Cal. 95.)"

It may be said, therefore, that the rule in respect to the consequences of the failure to propose a statement in time is the same under the code as it was under the old Practice Act, viz., that such failure takes away the right to have a statement, and that the right cannot be restored by order.[12]

3. *Waiver.*—The failure to propose a statement in time can be waived. No decision directly upon this point has been found. But as has been shown, the objection that the notice of intention was not served in time,[13] and even the objection that there is no notice of intention at all,[14] may be waived by proposing amendments to the proposed statement, without reserving proper objections; and the cases seem analogous. For the reason upon which the rule as to the waiver of a valid notice rests is that if proper objections had been reserved before proposing amendments, the moving party might have come to the settlement of the statement prepared with matter in excuse of the delay, and have it incorporated in the statement as settled. And this reason applies with equal force to cases where the proposed statement was not in time.

[12] The above applies to civil cases only. In criminal cases the time prescribed by statute within which to file the bill of exceptions is merely directory. People v. Martin, 6 Cal. 477; People v. Woppner, 14 Cal. 437; People v. Lee, 14 Cal. 510; People v. Kahl, 18 Cal. 432; People v. White, 34 Cal. 183; People v. Sprague, 53 Cal. 422. But the "direction" should be obeyed unless there was a good excuse for the delay. People v. Lee, 14 Cal. 510; People v. Sprague, 53 Cal. 422. And a good excuse will be presumed. People v. Raschke, 73 Cal. 378, 15 Pac. 13.

[13] See section 15, *ante*, and Brundage v. Adams, 41 Cal. 619, 11 Morr. Min. Rep. 470.

[14] See section 14, *ante*, and Williams v. Gregory, 9 Cal. 76; Frost v. Meets, 52 Cal. 664.

In Horton v. Jack,[14a] though nothing was said as to waiver, the principle was adopted as being applicable without question. The court said:

"Respondent objects to the consideration of the bill of exceptions on the ground that it was served more than ten days after service of the notice of intention to move for a new trial. The former objection was not taken in any way in the court below, though defendant proposed amendments, and therefore it cannot be considered here."

But if proper objections be reserved before proposing amendments, the subsequent proposal of amendments will not waive the defect.[15] Nor will it in such case be waived by appearance at or participation in the argument of the motion. The language of some of the cases seems to imply that the objection that a notice of intention or proposed statement was not in time is waived by appearance at and participation in the argument of the motion. But as stated in section 14, this cannot be the case. For the whole argument of counsel may have been directed to the point that the motion should be denied for want of a valid statement; and since the code does not provide a mode in which the argument of counsel can be brought up, no presumption as to what it was should be founded upon its absence. It is true that there is a well-settled rule that if a party appears and argues a motion *upon its merits,* without insisting upon objections to the moving papers, he thereby waives such objections. But before this rule can be applied it must appear that the party did argue the motion upon its merits, without insisting upon objections to the moving papers, and this cannot be inferred from the mere fact that he argued the motion. The failure to make objections to the papers is the material thing, and no provision is made for making this appear in the record. The case of Munch v. Williamson[16] is not in conflict with this position. The order in that case was as follows: "Now at this day,

[14a] 115 Cal. 29, 46 Pac. 920. Also Beach v. Spokane etc. Co., 25 Mont. 367, 65 Pac. 106.

[15] See Quivey v. Gambert, 32 Cal. 304; Cottle v. Leitch, 43 Cal. 320; Hobbs v. Duff, 43 Cal. 485; Bryan v. Maume, 28 Cal. 238. Also Doyle v. Gore, 13 Mont. 471, 34 Pac. 846; Woodward v. Webster, 20 Mont. 279, 50 Pac. 791; Power v. Lenoir, 22 Mont. 169, 56 Pac. 106; Beach v. Spokane etc. Co., 25 Mont. 367, 65 Pac. 106.

[16] 24 Cal. 167.

See, also, State v. Cheney, 24 Nev. 222, 52 Pac. 12, upon the subject of waiver. Waiver cannot be predicated of acts of any kind short of express statements to that effect, where proper objections were made at the first opportunity offered.

in open court, comes on to be heard the defendant's motion for a new trial, and thereupon, after having heard the arguments of counsel, the court overrules the same, to which ruling of the court the defendants, by counsel, except." With reference to the arguments of counsel that this showed a waiver, Sanderson, C. J., delivering the opinion, said: "We are unable to perceive how it can be seriously contended that this entry shows any appearance on the part of the respondent. It is only by a resort to a shadowy inference that we can say that there was an appearance even on the part of the appellant. It is claimed that the use of the word 'arguments' shows that the motion was argued upon both sides. If upon questions of this character the doctrine of presumption can be invoked at all, the presumption in the present case is very much weakened and attenuated by the fact disclosed by the record that each defendant in this case had two counsel, making four in all. We are of opinion that no appearance is shown. A party who claims the benefit of a waiver of this character must prove the waiver beyond cavil, and not leave it to be ascertained by conjecture or doubtful inference." [17]

A stipulation as to the correctness of a statement or bill of exceptions, followed by failure at the hearing of the motion to object because of want of service of the same in time, also no doubt operates as a waiver of such objection, as in the case of a failure to give notice in time. In Estate of Dougherty,[18] the respondent stipulated "that the foregoing is a true and correct statement and bill of exceptions on motion for new trial herein." The supreme court denied the motion to strike out the statement, saying:

"Under the circumstances, respondent will not be permitted here for the first time to impeach the record thus made with his consent and used in the court below without objection."

While failure to serve the statement in time operates, as above shown, to deprive the moving party of the right to have a statement at all,[18a] and while such failure goes, as will hereafter appear,

[17] As to the case of Millard v. Hathaway, 27 Cal. 119; and see section 14, *ante*.

[18] 139 Cal. 14, 72 Pac. 357. Mere assent to an extension of time to propose a statement will not be deemed evidence of waiver of a statement. Vreeland v. Edens, 35 Mont. 413, 89 Pac. 735.

[18a] In Featherstone v. Keane, 18 Idaho, 24, 108 Pac. 337, a statement was stricken from the transcript by the supreme court on the ground that it was not filed, served, and settled within the statutory time.

As to the rule with respect to case-made, see Devault v. Merchants' etc. Co., 22 Okl. 624, 98 Pac. 342; London

to the jurisdiction of the trial court to settle the same,[19] or to hear the motion thereon, and of the appellate court to consider it,[20] unless the objection be waived, the effect of such failure may be relieved under the provisions of section 473, Code of Civil Procedure. The settlement of a statement is a "proceeding" within the meaning of the statute,[21] and the supreme court, in Stonesifer v. Kilburn,[22] held that such a proceeding was within the scope of the statute. Under the authority of that case it has long been the recognized practice to seek relief in all cases where the moving party failed, by reason of mistake, inadvertence or excusable neglect, to serve his statement or bill of exceptions within the statutory time. It has, therefore, been often held that the statement could not be considered, even though settled, unless it appeared that there had been some action of the trial court, upon a proper showing under the section above referred to, accompanying the settlement of the bill or statement, relieving the party against the effect of his failure to serve the statement in time.[23]

etc. Co. v. Cummins, 23 Okl. 126, 99 Pac. 654; Bettis v. Cargile, 23 Okl. 301, 100 Pac. 436; Carr v. Thompson, 27 Okl. 7, 110 Pac. 667; Willson v. Willson, 27 Okl. 419, 112 Pac. 970; Latham v. Schlack, 27 Okl. 522, 112 Pac. 968; McCoy v. McCoy, 27 Okl. 371, 112 Pac. 1040.

[19] See sections 146 and 154, *post*. And see Jue Fook Sam v. Lord, 83 Cal. 159, 23 Pac. 225; Bunnel v. Stockton, 83 Cal. 319, 23 Pac. 301; Cameron v. Arcata etc. Co., 129 Cal. 279, 61 Pac. 955. To same effect see Connor v. Southern Cal. etc. Co., 101 Cal. 429, 35 Pac. 990; Henry v. Merguire, 106 Cal. 142, 39 Pac. 599. Also In re Plume, 23 Mont. 41, 57 Pac. 408; Beach v. Spokane etc. Co., 25 Mont. 367, 65 Pac. 106.

See Wright v. Mathews, 28 Mont. 442, 72 Pac. 820, where it was said that the trial court "could properly refuse to settle the statement, or he could settle the same, and deny the motion for a new trial." See section 146, and particularly the cases cited in notes 15d and 16 thereof. See, also, note 10b, section 153, *post*.

[20] Bunnel v. Stockton, 83 Cal. 319, 23 Pac. 301. The basis of the principle here invoked was thus expressed in State v. District Court, 28 Mont. 123, 72 Pac. 412: "A motion for a new trial is a statutory remedy, and, in order to successfully invoke it, the mode pointed out by statute must be pursued. Ogle v. Potter, 24 Mont. 501, 62 Pac. 920. If the purpose is to make the motion upon a statement of the case, the statement must be prepared and settled under the provisions of section 1155, and subdivisions 2 and 3 of section 1173, Code of Civil Procedure." And see State v. District Court, 29 Mont. 176, 74 Pac. 414.

The appellate court will consider no evidence as to the time of the service of the statement not before the trial court. Golden Fleece etc. Co. v. Silver etc. Co., 15 Nev. 450.

[21] Lukes v. Logan, 66 Cal. 33, 4 Pac. 883.

[22] 94 Cal. 33, 29 Pac. 332; and see Cole v. Wilcox, 99 Cal. 549, 34 Pac. 114; Banta v. Siller, 121 Cal. 414, 53 Pac. 935; Vinson v. Los Angeles etc. Co., 147 Cal. 479, 82 Pac. 53; Pollitz v. Wickersham, 150 Cal. 238, 88 Pac. 911; King v. Dugan, 150 Cal. 258, 88 Pac. 925.

[23] Wheeler v. Karnes, 125 Cal. 51, 57 Pac. 893; Cameron v. Arcata etc. Co., 129 Cal. 279, 61 Pac. 955; King v. Dugan, 150 Cal. 258, 88 Pac. 925; Johnson v. Ins. Co., 150 Cal. 336, 88 Pac. 985.

The proper practice in such cases is to incorporate in the bill or statement a showing in terms that application for such relief was made to the court and granted, setting out, of course, the affidavits and counter-affidavits offered at the hearing of the motion, as in the case of other appeals from orders made under section 473. The motion for relief is not properly a part of the judgment-roll, nor the order of the court thereon, and unless incorporated in the statement or bill of exceptions, as the case may be, it cannot be considered.[24]

§ 146. Practice Where the Statement is not Proposed in Time. There has been considerable confusion in regard to the proper practice where the statement has not been proposed within the time allowed by law, and since this confusion to some extent still exists, an extended examination will be given to the subject in this place. The matter first received attention in Quivey v. Gambert.[1] In that case the court below struck out the statement because not proposed in time. The moving party appealed from the order striking out his statement, but the supreme court held that the order was not appealable and dismissed the appeal. It took occasion, however, to consider what was the proper practice in such cases, and Sanderson, J., delivering the opinion of the majority of the court, said:

"In some districts a practice seems to have arisen in relation to proceedings touching new trials, which we think has no foundation in the Practice Act. If the defendant in the motion has, or supposes he has, some technical grounds upon which to resist the motion, such as a failure to file and serve notice of motion, or statement or affidavits to be used at the hearing within the periods of time respectively provided by the statute, he has been allowed to make a counter-motion to dismiss the motion for new trial where

[24] See King v. Dugan, 150 Cal. 258, 88 Pac. 925, where the statement showed that an objection to the settlement thereof was made on the ground that it had not been served within the statutory period; that, in response to this objection, appellant presented an affidavit containing a showing of mistake, inadvertence and excusable neglect, and a prayer for relief under section 473, Code of Civil Procedure; that respondent presented counter-affidavits, and that upon the hearing the court overruled the objection and settled the statement, the supreme court held that the showing was sufficient, being in effect what was required. See, also, Cole v. Wilcox, 99 Cal. 549, 34 Pac. 114. Also Beach v. Spokane etc. Co., 25 Mont. 367, 65 Pac. 106.

[1] 32 Cal. 304. As to the practice of striking out imperfect statements, or statements not presented in time, see note 16.

the notice is not within time, or to strike out the statement where the notice is in time but the statement is not. In Harper v. Minor the counter-motion was to dismiss the motion for a new trial, and in Jenkins v. Frink it was to strike out the statement. We are of the opinion that such a mode of procedure is irregular, and not only without the sanction of any provision of the statute regulating such matters, but is so inconsistent with the practice contemplated by the statute, and so embarrassing and mischievous in its results, that it ought not to be longer tolerated. Such a practice might be tolerated if such orders were appealable, but even then it would be a bad practice; for if such orders should turn out to be erroneous, two appeals would be necessary instead of one, in order to get the judgment of this court upon the ultimate question whether there ought to be a new trial or not. But in view of the fact that such orders are not appealable, a moment's reflection will show that such practice is altogether at variance with the methods of the statute, and tends materially to embarrass and complicate the proceedings to obtain a new trial, if not to entirely deprive the party seeking a new trial of his right to the opinion of this court as to whether he is entitled to it or not. Suppose the motion for a new trial to be dismissed, or what amounts to the same thing, the statement or affidavits upon which it is based stricken out, how is the plaintiff in the motion to proceed thereafter? He may claim that his notice or statement, as the case may be, is in time, and if so he is entitled to the opinion of this court upon that question. How is he to get his case here within any of the modes fixed by the statute? If no way has been provided, or if there is a way and it is unnecessarily circuitous and complicated, a practice which necessitates a resort to it ought not to be countenanced. It is suggested that he may still prosecute his motion for a new trial, and then appeal from the order. There is a manifest absurdity involved in the idea of further prosecuting a motion which has been dismissed, or the foundation upon which it rests stricken out. But overlook the absurdity and suppose the thing to have been done, what will come to this court on the appeal, of what will the record consist? In passing upon the question of new trial, we are confined to the record upon which the court below ruled. By the very conditions supposed, the court below had no record before it when it denied the motion. So we have none before us, and, as a matter of course, the order must be affirmed.

"But it is suggested that the order dismissing the motion or striking out the statement may be brought up on the appeal from the order denying the motion by a bill of exceptions. Suppose that this could be done, it would be necessary to come here twice before the motion for a new trial could get here; for the first appeal would merely reverse the order striking out the statement, and a statement would thereafter have to be settled by the court below and the motion for a new trial again decided before we could reach the question. But it cannot be brought here by a bill of exceptions. The definition of an exception as given in section 128 of the Practice Act is not broad enough to cover such a case. An exception as there defined is an objection taken at a trial, or at any time from the calling of the action for trial to the rendering of the verdict or decision. It is next suggested that on the appeal from the order denying the new trial the ruling of the court in dismissing the motion or striking out the statement can be brought up by a statement made on such appeal, as provided in section 338. Suppose that this can be done, such a course would still be objectionable, because it would make it necessary to bring the case here twice before the motion for a new trial could be reached, for the reason, as stated above, that until the error in dismissing the motion or striking out the statement has been corrected no statement for the purposes of the motion for a new trial can be prepared. But we do not consider that orders referred to in the three hundred and thirty-eighth section include orders granting or refusing new trials. Motions for new trials rest here, as in the court below, upon the record made and settled before the motion is heard. There can, therefore, be no occasion for a further statement on an appeal from such an order, for we can only review it upon the same record upon which the court below decided. The orders referred to in section 338 are evidently such special orders as are made during the progress of the case or after final judgment, which are appealable, and are not based upon a record previously made and settled. Where such is the case a statement may be necessary, and hence the section in question has provided that one may be made if required; but where, as here, the record is made in advance of the order, there can be no occasion for a subsequent record.

"From these considerations, we think it clear that the practice pursued in this case is out of the line of procedure adopted by the code. It is manifest that under either mode above suggested the

first appeal, though nominally from the order denying or granting a new trial, is in effect an appeal from the order striking out the statement; for that order is the order and the only one which is in fact reviewed, and the order from which the appeal appears to be taken is not reviewed at all, and cannot be until the case has gone back and an opportunity has been given to the parties to make a record upon which it can be heard. To show the utter absurdity of such a practice it is only necessary to trace it one step further. If a statement can be made up under the three hundred and thirty-eighth section after a motion for new trial has been decided, it must be done within twenty days. Suppose a dispute should arise as to whether it was filed in time, and a motion should be made to strike it out also, and should be sustained, how would the case stand then? Would still another statement be in order? If a statement would be in order in the first instance, it would for the same reason be in order in the second, and so on to the end of time; statement after statement could be struck out, and all access to this court on the part of the plaintiff in the motion be cut off. A practice which leads to such absurd consequences cannot be sustained.

"A party moving for a new trial is entitled to a ruling on his motion upon the basis upon which he presents it in order that he may have and enjoy unembarrassed his right of appeal to this court.[1a] If his notice or statement has not been served or filed within time, that is a good reason why his motion should be denied when finally brought to a hearing; but under the method of procedure prescribed by the code, it is not intended that the record upon which the motion is made may be first stricken out, and the motion then denied. Such a course is in effect a denial of any hearing upon the motion, and of an appeal to this court in a case where an appeal is given. There is no force in the suggestion that the defendant in the motion, if not allowed to take this course, will be forced to waive objections as to time. If the notice and statement, or either of them are not filed in time, he may safely rely upon such facts as fatal to the motion when brought to a hearing. If, however, as is generally the case, there is some doubt as to whether they are within time, and he does not desire to take any risk, he may propose amendments without waiving his right to object that they are not within time by a simple preface that he does so with-

[1a] See note 16, below.

out prejudice to his right to object at the hearing to the notice or statement upon those grounds. By so doing he waives nothing; on the contrary, he preserves all his rights in the premises. The court will then proceed and settle the statement, and at the hearing pass upon the objections so reserved. If the motion is denied, an appeal can then be taken to this court, where the whole matter can be reviewed upon the record upon which the court below heard the motion. Such is the plain and obvious course prescribed by the statute, and no departure from it can be indulged without, as we have seen, mischievous, if not absurd, results."

The reasoning of the foregoing opinion consists in substance of two propositions, viz.:

1. That since an order striking out a statement is not appealable, its necessary effect would be to deprive the moving party of his right to the opinion of the supreme court upon his motion for new trial.

2. That even if such order were appealable, it would necessitate two appeals for what could be accomplished by one, and would therefore render the proceedings needlessly embarrassing and complicated.

The foundation of the first ground was cut away by the decision in Calderwood v. Peyser.[2] In that case it was held that an order striking out a statement was appealable. But this did not affect the other ground upon which the opinion in Quivey v. Gambert rests, or revive the practice condemned in that case. On the contrary, in Calderwood v. Peyser an order striking out a statement on motion for new trial was reversed, the court saying on petition for rehearing in explanation of its decision: "We reversed this order because we held, as was held in Quivey v. Gambert, 32 Cal. 304, that such an order cannot be supported if objected to below." And the doctrine of Quivey v. Gambert was approved in subsequent cases, and appears to have obtained in practice. Thus in Cottle v. Leitch,[3] Wallace, C. J. (who wrote the opinion in Calderwood v. Peyser), delivering the opinion, said: "In the case of Quivey v. Gambert this court held that proposing amendments to statement which had been filed too late would not be a waiver of the objection upon that ground, if the objection be at the same time expressly reserved. The views upon this point expressed in

[2] 42 Cal. 110. [3] 43 Cal. 320.

that case have ever since been followed here, and the practice theretofore prevailing of moving to strike the statement from the files, because filed too late, has ever since been repudiated." So in Lucas v. Marysville,[4] the learned chief justice delivering the opinion, said: "In the case of Quivey v. Gambert, 32 Cal. 304, it was held that it was not good practice to strike from the files the proposed statement on motion for new trial upon the ground that the right to move had been waived or lost, and that objections to the right of the moving party to be heard upon the motion should be made at the hearing, and the rule in this respect indicated in that case has ever since been followed in this court."

These cases show, what indeed is apparent from the opinion of Calderwood v. Peyser, that that case was not intended to overrule the doctrine of Quivey v. Gambert as to striking out statements or moving to dismiss, but only to overrule it, in so far as it holds that an order striking out a statement is not an appealable order. The reasoning of the court in Quivey v. Gambert, with reference to striking out statements and dismissing motions for new trial, is unanswerable, and the rule laid down by the court, although subject to qualifications as shown below, is so convenient that it will always be followed by the great majority of the profession. For, as has been shown, the objection that the proposed statement was not in time must be reserved before proposing amendments;[5] if not it is waived, and cannot afterward be made either on motion to strike out the statement or in any other manner. When reserved the objection must (if not sustained at the settlement) be incorporated in the settled statement, together with the matter in its support; if it be not so incorporated, the presumption is that the proposed statement was in time, and that all the proceedings in its preparation were regular.[6] This presumption is

[4] 44 Cal. 210. In this case the court seems to hold that the judge must settle the statement whether an objection to the settlement be well taken or not. As to this point it is overruled by the case of Clark v. Crane, 57 Cal. 629, quoted in the text below.

[5] See section 145, *post*, subdivision 3.

[6] Look at People v. Martin, 6 Cal. 477; Battersby v. Abbott, 9 Cal. 565; Vilhac v. Biven, 28 Cal. 409; Young v. Rosenbaum, 39 Cal. 646; Sullivan v. Wallace, 73 Cal. 307, 14 Pac. 789; Bank of Orland v. Finnell, 133 Cal. 475, 65 Pac. 976; and see Barclay v. Blackinton, 127 Cal. 189, 59 Pac. 834. The objection that a statement was not proposed in time must appear from the statement itself as settled. If it does not, the presumption from the certificate of the judge is that everything was regularly done. And this presumption is not confined to cases where the statement as engrossed and certified does not show when the statement was proposed, but extends

conclusive. For the statement, when certified and filed like other records, imports absolute verity, and cannot be contradicted or added to by affidavits upon a motion to strike out or upon a motion to dismiss, or in any other manner. The objection must therefore be apparent upon the face of the statement itself; and if so apparent, it is manifest that it may be urged as a reason why the motion for new trial should be denied, both in the lower court on the hearing of the motion, and in the supreme court upon appeal from the order granting or refusing a new trial. This being the case, the inauguration of a separate line of proceedings by a separate motion to strike out the statement, or a motion to dismiss the motion for new trial, is not only utterly useless, but is open to the very grave objection of involving two appeals before the motion for new trial can get to the supreme court.[6a]

to cases where the statement as certified shows that it was not proposed within the ten days allowed by the statute. For where the simple fact appears that the proposal was not within the ten days, and nothing further is shown, it will be presumed that there was some extension of the statutory time, either by order of the judge or stipulation of the parties, and that the proposal was within the extended time. This would seem to be a legitimate application of the presumption in favor of the regularity of official action, and to be the result of the cases. Thus in People v. Martin, above cited, the bill of exceptions showed that it was not filed within a time prescribed by statute, but it did not show that no extension had been granted. The supreme court seemed to think that in criminal cases the failure to file the bill in time was not fatal, but in addition to this, said: "In the absence of anything appearing to the contrary, the legal intendment would arise from the fact of the bill being signed by the judge that the same was done regularly." So in Young v. Rosenbaum, above cited, the record did not show that the proposed statement had been served. The court held that "as no objection on this ground was taken in the court below, and as the statement is certified by the judge to be correct, it will be presumed that it was served in the absence of anything in the record showing to the contrary."

The presumption, however, is rebuttable. It may be overcome by anything *in the record* which shows that no extension was in fact given, or an objection on account of the delay. If the statement as settled shows that it was not proposed within the statutory time, and that an objection on that account was reserved, it is incumbent upon the moving party to have incorporated in the statement whatever matter there may be in answer to the objection; if he does not do so, the objection must prevail. Higgins v. Mahoney, 50 Cal. 444; Conner v. Southern California M. R. Co., 101 Cal. 429, 35 Pac. 990; Wheeler v. Karnes, 125 Cal. 51, 57 Pac. 893. The statement when certified and filed cannot be contradicted or added to by affidavits. See section 283, *post;* Wormouth v. Gardner, 35 Cal. 227.

See, also, to same effect, Murray v. Hauser, 21 Mont. 120, 53 Pac. 99.

[6a] In Burnett v. Davis, 27 Okl. 124, 111 Pac. 191, it was held that all matters relating to the service of a case-made, to the notice of the time and place of settling, and to signing and settling of the same, should be made to appear from the case-made itself, but that, where this is not done, it may be shown by evidence *dehors*. This rule has not been applied to statements and bills of exceptions, however. See cases cited in Burnett v. Davis, *supra*.

But the rule laid down in Quivey v. Gambert is subject to two important qualifications which do not seem to have occurred to the very able court which decided the case.

1. The rule laid down in the case proceeds upon the assumption that the moving party will always go on, notwithstanding the objection, and complete his statement and have it certified and filed. If he does so it is very easy for the successful party to have his objections incorporated in the statement as settled, and proceed in the manner above pointed out. But it is manifest that the moving party may not complete his statement. After giving his notice of intention, and perhaps taking some other steps, he may never proceed any further with his motion, or he may delay for an indefinite time, and *non constat* that he will ever proceed any further; and it may be of consequence to the successful party to have the motion for new trial disposed of. He cannot be expected to take upon himself the burden of preparing his adversary's record; and if he were willing to assume the burden, he would have no right to do so;[6b] he would have no right, for example, to propose a statement for his adversary. The only record permissible on a motion for new trial is that authorized by the statute, and that is to be specified in the notice of intention and prepared by the moving party. If the moving party does not prepare a record upon the motion for new trial, there can be none *upon that motion.* Such being the case, the course pointed out in Quivey v. Gambert of incorporating the objections into the record upon the motion for new trial cannot be adopted for the simple reason that there is no record upon such motion. The only course open to the successful party is to make a separate and independent motion, upon affidavits showing the facts, to have the motion for new trial dismissed.[7] In this way only can the facts in reference to the delay be made to appear of record and the party whose judgment is attacked obtain relief.[8] It is true that this course is open to the objection stated in Quivey v. Gambert of involving two appeals

[6b] See Stoyell v. Cole, 19 Cal. 602.

[7] Under the code the *proposed* statement is not to be filed as it used to be under the old Practice Act. No statement is filed except the engrossed and certified one. If none be engrossed and certified, there is nothing to "strike out."

[8] As to whether the motion for new trial should in such case be "dismissed" or "denied," see section 165, *post.*

before the motion for new trial can get to the supreme court.[8a] But that is a necessary consequence of the failure of the moving party to complete his record; and he is not in a position to complain.

2. Even where the moving party, notwithstanding the objections reserved to his statement, proceeds with its preparation, the course pointed out in Quivey v. Gambert can be followed only where the judge does not sustain the objections, but proceeds with the settlement of the statement. The successful party may press his objections when the statement is presented to the judge for settlement. If the judge does not think them well taken and overrules them, the course pointed out in Quivey v. Gambert must be followed. But if the objections are well taken, and are sustained by the judge, there would be no sense in compelling him to commit an error in overruling the objections merely in order that he might have an opportunity to correct the error at the hearing of the motion, and that the supreme court might have an opportunity to affirm his action. The moving party is entitled to have the opinion of the supreme court as to whether the action of the judge in sustaining the objections and refusing to settle the statement is correct. But the plainest, speediest, and most adequate mode of obtaining such opinion is by applying for a writ of *mandamus* to compel the judge to proceed with the settlement. Upon such application the facts *pro* and *con* can be fully shown, and the judgment of the supreme court as to whether or not the statement was in time pronounced. This is clear upon principle, and seems to have been decided in Clark v. Crane.[9] In that case the judge of the court below refused to settle the statement because the notice of intention was not given in time. The supreme court held that the notice was not in time, and declined to award a *mandamus*, and Thornton, J., delivering the opinion, said:

"But it is said that it was the duty of the judge to have settled the statement that the defendant might have an opportunity to prosecute his motion for a new trial, and if denied, bring the whole matter before this court for review through the process of appeal, and to sustain this contention we are referred to Quivey

[8a] In connection with this subject, see the practice where the judge decides the motion for new trial before the record is completed, or without a submission of the motion. Sections 134, *ante*, and 164, *post*.

[9] 57 Cal. 629.

v. Gambert, 32 Cal. 304. In that case the plaintiff recovered judgment in the court below. The defendant moved for a new trial and filed a statement. The court, on motion of plaintiff's attorney, struck the statement from the files. The defendant appealed from this order. On motion of the respondent the supreme court dismissed the appeal, on the ground that such an order, though made after final judgment, was not appealable, following several cases cited in the opinion. This would ordinarily have ended the cause in that court. But the court entered into a discussion of the proper method of procedure in such cases, and held that the practice of striking out the statement was irregular, and without the sanction of any provision of the statute. The opinion concludes with advising the court below to set aside its order striking out the statement, and to allow the motion for a new trial to proceed to a hearing on the statement, as if the party moving had complied with the statute in all regards. The party who has recovered judgment is also advised as to the course he should pursue in order to save his right. One of the learned judges dissented from the conclusion reached by his associates. This cause was subsequently reviewed in the case of Calderwood v. Peyser, 42 Cal. 110. In this cause the court came to the conclusion that an order striking a statement from the files of the court made after final judgment was an appealable order, and as to this point overruled Quivey v. Gambert, one of the justices who had participated in the ruling thus disposed of dissenting. It is unnecessary to review the reasoning of the opinions in the two cases just referred to, but we are satisfied with the conclusion reached in Calderwood v. Peyser, which has been acted on ever since. We will merely state here that the statute at that time, as it does now, gave an appeal 'from any special order made after final judgment' (Practice Act, sec. 336; Code Civ. Proc., sec. 939); and that the lawmakers seem to have been of opinion that any order was sufficiently within the line of procedure when it came in the order of succession designated in the statute, viz., after final judgment. If the order before us was one striking the statement from the files, there is then a remedy by appeal, according to the rule established by the case just above cited. This is generally regarded as fatal to an application for a writ of mandate, and has been in this state repeatedly so held. (See Peralta v. Adams, 2 Cal. 594; Fremont v. Merced M. Co., 9 Cal. 18, 9

Morr. Min. Rep. 659; Ludlum v. Fourth District Court, 9 Cal. 7; Early v. Mannix, 15 Cal. 149; People v. Sexton, 24 Cal. 78; Clark v. Minis, 50 Cal. 509.) The orders under consideration are special orders made after final judgment was entered, on the 8th of December, 1880, and the orders in question were not made until the 20th of that month. These orders are likewise appealable under the provisions of the code. They are as much special as an order striking a statement from the files, and, therefore, within the rule of Calderwood v. Peyser are appealable. If the facts do not appear on the record, they may be made to appear by bill of exceptions, as was held in Pieper v. Centenilla Co., 56 Cal. 173, and the whole matter brought here by the ordinary process of appeal.

"It may be said that where the remedy by appeal is not a speedy and adequate remedy, then the writ of mandate should issue. This was so held in Merced M. Co. v. Fremont, 7 Cal. 130. Then, admitting for the argument, that the remedy by *mandamus* is the proper one by reason of the fact that the remedy by appeal is not plain, speedy and adequate, does it follow that the writ must go in such a case as this? Do the facts of the case here presented entitle the applicant to the writ? We are all of opinion that where the facts show that the court below has no longer jurisdiction to act in the matter, the writ should be denied. Why compel the settlement of a statement when the facts show that if the statement was settled, the motion heard, and a new trial denied, so that an appeal might be prosecuted from it, the order of the court below must be affirmed, because the party had lost his right to move? Or if the new trial was granted, that on appeal the order would be reversed for the same reason. Either result of the appeal must be fatal to the claim of the party moving. The facts are all fully before us on this writ, and they show that the new trial must be denied, because the court has no longer power over the case. And if such facts show on the hearing of the writ that such must be the result, that the cause must end adversely to the pretensions of the applicant, why not so declare on such application, and relieve the parties from any further expense, trouble, and delay in the prosecution of a useless appeal? The facts can be passed upon on this application as well as on an appeal. It cannot be said that the result would not be the same. Then why not announce such result, adjudge that the

party cannot have this writ to order a judge or court to do an utterly vain and useless thing; that the performance of the act sought to be compelled here does not result as a duty from the office, trust, or station of the judge, or rest upon the court, for the reason that, owing to a nonobservance of the requirements of the law as to time, the duty or obligation no longer remains. Says Mr. Broom, in his very excellent work in explanation and exposition of Legal Maxims, 'It is a maxim of our legal authors, as well as a dictate of common sense, that the law will not itself attempt to do an act which would be vain, *lex nil frustra facit,* nor to enforce one which would be frivolous, *lex neminem cogit ad vana seu inutilia.*' The laws will not, in the language of the old reports, *enforce anyone to do a thing which will be vain and fruitless.* (See Broom's Legal Maxims, '*Lex non cogit ad impossibilia,*' 6th Am. ed., 248, 249, citing 3 Johns., per Kent, J., 598; 5 Reporters, 21; Co. Litt. 127 *b,* cited on argument 2 Bing. N. C. 121 (E. C. L. R. 29); Wing. Max. 600; R. v. Bishop of London, 212 *a,* as per Willes, J.; Bill v. Midland R. Co., 10 C. B., N. S. (E. C. L. R. 100). The citations show the limitations and application of the maxim. (See, also, Teel v. Sweating, 2 Johns. 184.) As remarked by Kent, J., in the case above cited from 3 Johns., 'it has hitherto been considered as a settled principle, that a court will not undertake to exercise power, but when they exercise it to some purpose.' "

The reasoning of the foregoing opinion upon the point directly involved, viz., that the question of the correctness of the judge's refusal to settle the statement may be examined upon the application for *mandamus,* and that if such refusal was right the writ will not be awarded, is unanswerable. But the language of the opinion requires limitation as much as does the language in the case of Quivey v. Gambert; and what is said concerning the effect of Calderwood v. Peyser indicates that the court misapprehended that case.[10] The limitations which it is supposed that the rule in Clark v. Crane requires are as follows:

(*a*) The case applies only where the judge sustains the objections *and refuses to settle the statement.* Where the judge overrules the objections and settles the statement, neither *mandamus,*

[10] As shown in the text above, the case of Calderwood v. Peyser overrules Quivey v. Gambert only upon the question of the appealability of orders striking out statements; as to the propriety of such orders it expressly affirms Quivey v. Gambert. See, also, the cases above cited in the text.

certiorari, nor prohibition can be resorted to, for the reason that the course pointed out in Quivey v. Gambert, of having the objections and the matter in their support incorporated in the statement, and so making its invalidity apparent upon its face, is by far the plainest and most speedy and effectual remedy that can be resorted to.[11] And where the objection is apparent upon the face of the statement (as it must be to be available at all[12]), the inauguration of a separate line of proceedings by motion to strike out or to dismiss is improper for the reasons above stated. Where, therefore, the judge proceeds with the settlement of the statement, the course pointed out in Quivey v. Gambert must be followed.

(*b*) Where the judge refuses to settle the statement, the opinion in Clark v. Crane seems to intimate that the moving party's remedy is to appeal from the order refusing the settlement. This is not directly decided, but is strongly intimated. But at least in the present condition of the business of the court it would take a year at least before such appeal could be determined, while an application for *mandamus* can be disposed of (as was done in Clark v. Crane) in a few months. In any case an appeal would involve much more time than an application for *mandamus*. And in view of the fact that after it has been determined that the statement ought to have been settled the party has still a long litigation before him, it would seem that an appeal from the order refusing the settlement would not be a "plain, speedy and adequate" remedy, and therefore that even where the order is appealable the party may apply for the writ.

But, conceding the correctness of the intimation in Clark v. Crane that an order refusing to settle a statement is an appealable order, yet it is clear that such an order cannot always be appealable. It is only so in any event when it happens to be "made after final judgment." As has been shown, proceedings to obtain a new trial are collateral to the judgment,[13] and may be commenced[14] and even completed before judgment is entered; and in practice it often happens that the entry of judgment is neglected until after the proceedings on motion for new trial have been disposed

[11] By that course *all* the questions in the case may be determined by *one* appeal to the supreme court, which is not the case if any other course be taken.

[12] See note 6 above.

[13] See section 2, *ante*.

of in the court below. Where such is the case an order refusing to settle a statement is not a "special order made after final judgment," and consequently is not appealable,[15] and *mandamus* is the proper remedy.

Indeed, there are grave reasons for doubting that an appeal can ever be taken from an order refusing to settle a statement on motion for new trial, even though made after final judgment. It has been decided time and again that *mandamus* is the appropriate remedy. It is well settled that *mandamus* will not lie where there is a remedy by appeal. In Careaga v. Fernald,[15a] it was said that the remedy by appeal was inadequate; and in Hearst v. Dennison,[15b] it was said that "it is doubtful if an appeal lies at all. If a judge refuses to settle a *bona fide* statement, he may be compelled to settle it by *mandamus*." The later cases go even further. In Murphy v. Stelling,[15c] the court said: ". . . . *Mandamus* is the proper and exclusive remedy where a trial judge refuses to settle a statement which it is his duty to settle." The cases are not always consistent,[15d] but they unite upon the prin-

[14] See section 16, *ante*.

[15] An order must be after the *entry* of judgment in order to be appealable as a special order made after final judgment. See sections 92, 102, *ante*.

[15a] 66 Cal. 351, 5 Pac. 615. And see Hicks v. Masten, 101 Cal. 651, 36 Pac. 130.

[15b] 72 Cal. 227, 13 Pac. 628.

[15c] 138 Cal. 641, 72 Pac. 176.

[15d] In Stonesifer v. Armstrong, 86 Cal. 594, 25 Pac. 50, which was an application for writ of mandate to compel a judge to settle a bill of exceptions, there was also in the record an application for relief from the effect of a failure to propose the statement in time. The writ was denied, but the court intimated that it would entertain an appeal from an order refusing the relief asked for. Accordingly, in Stonesifer v. Kilburn, 94 Cal. 33, 29 Pac. 332, this appeal was taken, but it appears to have been nominally an appeal from an order refusing to settle the bill. The court treated it as the latter, and entertained it upon the authority of certain early decisions with respect to appeals from orders striking out statements, refusing to amend an order extending time for moving for new trial, and certifying statements. It is not clear whether this appeal was from the order refusing relief, or from the order refusing to settle the bill of exceptions. If the former, the decision was clearly correct. If from the latter, it was clearly wrong, as the court had already decided in the earlier case. Until the relief had been granted, appellant had no case. Relief was not granted by the trial court.

In Landers v. Landers, 82 Cal. 480, 23 Pac. 126, the court *intimated* that *mandamus* was the sole remedy. In Whipple v. Hopkins, 119 Cal. 349, 51 Pac. 535, there was an appeal from an order refusing to settle a bill of exceptions, and the appeal was dismissed, the court holding that it was not properly taken, but the appeal in question did not affect the merits of the case which was decided upon entirely different issues.

In Murphy v. Stelling, 138 Cal. 641, 72 Pac. 176, the appeal was not from an order refusing to settle the statement, but was from the order refusing relief under section 473, Code of Civil Procedure. In Hudson v. Hudson, 129 Cal. 141, 61 Pac. 773, the attempted appeal was from an order refusing to

ciple that *mandamus* is by far the better, even if it is not the exclusive, practice, and no one has seriously contended, during the past twenty-five years of California juridical history, for the right of appeal from such an order.

The results of the foregoing examination of the practice where it is claimed that the statement was not proposed in time may be recapitulated as follows:

The party must reserve his objection on account of the delay before proposing amendments to the statement. If he does not, he waives the objection, and cannot afterward raise it in any form. The objection when so reserved is to be urged when the statement is presented for settlement as a reason why it should not be settled. If the judge overrules the objection and proceeds to settle the statement, the party must have his objection and the matter in its support incorporated in the statement. When so incorporated it may be urged as a reason why the motion should be denied, both in the lower court upon the hearing of the motion and in the supreme court upon appeal from the order granting or refusing the motion. Where the judge sustains the objection of the successful party and refuses to settle the statement, the moving party must take steps to obtain the opinion of

amend a bill of exceptions and from an order striking out of the settled bill certain evidence, and also from an order refusing to settle another bill. All were in reality the same refusal to allow the party to amend the bill that had been presented for settlement, and the appropriate remedy was that prescribed by section 652, Code of Civil Procedure. There was therefore no necessity for a decision upon the point as to the appropriate remedy for a refusal to settle a bill or statement. The court held that *mandamus* was the proper remedy.

In Machado v. Kinney, 135 Cal. 354, 67 Pac. 331, the appeal was from the judgment and new trial order. There was no statement, the statement not having been settled. The court said: "On this appeal we cannot review the action of the court in refusing to settle the statement. The remedy for that is pointed out in Hudson v. Hudson, 129 Cal. 141, [61 Pac. 773]." In Williamson v. Joyce, 137 Cal. 152, 69 Pac. 980, it is intimated that the right of appeal may really exist. Referring to the appeal from an order refusing to settle a bill of exceptions, the court said: "The latter appeal, however (assuming the order to be appealable), must be disregarded, as in the absence of a bill of exceptions, there is nothing to show error."

See, also, People v. Jackson, 138 Cal. 33, 70 Pac. 918; Banta v. Siller, 121 Cal. 414, 53 Pac. 935; Wheeler v. Karnes, 125 Cal. 51; Fountain Water Co. v. Superior Court, 139 Cal. 648, 73 Pac. 590; Hartmann v. Smith, 140 Cal. 461, 74 Pac. 1; Kaltschmidt v. Weber, 136 Cal. 675, 69 Pac. 497; Henry v. Merguire, 106 Cal. 142, 39 Pac. 599; and see section 155, *post*, as to general subject of *mandamus* to compel the settlement of a statement; and section 196, *post*, as to appealability of special orders after final judgment; and see chapter 54, as to general subject of *mandamus*.

See, also, Ayotte v. Thomas, 20 Mont. 223, 50 Pac. 553, and In re Plume, 23 Mont. 41, 57 Pac. 408; Beach v. Spokane etc. Co., 25 Mont. 367, 65 Pac. 106.

the supreme court as to the rightfulness of the refusal. Where no judgment has been entered, it is certain that the only remedy is to apply for a *mandamus* to compel the judge to proceed with the settlement. Where final judgment has been entered before the refusal to settle the statement, it is not at all clear but that he may, in that case, if he choose to resort to a tedious remedy, appeal from the order. It is not to be doubted that his right to a writ of mandate has the weight of authority, and that he may, if he choose, have that remedy. It is true, the earlier cases express a doubt upon the point, but, as above appears, the later cases clearly uphold it. Upon the application for *mandamus* the question of the correctness of the refusal of the judge to settle the statement may be examined. If the refusal be correct, it can be so adjudged, and that is practically the end of the motion; but if it be determined that the refusal was incorrect, the judge may be commanded to proceed with the statement.

The foregoing applies only where the moving party proceeds with the preparation of his statement, notwithstanding his opponent's objection. Where he does not so proceed, the remedy of the prevailing party is to move upon affidavits to have the motion for new trial dismissed.[16]

§ 147. Extension of Time to Serve Proposed Statement.—Before 1861 there was no provision in the section in relation to extension of the time in which to file the statement, nor was there a general section in relation to extensions of time. In Wood v. Forbes,[1] when the party filed his statement, "ten days' time having been given him for that purpose by the court," it was held

[16] The various propositions of this recapitulation are discussed and verified in the foregoing section.

See, also, Sweeney v. Railway Co., 11 Mont. 34, 27 Pac. 347; Beach v. Spokane etc. Co., 25 Mont. 367, 65 Pac. 106. The point was fully considered in this last-cited case, and the doctrine of the text thoroughly sustained. See, also, State v. District Court, 28 Mont. 123, 72 Pac. 412, where the rights of the various parties in the matter of the statement is fully discussed. See, also, Wright v. Mathews, 28 Mont. 442, 72 Pac. 820; Power v. Lenoir, 22 Mont. 169, 56 Pac. 106; Burns v. Napton, 26 Mont. 360, 68 Pac. 17; State v. District Court, 28 Mont. 123, 72 Pac. 412.

As to the practice of striking out statements, the rule is not uniform. In Nevada the rule at one time was that where the statement was not filed in time it should be stricken out. See Williams v. Rice, 13 Nev. 234; Harrison v. Lockwood, 14 Nev. 263; Robinson v. Benson, 19 Nev. 331, 10 Pac. 441; G. F. M. Co. v. Cable Con. Co., 15 Nev. 450. In Featherstone v. Keane, 18 Idaho, 24, 108 Pac. 337, the statement was stricken out by the supreme court on the ground that it was not filed, served and settled in time.

[1] 5 Cal. 62.

that the court had power to extend the time, and Bryan, J., delivering the opinion, said: "The court has always held that statutes fixing the time for filing papers in a cause are merely directory, and that the court has it always in its power, in the exercise of a proper discretion, to extend the time fixed by law, whenever the ends of justice would seem to demand such extension." In 1861, section 195, in relation to new trials, was amended,[2] so as to provide that the moving party "shall within five days after the giving such notice, *or within such further time, not exceeding twenty days, as the court or judge thereof may by order grant,* prepare, and file, etc.," and that "if no affidavit or statement be filed within five days after the notice, *or within such further time as the parties may agree upon, or the court or judge thereof may by order grant,* the right to move for a new trial shall be deemed waived." In 1863 the section was amended[3] so as to allow the court commissioner to extend the time as well as the judge. But no further change was made until the adoption of the Code of Civil Procedure. Under the amendment of 1863, it was held that the time to file the proposed statement could be extended for twenty days.[4]

As above stated, before 1861 there was no general section in relation to extensions of time. In that year section 530 was amended[5] so as to provide among other things the following:

"Sec. 530. When the act to be done relates to the pleadings in the action, or the undertakings to be filed, or the justification of sureties, or the service of notices, other than of appeal, *or the preparation of statements,* or of bills of exceptions, or of amendments thereto, the time allowed by this act may be extended, upon good cause shown, by the court in which the action is pending, or the judge thereof, or in the absence of such judge from the county in which the action is pending, by the county judge; but such extension shall not exceed thirty days beyond the time prescribed by this act, without the consent of the adverse party."

It will be observed that the foregoing section permitted the extension of the time for "the preparation of statements" for *thirty* days. But it did not apply to statements on motion for

[2] Laws of 1861, p. 590.
[3] Laws of 1863, p. 643.
[4] Carillo v. Smith, 37 Cal. 337; Harper v. Minor, 27 Cal. 107.
[5] Laws of 1861, p. 591.

new trial, such statements being provided for by the amendment to section 195 above quoted. This was said in Harper v. Minor, in which case it was decided that section 195 authorized an extension of twenty days in which to file the notice of intention. In the course of the opinion Sawyer, J., said: "In order to guard against a misconstruction of our opinion, we deem it proper to state here that we do not intend to be understood as intimating that the court has authority under section 530 to extend the time for filing statements on motion for new trial thirty days after giving the notice. The general terms of the section are, perhaps, broad enough to bear that construction, if that section contained the only restriction upon the subject; but it does not. Section 195, as amended in 1861, and also as amended in 1863, gives the party five days after giving notice as an absolute right within which to file statement, and then adds 'or within such further time, *not exceeding twenty days,* as the court or judge thereof may by order grant,' etc. This is an express limitation as to the power of the court or judge, in a section relating exclusively to a motion for new trial, and must prevail rather than the general provision in section 530. The general provision in section 530 would have effect by referring it to statements on appeal." The subsequent practice was in accordance with the above *dictum.*[6]

The Code of Civil Procedure has no provision as to extensions in the sections relating to new trials. In that respect it is different from the old Practice Act. But it has a general section in relation to extensions of time, which corresponds to section 530, above quoted, and which as amended in 1880[7] is as follows:

"Sec. 1054. When an act to be done as provided in this code relates to the pleadings in the action, or the undertakings to be filed, or the justification of sureties, *or the preparation of statements,* or of bills of exceptions, or of amendments thereto, or to the service of notices other than of appeal, the time allowed by this code may be extended, upon good cause shown, by the court

[6] See Cottle v. Leitch, 43 Cal. 320; Carillo v. Smith, 37 Cal. 337.

[7] As the California code was first enacted extensions were limited to twenty days. In 1874 the old limitation of thirty days was restored. In 1880 the section was amended so as to read as above stated. The change was merely to accommodate the section to the change from district courts with one judge each to superior courts with several judges. It consisted in the substitution of the words "a judge thereof," for the words "the judge thereof, or in the absence of such judge from the county in which the action is pending by the county judge."

in which the action is pending, or a judge thereof; but such extension shall not exceed thirty days without the consent of the adverse party."

By amendment, provision was subsequently made for the further extension of this thirty day extension in cases where the attorney of record is actually engaged in attendance upon the legislature as a member thereof. Also for a ninety day extension, in place of the regular thirty day period, from June, 1906, to February, 1907, inclusive; also, for a similar extension of ninety days, during the same period, of the time for serving and filing notices of appeal.

There being no restriction upon the operation of this section, as there was upon the operation of section 530, as explained in Harper v. Minor, above quoted, it cannot be doubted that under it the judge has power to extend the time for filing and serving statements on motion for new trial for thirty days.[8] The extension must be granted before the expiration of the ten days allowed by the section; or, where the statutory time has been extended by stipulation, before the expiration of the stipulated time.[8a] If the order is made after the expiration of the time prescribed by statute, or agreed to by stipulation, it is ineffectual.[8b] As shown in the preceding section of this treatise, if the proposed statement be not served within the time prescribed, or within some extension of it, the right to have a statement is lost. And when lost it cannot be restored by order of the court,[9] even though such order

[8] As to extension of time to file and serve bills of exceptions on appeal from the judgment, see section 257, *post*. As to bills of exceptions generally, see Pink v. Catanich, 51 Cal. 420; In re Clary, 112 Cal. 292, 44 Pac. 569; Frassi v. McDonald, 122 Cal. 400, 55 Pac. 139; Cameron v. Arcata etc. Co., 129 Cal. 279, 61 Pac. 955; Bank of Orland v. Finnell, 133 Cal. 475, 65 Pac. 976; Johnson v. Insurance Co., 150 Cal. 336, 88 Pac. 985.

[8a] See Curtis v. Superior Court, 70 Cal. 390, 11 Pac. 652; Simpson v. Budd, 91 Cal. 488, 27 Pac. 758; Reclamation District v. Hamilton, 112 Cal. 603, 44 Pac. 1074; and see Bunnell v. Stockton, 83 Cal. 320, 23 Pac. 301, to same effect.

As to extension of time to serve case-made on appeal, see Mutual etc. Co. v. Farmers' etc. Co., 27 Okl. 414, 112 Pac. 967; Ellis v. Carr, 25 Okl. 874, 108 Pac. 1101; Bettis v. Cargile, 23 Okl. 301, 100 Pac. 436; Latham v. Schlack, 27 Okl. 522, 112 Pac. 968; Maddox v. Drake, 27 Okl. 418, 112 Pac. 969.

[8b] See In re Clary, 112 Cal. 292, 44 Pac. 569; Freese v. Freese, 134 Cal. 48, 66 Pac. 43; and see cases cited in the preceding note. See, also, as to the rule in Idaho, Simpson v. Pioneer etc. Co., 17 Idaho, 435, 106 Pac. 1, and cases cited.

So, it would seem, the order of extension may be made prematurely. This has been held in regard to a case on appeal. Planters' etc. Assn. v. Rose, 27 Okl. 530, 112 Pac. 966.

[9] Leech v. West, 2 Cal. 95; Bear River & A. W. Co. v. Boles, 24 Cal. 359, 4 Morr. Min. Rep. 592; and see Thompson v. Lynch, 43 Cal. 482; and Clark v. Crane, 57 Cal. 629; and see section 145, *ante*, subdivision 2.

be made *nunc pro tunc* as of a date prior to the expiration of the time.[10] And the extension must be *by order,* either made in open court and entered in the minutes, or in writing and signed by the judge.[11] A mere verbal promise of the judge that when the court opened he would cause an order to be entered is insufficient.[12] But where an order, extending the time to file a statement on motion for new trial is in fact made in court, but the clerk does not enter it as made, the entry may be amended, as of the day the order was made, even though there has been in the meantime an adjournment of the term.[13]

As to the construction of orders extending the time it is evident that each case must be governed by its own circumstances. The following decisions furnish instances of the construction which has been given to orders of this character. In Bear River Co. v. Boles[14] the order provided that "all proceedings under the judgment recovered by plaintiff against defendants be, and they are hereby, stayed and superseded until the fifth day of May next, *in order that counsel may present and prepare his statement on motion for new trial.*" The affirmance was upon the ground that there was no valid notice of intention. But the court said that it did not consider that the above order operated to extend the time to file the statement. In Easterly v. Larco[15] an order was made one day after the decision, and before notice of intention had been given, granting twenty days in which to file a statement on motion for new trial, but without specifying when the twenty days commenced to run. The statement was not filed within twenty days from the date of the order, but was filed within twenty days from the giving of the notice of intention. It was held to be too late, and the order denying the new trial was affirmed on this ground. In Jenkins v. Frink[16] the order was that the "defendants have twenty days within which to file *a motion for new trial* herein," but did not specify when the time should begin

[10] Hegeler v. Henckell, 27 Cal. 491.

[11] Where the order is in writing and signed by the judge, it is certainly better practice to *file* it. But it would seem that the filing is not essential to its validity. Swift v. Canovan, 47 Cal. 86; section 1003, California Code of Civil Procedure.

[12] Campbell v. Jones, 41 Cal. 515, 518.

[13] Spanagel v. Dellinger, 34 Cal. 476. But as a matter of course where no order was in fact made by the court, the extension cannot be granted by amending some other order in the case. Compare Hegeler v. Henckell, 27 Cal. 491, and De Castro v. Richardson, 25 Cal. 49.

[14] 24 Cal. 359, 4 Morr. Min. Rep. 592.

[15] 24 Cal. 179.

[16] 27 Cal. 337.

to run. It was doubted whether the words "motion for new trial" would operate to extend the time for filing a statement on motion for new trial, but it was held upon the authority of Easterly v. Larco, just cited, that even if the order extended the time to file a statement, it extended it twenty days from the date of the order, and not twenty days from the expiration of the time given by the statute; and the statement not having been filed within twenty days from the date of the order, the order of the court below striking it out was affirmed. In Cottle v. Leitch,[17] while the existing statute allowed an extension of twenty days only, the judge made an order extending the time for thirty days. The statement was not filed within the twenty days, and was held to be too late, the court saying: "The most favorable view that can be taken for the defendant is to hold it as an order extending the time twenty days."

In Bunnel v. Stockton[18] the time to prepare and serve the statement was extended thirty days. Before the expiration of this period the time was extended twenty days more by stipulation. Pending this last extension, an additional thirty day extension was granted appellant without the consent of his adversary. Held, that the court could not grant a longer extension than thirty days, and that the fact that respondent had consented to one extension did not create a new status, or renew the authority of the court to grant a second extension of thirty days. In Cameron v. Arcata etc. Co.,[19] the verdict was rendered September 3d, and judgment was entered on the following day. On the day of entry of judgment, September 4th, an extension of thirty days to prepare and serve a bill of exceptions was granted. October 4th a second thirty day extension was granted. In the meantime, on September 10th, a notice of intention to move for a new trial was served and filed. The bill of exceptions was served on October 29th. The report of the case does not give the basis for the appellant's contention that his bill of exceptions was in time. It seems, however, that it was contended that the moving party was entitled to thirty days on his appeal from the judgment and thirty days additional in the preparation of his record on motion for a new trial. The court held, however, that even if the most favorable view was taken of the situation on behalf of the appel-

[17] 43 Cal. 320.
[18] 83 Cal. 319, 23 Pac. 301.
[19] 129 Cal. 279, 61 Pac. 955.

lant, the bill of exceptions should have been filed October 20th, which was forty days from the date the notice of intention was served and filed. In Freese v. Freese,[20] the notice of intention was served and filed May 5th. On May 19th there was an order granting a ten day extension. On May 31st there was a second order of like tenor; and a third on June 11th. The statement was served June 20th. Held, that the first extension, being more than ten days after giving the notice of intention, was ineffectual; but that if it had been effectual, the second extension was also too late; and, finally, that the third was too late.[21-22]

The extension of time to prepare a statement under the provisions of section 1054, as above shown, necessarily includes an extension of time to serve the same.[23]

An order extending the time to prepare and serve a bill of exceptions on an appeal from the judgment may be made before entry of judgment, and after rendition of the verdict.[24] It is doubtful, however, if such an order could be made prior to rendition of the verdict, though this has not been directly determined.

An extension of time to prepare and serve a statement or bill of exceptions is not one of those exceptional matters which a disqualified judge can do in a cause, pending its transfer, or its trial before a judge who is qualified to hear it. It is a judicial act, not included in the list of exceptions prescribed in section 170, Code of Civil Procedure, and an order of extension under section 1054, made by a judge who is disqualified, is invalid and

[20] 134 Cal. 48, 66 Pac. 43.

[21] The time may be extended by agreement, but where the party has an attorney, the extension must come from the attorney, and a stipulation signed by the party is invalid, although the attorney was out of the county at the time. Mott v. Foster, 45 Cal. 72; and see section 13, *ante*.

[22] As to extension of time to serve and file notices of intention, see section 21, *ante*.

See the following miscellaneous cases on the subject of extension of time to serve statements and bills of exceptions: Muir v. Galloway, 61 Cal. 498; Curtis v. Superior Court, 70 Cal. 390, 11 Pac. 652; Simpson v. Budd, 91 Cal. 488, 27 Pac. 758; In re Clary, 112 Cal. 292, 44 Pac. 569; Reclamation District v. Hamilton, 112 Cal. 603, 44 Pac. 1074; Frassi v. McDonald, 122 Cal. 400, 55 Pac. 139; Doyle v. Gare, 13 Mont. 471, 34 Pac. 846, 36 Pac. 762; Walsh v. Mueller, 14 Mont. 76, 35 Pac. 226; Vreeland v. Edens, 35 Mont. 413, 89 Pac. 735; Elliott v. Whitmore, 10 Utah, 253, 37 Pac. 463.

If the last day falls on Sunday or a holiday, the rule as to the exclusion of such day applies as in other cases. See Rogers v. Trumbull, 32 Wash. 211, 73 Pac. 381; Bank v. Willey, 7 Wash. 535, 35 Pac. 411; Spokane Falls v. Browne, 3 Wash. 84, 27 Pac. 1077; Delaski v. Northwestern etc. Co., 61 Wash. 255, 112 Pac. 341.

[23] Bryant v. Sternfield, 89 Cal. 611, 26 Pac. 1091; and see Burton v. Todd, 68 Cal. 485, 9 Pac. 663.

[24] Bank of Orland v. Finnall, 133 Cal. 475, 65 Pac. 976.

ineffectual.[25] The order extending the time to prepare and serve a statement must therefore be made by the judge who takes the place of the judge who is disqualified, and it may even be made outside of the county in which the action is pending.[26]

An order extending the time to make and serve a case-made on appeal cannot be made before the rendition of the judgment or order appealed from.[27]

§ 148. Time to Propose Amendments to the Proposed Statement.—The old Practice Act did not contain any express provision for the proposal of amendments to the proposed statement.[1] The moving party proposed his statement, and the judge was required to settle it if not agreed to so as to make it conform to the truth. Amendments proposed by the successful party were regarded as suggestions to the judge. And as it could hardly be expected that the judge should make an extended examination of the proposed statement, without anything to direct his attention to any particular feature of it, it became the universal practice for the successful party to make the examination, and to hand to the judge a memorandum of whatever was thought necessary to make the statement conform to the truth. With reference to this practice Currey, J., delivering the opinion in Vilhac v. Biven,[2] said: "The statute does not specify the time within which proposed amendments to a statement prepared and filed to be used on motion for a new trial shall be made or filed. As the statute is silent on the subject, the practice in such cases must necessarily

[25] Johnson v. Insurance Co., 150 Cal. 336, 88 Pac. 985.

[26] Matthews v. Superior Court, 68 Cal. 638, 10 Pac. 128. This doctrine was upheld in Farleigh v. Kelly, 24 Mont. 369, 62 Pac. 495, 685; Gould v. Elevator Co., 3 N. D. 96, 54 N. W. 316; Holden v. Haserodt, 3 S. D. 4, 51 N. W. 340.

[27] Planters' Mutual Ins. Co. v. Rose, 27 Okl. 530, 112 Pac. 966. This was a somewhat anomalous proposition, at best, it would seem; for how could the parties know who would be called upon to prepare the case-made until the judgment or order had been rendered? The reason of the decision is very clear, however, and applies with equal force to the preparation of statements; for the time to prepare a statement can be extended only for good cause shown, and how can any cause whatever be shown before the order or judgment is rendered?

[1] See Laws of 1851, p. 81, section 195; Laws of 1861, p. 590; Laws of 1863, p. 643; Laws of 1863–64, p. 246; Laws of 1865–66, p. 845.

[2] 28 Cal. 409. In this case it was held that it would be presumed from the certificate of the judge that the settlement was upon notice and regular. Compare Battersby v. Abbott, 9 Cal. 565; and People v. Martin, 6 Cal. 477.

be regulated by the court. In respect to the service of proposed amendments, or a copy thereof, the statute makes no provision." So in Warden v. Mendocino Co.,[3] while considering the question as to whether there had been reasonable diligence in the prosecution of a motion for new trial, the same learned justice said: "The statute does not specify the time within which amendments to a statement shall be prepared, nor the time within which the adverse party must agree to the statement prepared in case he does not choose to prepare amendments. But as the adverse party is allowed to propose amendments, he has by the practice of the courts a reasonable time for the purpose, and we may well assume that he was reasonably entitled to the same time as the statute, independent of an order of court allowing further time, gives to the moving party to prepare and file a statement on his part."

The language above quoted seems to imply that there was a provision of the statute requiring amendments to be served, but not specifying the time within which it was to be done. But as above stated, the old Practice Act contained no such provision. The Code of Civil Procedure, however, provides that when the proposed statement is served, "if such proposed statement be not agreed to by the adverse party, he must, *within ten days* thereafter, prepare amendments thereto, and serve the same, or a copy thereof, upon the moving party." The ten days thus given in which to serve the proposed amendments could undoubtedly be extended in the same way and for the same period as the time in which to serve the proposed statement.[4] And if an extension be granted, the judge would be bound to wait until its expiration before settling the statement. If no amendment be served within the prescribed time, or some extension thereof, the judge may proceed to settle the statement. But it is his duty to make the statement conform to the truth, and consequently, he may alter the proposed statement in any way that may be necessary. And although no amendments be served within the prescribed time, there is nothing to prevent him from availing himself of the assistance of any amendments that may be handed to him before the

[3] 32 Cal. 655.

[4] As to which see section 147, *ante*.

settlement, and he might delay the settlement for a reasonable time in order to gain such assistance.[5]

Courts should be liberal in allowing amendments to defective statements, and should themselves suggest them whenever a defect or deficiency is apparent.[6]

§ 149. What the Statement Should Contain—Specifications of Error.—The subject of specifications of error has played such an important part in the practice on appeal that it is deemed advisable to give it an extended consideration. As will be shown in another place,[1] there were under the old Practice Act two kinds of statements, viz., statements on motion for new trial and statements on appeal. These differed in the uses to which they could be put and in the time within which they had to be prepared, but not in form. Both were required to contain specifications of error, the provisions in relation to which were so similar that the whole subject will be treated in this place. It will be convenient to consider the necessity for specifications first and then what specifications are sufficient.[1a]

1. *The Necessity for Specifications.*—The section of the old Practice Act in relation to statements on motion for new trial was section 195. As enacted in 1851,[2] this section provided that 'the party intending to move for a new trial shall give notice of the same, ... and shall within five days after such notice prepare and file with the clerk *a statement of the grounds upon which he intends to rely.*" The section in relation to statements on appeal was section 338. As enacted in 1851,[3] this section provided that the party intending to appeal should file a statement "which shall contain *the grounds upon which he intends to rely,* and so much of the evidence as may be necessary to explain the grounds, and no more." The provisions, it will be observed, do not in terms make distinction between specifications of errors in law and specifications of the insufficiency of the evidence, the

[5] As to the Nevada practice, see State v. Cheney, 24 Nev. 222, 52 Pac. 12.

[6] Caldwell v. Greeley, 5 Nev. 258.

[1] See section 251, *post.*

[1a] A statement on motion for new trial need not designate the general grounds of error relied upon, but only specify the particulars wherein the error lies. The practice requires the notice to designate the general grounds, and the statement to contain the specifications. Worthington v. Cutts, 8 Nev. 118.

[2] Laws of 1851, p. 81. This provision was not amended until 1861, as shown further on in the text.

[3] Laws of 1851, p. 105. This provision stood until 1863. See text.

requirement being that the party should state "the grounds" relied on. The first case found upon the subject is Adams v. Oakland,[4] in which it was held that the statement on motion for new trial in the case could not be considered because it was a mere "statement of the evidence," and not a "statement of the grounds upon which his motion was based." Afterward, upon the authority of this case, Wing v. Owen[5] was decided, in which the court said: "In this case no statement was filed setting forth the grounds of the motion upon which the defendants intended to rely on their motion for new trial. The failure to file such statement operates as a waiver of the right to the motion." But the opinions in these two cases were brief, and they do not seem to have been much regarded by the profession; for in the subsequent case of Barrett v. Tewksbury,[6] in which the statement on appeal was disregarded for want of specifications of error, the court admitted that the prevailing practice was to dispense with specifications.[7] The opinion was delivered by Field, C. J., who said:

"The specification of the grounds is the essential element of a statement; the evidence is the mere incident. It is the statement 'of the case' and not of the evidence which is to be annexed to the record of the judgment or order appealed from. The case on appeal consists of the questions of law or of fact raised. These must be distinctly set forth, and accompanied with only so much of the evidence as may be necessary to explain and show their pertinency and materiality, and *no more*. (Practice Act, sec. 338.) The specification is necessary in the preparation of the statement to enable the adverse party to suggest intelligently such amendments as he may deem important to the just determination of the case. Without it neither the adverse party nor the judge can well know how much of the evidence should be set forth. It often happens that of numerous points taken in the progress of the trial the greater number, after mature consideration, are abandoned by counsel, and the appeal made to rest upon only one or two of them. In such instances a large portion of the testimony actually given becomes entirely immaterial on appeal; but without a specification of the grounds upon which the

[4] 8 Cal. 510; see Brooks v. Townsend, 4 Cal. 286.
[5] 9 Cal. 247.
[6] 15 Cal. 354.
[7] See rehearing on page 358.

appellant intends to rely the adverse party will be ignorant of the materiality of that which is inserted or omitted in the statement. There is no distinction as to the manner in which a statement shall be prepared between a case at law and a case in equity. It is as essential for every purpose that the grounds of appeal should be stated in the one case as in the other; and in both cases much, if not the greater portion, of the evidence given in the court below will be wholly immaterial for the determination of those grounds in this court."

This opinion was adhered to on petition for rehearing; but in view of the fact that the prevailing practice had not been in accordance with it, the court examined the merits of the case (without changing the result, however), and announced that in all cases then pending the appellants would be allowed to annex specifications *nunc pro tunc*. This decision was made in 1860. In 1861 section 195 was amended[8] so as to provide that "the grounds of the motion shall be specifically set forth, and the statement shall contain so much of the evidence or reference thereto as may be necessary to explain the grounds taken, and no more." As will be observed, this amendment, like the section amended, made no distinction between specifications of the insufficiency of the evidence and specifications of errors in law, but simply provided that the statement should set forth "the grounds" of the motion. In 1863, however, the section was amended[9] so as to make this distinction. As then amended, section 195 provided that "when the notice designates as the grounds of the motion errors in law occurring at the trial and excepted to by the moving party, the statement shall specify the particular errors upon which the party will rely. If no such specifications be made, the statement shall be disregarded. The statement shall contain so much of the evidence or reference thereto as may be necessary to explain the particular points specified, and no more." In the same year a corresponding amendment[10] was made to section 338. As then amended this section provided that the appellant should prepare a statement, "which shall state specifically the particular errors or grounds upon which he intends to rely on the appeal, and shall contain so much of the evidence as may

[8] Laws of 1861, p. 590.
[9] Laws of 1863, p. 643. The portion in relation to insufficiency of the evidence is given in section 150, *post*.
[10] Laws of 1863, p. 644.

be necessary to explain the particular errors or grounds specified, and no more." No further change was made in either section until the adoption of the Code of Civil Procedure.

As amended in 1863, the provisions of both sections seem as clear as anything can be. But notwithstanding the clearness of the statute, innumerable cases went off upon failure to comply with it, and the justices often complainingly called attention to the matter. Thus in Hutton v. Reed,[11] Sawyer, J., delivering the opinion, said:

"Notwithstanding the repeated decisions on the point, there still seems to be a misapprehension as to what is required under the statute to constitute a valid statement of the grounds relied on in such cases, and there is more or less discussion upon the subject whenever these motions are made. For this reason we propose now to examine these questions, and once for all lay down the rule which we suppose to be contemplated by the statute and established by the decisions." The learned justice then quoted largely from Barrett v. Tewksbury, above cited, and proceeded as follows: "That case was well considered in the first instance, and again on petition for rehearing, and had the concurrence of all the judges. The requisites of a statement are so fully and precisely laid down that we have quoted at length from the opinion in the case, for the purpose of calling particular attention to the subject; for it seems to us that this case must have been overlooked, or there could not be so frequent occasions for making similar objections to statements in cases appealed to this court. The amendment to section 338, since the decision in Barrett v. Tewksbury, prescribes these essential requisites in still more precise and emphatic language. It now provides that the appellant in his statement 'shall state specifically the particular errors or grounds upon which he intends to rely on the appeal.' If there ever was room for doubt as to what was necessary to state, there can be none since the amendment of the act. It is manifest that the legislature intended by this language something more than a specification of the grounds of appeal in general terms, such as those in the so-called assignment of errors in Squires v. Foorman, or such as the general language of the statute in enumerating the cases for granting new trials in section 193 of the Practice Act. It was

[11] 25 Cal. 478. See, also, Harper v. Minor, 27 Cal. 107; Butterfield v. C. P. R. R. Co., 37 Cal. 381.

intended that the specific error should be distinctly pointed out. It is as easy to do this in the statement as in points or briefs, and such is the requirement of the statute. It is also easy to indicate the ground so distinctly that there can be no room for discussion here as to whether the 'errors or grounds upon which the appellant intends to rely' are so specifically stated or not. Hereafter, if the grounds are so loosely or defectively stated as to admit of argument as to their sufficiency, it must not be expected that this court will adopt a liberal construction for the purpose of saving the appellant's case."

The requirement that errors in law should be specified was declared to be of great practical importance.[12] And no rule of practice was better settled than that only those errors in law which were specified in the statement could be considered; and that if none were specified, the statement, so far as errors in law were concerned, was to be disregarded.[13] This rule, as stated in Barrett v. Tewksbury, above quoted, applied both at law and in equity. It applied to appeals from the probate court,[14] and indeed to all cases in which statements on appeal or statements on motion for new trial could be used. And it made no difference

[12] See Burnett v. Pacheco, 27 Cal. 408.

[13] (a) As to statements on motion for new trial, see the following cases: Walls v. Preston, 25 Cal. 59; Moore v. Murdock, 26 Cal. 514; Burnett v. Pacheco, 27 Cal. 408; Partridge v. San Francisco, 27 Cal. 415; Zeigler v. Wells-Fargo & Co., 28 Cal. 263; Carleton v. Townsend, 28 Cal. 219; Vilhac v. Biven, 28 Cal. 409; Zenith G. & S. M. Co. v. Irvine, 32 Cal. 302; Barstow v. Newman, 34 Cal. 90; Sanchez v. McMahon, 35 Cal. 218; Beans v. Emanuelli, 36 Cal. 117; Richardson v. Kier, 37 Cal. 263; Butterfield v. C. P. R. R., 37 Cal. 381; Harding v. Vandewater, 40 Cal. 77; Crosett v. Whelan, 44 Cal. 200; People v. C. P. R. R. Co., 43 Cal. 398; McCreery v. Everding, 44 Cal. 246; City of Stockton v. Creanor, 45 Cal. 247; Ferrer v. Home Mutual Ins. Co., 47 Cal. 416; Wyatt v. Buell, 47 Cal. 624; Budd v. Drais, 50 Cal. 120; Spencer v. Long, 39 Cal. 700.

(b) As to statements on appeal, see the following cases: Walls v. Preston, 25 Cal. 59; Haggin v. Clark, 28 Cal. 162; Zeigler v. Wells-Fargo & Co., 28 Cal. 263; Leffingwell v. Griffing, 29 Cal. 192; Stoddard v. Treadwell, 29 Cal. 281; Merrill v. Tenyck, 45 Cal. 74; Wilson v. Wilson, 45 Cal. 399; Ferrer v. Home Mutual Ins. Co., 47 Cal. 416.

(c) In the case of Brady v. O'Brien, 23 Cal. 244, an order granting a new trial upon a statement which contained no specifications was affirmed because the record did not show that any objection had been made on that ground in the court below. The record could not possibly have shown any such objection, because it must have been complete before the hearing of the motion. See section 134. But aside from this the proposition that it is necessary to object in the court below to the want of specification is contrary to all the decisions above given. No attention seems to have been paid to the decision.

[14] Estate of Boyd, 25 Cal. 511.

in the rule that the statement contained only one exception,[15] or that it affirmatively showed that it contained all the evidence.[16]

It does not seem definitely settled whether or not the parties can waive the requirement that there shall be specifications. In Weil v. Paul,[17] it was held that the parties could waive the specifications by stipulation. In the subsequent case of Walls v. Preston,[18] it was held that submission of a motion by consent upon the statement would not amount to a waiver, the court saying: "There is nothing upon which the court below can act on the hearing of the motion unless the grounds of the motion are designated." Unquestionably a party will not be heard to complain of errors to which he consented, or which he waived in the trial court. But the requirement that there shall be specifications seems to be as much for the assistance of the court and to prevent the confusion of a voluminous record as for the benefit of the parties; and it may be doubted whether a party can waive a requirement which is, in part at least, for the benefit of the court.[18a]

The provision of the Code of Civil Procedure as amended in 1874 is similar to that of the act of 1863. As already shown, the code as first enacted did not provide for statements of any kind; but by the amendment of 1874 it was provided that[19] "when the notice designates as the grounds of the motion errors in law occurring at the trial and excepted to by the moving party, *the statement shall specify the particular errors* upon which the party will rely. If no such specification be made, the statement shall be disregarded upon the hearing of the motion."

No change has been made in the code in this respect; and, in view of the similarity of the provisions, the decisions under the old Practice Act have been closely followed in the decisions under the code. Thus in Thompson v. Patterson,[19a] where the appeal was from an order refusing a new trial, the court said: "Specification of grounds of error is, therefore, the essence of a statement or bill of exceptions on motion for new trial, without which it

[15] Zenith G. & S. M. Co. v. Irvine, 32 Cal. 302.

[16] See Brumagim v. Bradshaw, 39 Cal. 24. This case was in relation to specifications of the insufficiency of the evidence. But it would seem that the same rule should be applied to errors in law.

[17] 22 Cal. 492.

[18] 25 Cal. 59.

[18a] See Reynolds v. Lawrence, 15 Cal. 359.

[19] Section 659, subdivision 3, California Code of Civil Procedure.

[19a] 54 Cal. 542.

has no legal existence." So in Crane v. Gladding,[19b] the court said:

"But the alleged statement, as settled and filed, contained no specification of particulars in which the evidence was deemed insufficient, nor any specification of particular errors of law, occurring at the trial, and excepted to by the appellant; it must, therefore, be disregarded."

So in Pico v. Cohn,[19c] where the appeal was from an order granting a new trial, upon a motion made on errors of law and insufficiency of the evidence, the supreme court declined to consider the first-named ground, saying: "As the errors of law were not specified as directed by the code, we must presume that they were, in accordance with the statute (Code Civ. Proc., sec. 659, subd. 3), disregarded."

So the reason of the requirement is recognized as being the same under both Practice Act and code. In Bohnert v. Bohnert,[19d] the court, Paterson, J., delivering the opinion, said:

"In their brief, counsel for appellant discuss a large number of errors alleged to have been committed by the court during the trial; but as there is no specification of error in the statement, they cannot be considered. (Ferrer v. Home Mut. Ins. Co., 47 Cal. 427; Fleming v. Albeck, 67 Cal. 227, [7 Pac. 659]; Pico v. Cohn, 67 Cal. 258, [7 Pac. 680].) The statute provides that 'when the notice designates as the ground of the motion errors in law occurring at the trial, and excepted to by the moving party, the statement shall specify the particular errors *upon which the party will rely.*' (Code Civ. Proc., sec. 659.) The object of this provision is apparent: it is to enable the adverse party to prepare his amendments without the necessity of going through the statement proposed by the moving party to ascertain what objections, rulings, and exceptions are incorporated therein. Unless the alleged errors are specifically pointed out, they are deemed to have been waived by the moving party. He is bound to state upon what particular errors he will rely for a new trial."

Nor is the appellant excused from the necessity of specifying the errors of law upon which he will rely by reason of having already specified them in the notice of intention.[19e] If he requires

[19b] 59 Cal. 303.
[19c] 67 Cal. 258, 7 Pac. 680.
[19d] 95 Cal. 444, 30 Pac. 590.
[19e] Leonard v. Shaw, 114 Cal. 69, 45 Pac. 1012; Sprigg v. Barber, 122 Cal. 573, 55 Pac. 419; and see, also, Sather Banking Co. v. Briggs Co., 138 Cal. 724, 73 Pac. 352.

a statement at all, such statement must contain the specifications of error required by the statute.[19f]

2. *What Specifications of Error are Sufficient.*—An assignment of errors, in the common-law signification of the term, as stated by Sawyer, J., in Hutton v. Reed,[20] is something in the nature of a

[19f] Where the motion is made on the minutes of the court, the statute requires that the notice of intention shall contain specifications of error and of insufficiency of the evidence. As will hereafter appear (chapter 23), the statement is not, in such a case, prepared until after the hearing, and is not required at all unless it is desired to secure a review of the order. Such statement must, nevertheless, contain the usual specifications, and their absence in the statement is not cured by the erroneous incorporation of the notice of intention, containing the specifications, in the transcript. The appellate court cannot go beyond the judgment-roll and the statement or bill of exceptions, in the course of its review, and will not consider any paper or document incorporated in the transcript by error. Sprigg v. Barber, 122 Cal. 573, 55 Pac. 419. And see section 163, *post*.

The following decisions support the general rule as to the necessity of specifications: Fleming v. Albeck, 67 Cal. 227, 7 Pac. 659; Silva v. Holland, 74 Cal. 531, 16 Pac. 385; Hershey v. Kness, 75 Cal. 116, 16 Pac. 548; Heilbron v. Irrigation Ditch Co., 76 Cal. 8, 17 Pac. 932; Bagnall v. Roach, 76 Cal. 107, 18 Pac. 137; Nye v. Marysville etc. Co., 97 Cal. 462, 32 Pac. 530; Leonard v. Shaw, 114 Cal. 69, 45 Pac. 1012; Niosi v. Empire Steam Laundry, 117 Cal. 257, 49 Pac. 185; Smith v. Smith, 119 Cal. 183, 48 Pac. 730, 51 Pac. 183; Sprigg v. Barber, 122 Cal. 573, 55 Pac. 419; Ackley v. Fishbeck, 124 Cal. 409, 57 Pac. 207; Thompson v. Los Angeles, 125 Cal. 270, 57 Pac. 1015; Lambert v. Marcuse, 137 Cal. 44, 69 Pac. 620; Sather Banking Co. v. Briggs Co., 138 Cal. 424, 73 Pac. 352; and see Graham v. Stewart, 68 Cal. 375, 9 Pac. 555; Alameda Macadamizing Co. v. Williams, 70 Cal. 534, 12 Pac. 530; Shadburne v. Daly, 76 Cal. 355, 18 Pac. 403; Martin v. Southern Pacific Co., 150 Cal. 124, 88 Pac. 701; also Edelbuttel v. Durrell, 55 Cal. 277; Joyce v. White, 95 Cal. 236, 30 Pac. 524; Hall v. Susskind, 120 Cal. 559, 53 Pac. 46. In Smith v. Smith, above cited, the paper which appeared to be a statement turned out to be a bill of exceptions. Bills of exceptions do not require specifications of error. The principle involved was correctly decided, however, notwithstanding the misapprehension.

See, also, the following: Slater v. Union Pacific Co., 8 Utah, 178, 30 Pac. 493; Earles v. Gilham, 20 Nev. 46, 14 Pac. 586; Gill v. Hecht, 13 Utah, 5, 43 Pac. 626; Bardwell v. Anderson, 18 Mont. 528, 46 Pac. 443; Brown v. Warren, 16 Nev. 228; Jones v. Adams, 17 Nev. 84, 28 Pac. 64; Hoopes v. Meyer, 1 Nev. 433, overruled by Corbett v. Job, 5 Nev. 201; Roberts v. Webster, 25 Nev. 94, 57 Pac. 180, 58 Pac. 411; Moddie v. Breiland, 9 S. D. 506, 70 N. W. 637; McMahon v. Crockett, 12 S. D. 11, 80 N. W. 136; Nelson v. Jordeth, 15 S. D. 46, 87 N. W. 140; Baumer v. French, 8 N. D. 319, 79 N. W. 340; Anderson v. Medbury, 16 S. D. 324, 92 N. W. 1089; Wenke v. Hall, 17 S. D. 305, 96 N. W. 103; Clark v Mitchell, 17 S. D. 430, 97 N. W. 358; Rehberg v. Greiser, 24 Mont. 487, 62 Pac. 820, 63 Pac. 41.

[20] 25 Cal. 478. In the course of his opinion the learned justice said: "The term 'assignment of errors' is not used in our Practice Act. An assignment of errors in the strict common-law sense of the term was in the nature of a pleading to which there was a demurrer and joinder in error (2 Tidd's Pr. 1168; 3 Steph. Com. 644; 2 Burr. Pr. 147). It did not constitute a part of the transcript, but was founded upon it, and was filed in the appellate court at or subsequently to the time of filing the transcript. It is hardly necessary to say that the filing of such an assignment of errors was never required under the system of practice in this state. Yet we find

pleading to which there was a demurrer and joinder in error. The term "assignment of errors," however, is not known to our system, which provides for nothing like what was designated by the term "at common law." With us the specification must be contained in the statement, and is a part thereof.[21] An unsigned paper appended to the statement, but not referred to therein, is not a specification which can be considered.[22] Nor is the notice of ap-

the term used in our reports in a sense different from but analogous to its common-law sense. Thus in People v. Goldbury, 10 Cal. 312, People v. Comedo, 11 Cal. 70, and Sayre v. Smith, 11 Cal. 129,—generally cited in these discussions,—the appeals were dismissed; and in Squires v. Foorman, 10 Cal. 298, the judgment was affirmed for want of an assignment of errors. These cases, except the last, are imperfectly reported, and we have taken the trouble to examine the records with a view of ascertaining, if possible, the precise circumstances under which they were decided, the sense in which the term 'assignments of error' was used by the court, and the practice which has heretofore prevailed in such cases. So far as we have been able to ascertain the facts from the records, the appeals in these several cases were not dismissed, nor the judgments affirmed on motion of respondent's counsel for defects existing in the statements or transcripts. But, on the contrary, the court on taking up the cases for examination and decision seems to have found no specific statement of the errors, or anything in the nature of a brief or points on file on the part of the appellant to direct attention to the points relied on, or aid in the examination of the record. If anything was found—as in the case of Squires v. Foorman, in which a paper indorsed 'assignment of errors' was filed—the specification of the errors was in such general terms as to afford the court no assistance. In such cases the court (not feeling called upon to perform the duties of counsel) upon its own motion—as this court has done in similar instances — either affirmed the judgment or dismissed the appeal for want of the aid of what was termed an 'assignment of errors,' that is to say, a specification of the points or particular errors relied on, filed in the case, which seems to have been the sense in which the term was used by the court."

In Abrams v. Howard, 23 Cal. 388, in answer to an objection that the statement contained no specifications of error, Crocker, J., delivering the opinion, said: "The appellant has filed his assignments of error in this court, which is all that is requisite." This is too palpably erroneous to merit consideration.

[21] There is nothing contrary to this in People v. C. P. R. R. Co., 43 Cal. 398. In that case Wallace, C. J., delivering the opinion, said: "The specification required, *though found in, and therefore in one sense a part of the statement,* is nevertheless distinct practically from the statement—it must of course be supported by the statement—but it may be and usually is narrower than the statement in its scope. It cannot, indeed, be broader; it cannot point to anything which is not to be found in the statement by which it is supported, but it may, and in practice usually does, omit many matters of alleged error and insufficiency which are to be found in the statement, and which by thus omitting it definitely repudiates and abandons. Its office is to select out of the mass of these, and by this selection to preserve such and only such of the matters appearing in the statement itself, upon which it is the purpose of the party to finally rely and insist in support of the motion."

[22] Spencer v. Long, 39 Cal. 700. Nor would it be, if signed. But probably if it were referred to (sufficiently to identify it) in the statement it could be considered a part of it, just as an exhibit, when referred to, is part of a pleading. But where a statement has been signed and filed without any specifications, an order made after appeal taken from the order denying the

peal,[23] or the notice of intention,[24] the proper place for a specification of errors.

The specification must be of "the particular errors." A mere general specification is insufficient. The reports furnish examples of this. Thus a specification that "the court erred in entering judgment for the plaintiff" is too general for any purpose.[25] So, also, is a specification that "the court erred in ordering judgment for the plaintiff on the findings."[25a] So the following specifications, viz.: "*First,* that the decision of the court is against law; *second,* that upon the facts and evidence the court should have rendered its judgment in favor of plaintiff,"—was held to be insufficient either as of error or of insufficiency of the evidence.[26] So where the specification was as follows: "To which order and decision the said plaintiff then and there duly excepted, and assign as error that said order and decision are against law," it was held to be insufficient for any purpose.[27] It would seem, however, that some errors in law from their nature admit of a more general specification than others. Thus since there can be only one motion for nonsuit in a case, there can be no danger of confounding the ruling upon it with other rulings. Accordingly, the following specification, viz.: "The court erred in granting defendant's motion for a nonsuit, and in granting a nonsuit," was held to be sufficient.[28] So written instructions requested by a party stand in some

motion for new trial, by which the party is allowed to file specifications, *nunc pro tunc* as of the day of the settlement is of no validity. Preston v. Hearst, 54 Cal. 595. See, also, Ackley v. Fishbeck, 124 Cal. 409, 57 Pac. 207, where, appended to the statement, but forming no part of it, was what was designated as "assignments of error." It was not authenticated as part of the record, and was excepted from the stipulation certifying to the contents of the transcript. There was nothing to show that it was considered on the hearing of the motion for a new trial. There was no specification of error in the statement, and the court declined to consider the so-called "assignment of errors."

[23] Barnett v. Pacheco, 27 Cal. 708.

[24] Ferrer v. Home Mut. Ins. Co., 47 Cal. 416; and see Mack v. Wetzler, 39 Cal. 247. But the notice is the proper place where the motion is made upon the minutes of the court. This does not dispense with the necessity of specifications in the statement prepared after the hearing for use on appeal, and the incorporation of the notice in the transcript, but outside the statement, does not meet the requirements of the code. The specifications must in any event be set out in the statement. Sprigg v. Barber, 122 Cal. 573, 55 Pac. 419. It is proper, however, to incorporate the notice of intention in the statement. See section 163, *post,* and cases cited.

[25] Wilson v. Wilson, 45 Cal. 399.

[25a] Shepherd v. Jones, 71 Cal. 223, 16 Pac. 711.

[26] Harding v. Vandewater, 40 Cal. 77. See, also, City of Stockton v. Creanor, 45 Cal. 247, and Moore v. Murdock, 26 Cal. 514.

[27] Haggin v. Clark, 28 Cal. 162; and see Butterfield v. Pearson, 37 Cal. 381.

[28] Donahue v. Gallavan, 43 Cal. 573; and Moore v. Murdock, 26 Cal. 514; but see People v. Banvard, 27 Cal. 470.

measure apart from the other proceedings, and accordingly the following specification, viz.: "Errors in law occurring at the trial and excepted to by the plaintiffs, and on which the plaintiffs will rely on motion for new trial, as follows, to wit, ... (2) The giving of each of the instructions requested by the defendants,"—was held to be sufficient, and Belcher, J., delivering the opinion, said: "This specification we consider sufficient. It points to each of the propositions or instructions given for the defendant, and designates it as a particular error on which the party will rely."[29] A similar specification of the errors excepted to in an oral charge, however, would not be sufficient.[30] But it has been held that a specification in general terms that "the court erred in giving to the jury instructions asked by plaintiff, was sufficient."[30a]

But the rulings upon the admissibility of evidence are in most cases very numerous, the introduction of the evidence commonly being the principal part of the trial. And consequently more particularity is required in the specifications of such rulings. The reports furnish instances of this. Thus in People v. C. P. R. R. Co.,[31] the following specification, viz.: "*First*, errors in admitting the evidence offered by plaintiff as set forth in the foregoing statement, objected to and excepted to at the time; *second*, errors in excluding the evidence offered by defendant as stated in the foregoing statement, and to which refusal and exclusion the defendant then and there excepted,"—was held to be insufficient. So in Carleton v. Townsend,[31a] where the specification was as follows, viz.: "Errors in law committed by the court on the trial of said cause, and which were excepted to by said defendants—*first*, in ruling in and admitting to the jury evidence on behalf of said plaintiff, which was objected to by said defendants, and which was illegal and ought not to have been admitted; *fifth*, in ruling out and excluding from the jury the evidence offered by said defendants to show that the title to the premises in dispute had, prior to any supposed trespass or ejectment by said defendants or either of them, passed to or become vested in James E. Mumford; *sixth*, in ruling out and excluding from the jury other legal, com-

[29] McCreery v. Everding, 44 Cal. 246.

[30] See subdivision 2, section 128, *ante;* Hill v. Weisler, 49 Cal. 146; Butterfield v. C. P. R. R. Co., 37 Cal. 381; and compare McCreery v. Everding, 44 Cal. 246.

[30a] Joyce v. White, 95 Cal. 236, 30 Pac. 524.

[31] 43 Cal. 398; and see Butterfield v. C. P. R. R. Co., 37 Cal. 381.

[31a] 28 Cal. 219.

petent, and material evidence offered in behalf of said defendants,"—it was held to be insufficient. And Rhodes, J., delivering the opinion, said: "The general statement that the court erred in admitting illegal and incompetent evidence for the plaintiff, or in excluding legal and competent evidence offered by them to show title in the defendant's grantor, amounts to but little if anything more than an allegation that the court committed errors in law."

In Hall v. Susskind,[81b] where the specifications referred to errors "pointed out and designated in the foregoing transcript by exceptions Nos. 1, 2, 3, etc., to 25, and the court erred in each of said rulings," they were held to be too general, the supreme court saying that "this was no more than to say that the court erred in the various rulings excepted to by the defendant as shown in the transcript, and can scarcely be regarded as a specification of particular errors, as the statute requires."

No doubt specifications consisting of references of this kind may be made sufficiently particular, but if pointed at exceptions by number, the numbering of the exceptions to correspond must not be overlooked. Thus in Fleming v. Albeck,[81c] where the specifications were referred to as follows: "The court erred in overruling defendant's objection to question put by plaintiff's counsel to witness H. W. French, marked in the foregoing statement exception No. 1, and found in lines 10 and 23, page 10." No exceptions so numbered or marked were to be found in the transcript. The supreme court therefore refused to consider the specifications so noted.

And it is to be observed that specifications of errors in law are not to be confounded with specifications of the insufficiency of the evidence. An instance of this is to be found in Smith v. Christian.[82] In that case the specification was as follows: "Defendant

[81b] 120 Cal. 559, 53 Pac. 46.

[81c] 67 Cal. 226, 7 Pac. 659.

[82] 47 Cal. 18.

See Gillies v. Clarke etc. Co., 32 Mont. 320, 80 Pac. 370, where the court held that while specifications of the insufficiency of the evidence were required to be clear and distinct from specifications of error, and that they were not to be confounded, yet the real character of the specifications was not affected by the heading thereof, and that if specifications of the insufficiency of the evidence were sufficiently definite, it mattered not that they were described in the heading as "Specifications of Errors Occurring at Said Trial." See, also, Bardwell v. Anderson, 18 Mont. 528, 46 Pac. 443, and Schilling v. Curran, 30 Mont. 370, 76 Pac. 998, where the specifications were held to have been insufficient as specifications of insufficiency because improperly specified as errors of law.

To the same effect, see Cunnington v. Scott, 4 Utah, 446, 11 Pac. 578; State v. Spencer, 15 Utah, 149, 49 Pac. 302.

specifies the following particulars *in which the court erred:* The testimony shows that the award is void, it having been made by an umpire selected by lot. The testimony or pleadings, as admitted, show that the segregation of the award was without authority; that by the submission it was only provided for awarding damages in the aggregate, if any, and the arbitrators had no authority to determine what each party should pay; there was no subsequent promise to pay; there was no consideration to support any such promise if made"—this was held to be insufficient, and the court said: "These specifications cannot be considered to be specifications of the particulars in which the *evidence* was insufficient, because they are not stated to be such; on the contrary, they are expressly set forth as being *errors in law*—'particulars in which the court erred.' But it is clear that the matters thus set forth do not constitute errors of law. It is not an error of law that the evidence is insufficient to justify a particular finding of fact."

It is to be noted that the specification is only the act of the attorney for the moving party, annexed to the statement after the trial, and is not, of itself, the equivalent of a substantive showing of what happened at the trial. The statement, therefore, must contain, in addition to the specification, so much of the evidence or other proceedings as is necessary to support and illustrate the specification.[32a]

§ 150. What the Statement Should Contain—Specifications of the Insufficiency of the Evidence.[1]—As is shown in the preceding section, the statute did not, before 1863, make any distinction in terms between specifications of errors in law and specifications of the insufficiency of the evidence, but merely required the statement to specify "the grounds" upon which the moving party intended to rely. In 1863,[2] however, as shown in the preceding section, the statute was amended so as to expressly require a specification of the errors in law, and a specification of the insufficiency of the evidence. As then amended the statute provided that "when the notice designates, as the ground upon which the

[32a] See People v. Faulke, 96 Cal. 17, 30 Pac. 837; Braverman v. Fresno Canal etc. Co., 101 Cal. 644, 36 Pac. 386.

[1] Questions of the insufficiency of the evidence could not be presented by statements on appeal under the old Practice Act, and under the code no provision is made for such statements. Consequently, the specifications here considered are specifications in statements on motion for new trial.

[2] Laws of 1863, p. 643, sec. 195.

motion will be made, the insufficiency of the evidence to justify the verdict or other decision, the statement *shall specify the particulars in which such evidence is alleged to be insufficient.* If no such specifications be made the statement shall be disregarded. The statement shall contain so much of the evidence, or reference thereto, as may be necessary to explain the particular points thus specified and no more." This amendment stood until the adoption of the Code of Civil Procedure. The provision of the Code, as amended in 1874, is, that "when the notice of the motion designates as the ground of the motion the insufficiency of the evidence to justify the verdict or other decision, the statement *shall specify the particulars in which such evidence is alleged to be insufficient.* If no such specifications be made, the statement shall be disregarded on the hearing of the motion."[3] It will be observed that these two provisions are almost identical, and consequently that the decisions under the old act are applicable under the code. The above provisions, in relation to the insufficiency of the evidence, are as peremptory as those in relation to errors in law; and the requirement has always been strictly enforced.[4]

[3] Section 659, subdivision 3, California Code of Civil Procedure. As already stated, the code did not provide for statements of any kind prior to 1874. Subsequent amendments made no change in respect to this subdivision.

The necessity for adequate specifications of particulars was recognized in the following decisions: Strasburger v. Beecher, 20 Mont. 143, 49 Pac. 740; Thorp v. Freed, 1 Mont. 651; First Nat. Bank v. Roberts, 9 Mont. 323, 23 Pac. 718; Zickler v. Deegan, 16 Mont. 198, 40 Pac. 410; King v. Lincoln, 26 Mont. 157, 66 Pac. 836; Cain v. Gold etc. Co., 27 Mont. 529, 71 Pac. 1004; Phillips v. Coburn, 28 Mont. 45, 72 Pac. 291; King v. Pony etc. Co., 28 Mont. 74, 72 Pac. 309; State v. Napton, 28 Mont. 336, 72 Pac. 676; Finlen v. Heinze, 28 Mont. 548, 73 Pac. 123; Meisner v. Dillon, 29 Mont. 116, 74 Pac. 130; Ball v. Gussenhoven, 29 Mont. 331, 74 Pac. 871; Nord v. Boston etc. Co., 30 Mont. 48, 75 Pac. 681; Schilling v. Curran, 30 Mont. 370, 76 Pac. 998; Gillies v. Clark, 32 Mont. 320, 80 Pac. 370; Patten v. Hyde, 23 Mont. 23, 57 Pac. 407; Martin v. Corscadden, 34 Mont. 308, 86 Pac. 33; Beck v. Thompson, 22 Nev. 109, 36 Pac. 562; Watt v. Nevada etc. R. R. Co., 23 Nev. 154, 62 Am. St. Rep. 772, 44 Pac. 223, 46 Pac. 52, 726; Dick v. Bird, 14 Nev. 161; Lamance v. Byrnes, 17 Nev. 197, 30 Pac. 700; Rosina v. Trowbridge, 20 Nev. 105, 17 Pac. 751; Holcomb v. Keliher, 3 S. D. 497, 54 N. W. 535; Gagner v. Fargo, 12 N. D. 219, 96 N. W. 841.

[4] See the following cases: Wixon v. B. R. & A. W. & M. Co., 24 Cal. 367, 85 Am. Dec. 69, 1 Morr. Min. Rep. 656; Hutton v. Reed, 25 Cal. 478; Moore v. Murdock, 26 Cal. 514; Burnett v. Pacheco, 27 Cal. 408; Crowther v. Rowlandson, 27 Cal. 376; Carleton v. Townsend, 28 Cal. 219; Vilhac v. Biven, 28 Cal. 409; Le Roy v. Rogers, 30 Cal. 229, 89 Am. Dec. 88; Love v. S. N. L. W. & M. Co., 32 Cal. 639, 91 Am. Dec. 602; Barstow v. Newman, 34 Cal. 90; Reamer v. Nesmith, 34 Cal. 624, 5 Morr. Min. Rep. 610; Cowing v. Rogers, 34 Cal. 648; Pralus v. Jefferson G. & S. M. Co., 34 Cal. 558, 12 Morr. Min. Rep. 473; Sanchez v. McMahon, 35 Cal. 224; Beans v. Emanuelli, 36 Cal. 117; Butterfield v. C. P. B. R. Co., 37 Cal. 381;

The purpose of specifications of the insufficiency of the evidence was thus clearly expressed in the leading case of De Molera v. Martin,[5] Harrison, J., delivering the opinion of the court:

"The purpose of the statute requiring such specification is apparent. It is to direct the attention of the court and counsel to the particulars relied upon by the moving party, to the end that the evidence bearing upon the specifications of such particulars may be inserted in the statement and considered by the court. (Edelbuttel v. Durrell, 55 Cal. 277.) The adverse party is to be advised of the points relied on in order that he may intelligently propose such amendments to the statement as will support the decision, and that the judge may be enabled in settling it to deter-

Green v. Killey, 38 Cal. 201; Spanagel v. Dellinger, 38 Cal. 278; Brumagim v. Bradshaw, 39 Cal. 24; Mack v. Wetzlar, 39 Cal. 247; Spencer v. Long, 39 Cal. 700; Harding v. Vandewater, 40 Cal. 77; Hawkins v. Abbott, 40 Cal. 639; Foote v. Richmond, 42 Cal. 439; Livermore v. Stine, 43 Cal. 274; Hixon v. Brodie, 45 Cal. 275; Kusel v. Sharkey, 46 Cal. 3; Goodrich v. Van Landigham, 46 Cal. 601; Smith v. Christian, 47 Cal. 18; Ferrer v. Home Mut. Ins. Co., 47 Cal. 416; Wyatt v. Buell, 47 Cal. 624; Coleman v. Gilmore, 49 Cal. 340; Doherty v. Enterprise Min. Co., 50 Cal. 187; Rider v. Edgar, 54 Cal. 127; Preston v. Hearst, 54 Cal. 595; Eddelbuttel v. Durrell, 55 Cal. 277; Fabian v. Callahan, 56 Cal. 159; Lewis v. Kelton, 58 Cal. 303; Benjamin v. Stewart, 61 Cal. 605; Donohoe v. Mariposa etc. Co., 66 Cal. 317, 5 Pac. 495; Graham v. Stewart, 68 Cal. 374, 9 Pac. 555; Weyl v. Sonoma etc. Co., 69 Cal. 202, 10 Pac. 510; Hartman v. Rogers, 69 Cal. 643, 11 Pac. 581; Shepherd v. Jones, 71 Cal. 223, 16 Pac. 711; Hancock v. Burton, 73 Cal. 52, 14 Pac. 392; Silva v. Holland, 74 Cal. 530, 16 Pac. 385; Hershey v. Kness, 75 Cal. 115, 16 Pac. 548; Patent Brick Co. v. Moore, 75 Cal. 205, 16 Pac. 890; Lowrie v. Salz, 75 Cal. 349, 17 Pac. 232; Heilbron v. Irrigation Ditch Co., 76 Cal. 8, 17 Pac. 932; Heilbron v. Canal Co., 76 Cal. 11, 17 Pac. 933; Menk v. Home Ins. Co., 76 Cal. 50, 9 Am. St. Rep. 158, 14 Pac. 837, 18 Pac. 117; Parker v. Reay, 76 Cal. 103, 18 Pac. 124; Paris v. Raynor, 76 Cal. 647, 18 Pac. 788; Belcher v. Murphy, 81 Cal. 39, 22 Pac. 264; Anthony v. Jillson, 83 Cal. 296, 23 Pac. 419; Knott v. Peden, 84 Cal. 299, 24 Pac. 160; Spotts v. Hanley, 85 Cal. 155, 24 Pac. 738; Cummings v. Ross, 90 Cal. 68, 27 Pac. 62; Meads v. Lasar, 92 Cal. 221, 28 Pac. 935; Dawson v. Schloss, 93 Cal. 194, 29 Pac. 31; Gregory v. Gregory, 102 Cal. 50, 36 Pac. 364; Green v. Green, 103 Cal. 108, 37 Pac. 188; Adams v. Helbing, 107 Cal. 298, 40 Pac. 422; Kumle v. Grand Lodge, 110 Cal. 204, 42 Pac. 634; Haight v. Tryon, 112 Cal. 4, 44 Pac. 318; Wise v. Wakefield, 118 Cal. 107, 50 Pac. 310; De Molera v. Martin, 120 Cal. 544, 52 Pac. 825; Citizens' Bank v. Jones, 121 Cal. 30, 53 Pac. 354; Sprigg v. Barber, 122 Cal. 573, 55 Pac. 419; Kyle v. Craig, 125 Cal. 107, 57 Pac. 791; Thompson v. Los Angeles, 125 Cal. 270, 57 Pac. 1015; McLennon v. Wilcox, 126 Cal. 51, 58 Pac. 305; Taylor v. Bell, 128 Cal. 306, 60 Pac. 853; Rauer v. Fay, 128 Cal. 523, 61 Pac. 90; In re Strock, 128 Cal. 658, 61 Pac. 282; O'Leary v. Castle, 133 Cal. 508, 65 Pac. 950; Sather Banking Co. v. Bridge Co., 138 Cal. 724, 72 Pac. 352; Liurette v. Hiller, 139 Cal. 729, 73 Pac. 836; Graybill v. De Young, 140 Cal. 323, 73 Pac. 1067; Ben Lomond Wine Co. v. Sladky, 141 Cal. 619, 75 Pac. 332; Bell v. Staack, 141 Cal. 186, 74 Pac. 774; Hawley v. Harrington, 152 Cal. 188, 92 Pac. 177.

[5] 120 Cal. 544, 52 Pac. 825. And see Dawson v. Schloss, 93 Cal. 194, 29 Pac. 31, for a useful expression of the reason and purpose of the rule requiring specifications.

mine whether any portion of the statement is 'useless and redundant matter' in respect to the particulars which are specified. Unless the particulars in which the evidence is claimed to be insufficient are specified, the party cannot know what amendments to propose, or whether all of the evidence relating to the points upon which the moving party intends to rely is inserted in the statement. If certain particulars are specified, the adverse party is justified in assuming that these are the only ones which will be considered on the motion, and he is not required to propose as amendments to the statement the insertion of any evidence other than such as relates to these particulars. If no particulars are specified, other than by the general ground of insufficiency of the evidence, it would be necessary to incorporate all of the evidence of the case in the statement, and there would be no redundant or useless matter for the judge to strike out. And in the absence of such specifications he is not called upon to propose any amendments, but has the right to assume that the court will follow the statute and disregard the statement."

The decision in De Molera v. Martin, *supra*, was the culminating authority in a long line of cases beginning with Eddelbuttel v. Durrell,[5a] and was and is the authority most frequently cited and oftenest relied upon by the respondent on the appeal.[5b] The specifications in De Molera v. Martin, *supra*, were held insufficient as being too general, the court saying:

"The above specification, that the evidence is insufficient to justify the decision that the plaintiff was at any time the owner and entitled to the possession of the land in controversy, is but a repetition of the ground designated in the notice of intention to move for a new trial, instead of a specification of any particular in which the evidence is insufficient, and is merely a statement that upon a consideration of the entire evidence the decision should have been

[5a] 55 Cal. 277; and see Parker v. Reay, 76 Cal. 103, 18 Pac. 124; Spotts v. Hanley, 85 Cal. 155, 24 Pac. 738; Cummings v. Ross, 90 Cal. 68, 27 Pac. 62; Dawson v. Schloss, 93 Cal. 194, 29 Pac. 31.

[5b] See Kyle v. Craig, 125 Cal. 107, 57 Pac. 791; McLennon v. Wilcox, 126 Cal. 51, 58 Pac. 305; Taylor v. Bell, 128 Cal. 306, 60 Pac. 853; but see Owen v. Pomona etc. Co., 131 Cal. 530, 63 Pac. 850, 64 Pac. 253; Abbot v. Jack, 136 Cal. 510, 69 Pac. 257; Drathman v. Cohen, 139 Cal. 310, 73 Pac. 181, where there are distinct indications of a relaxation of the rule; also Polk v. Boggs, 122 Cal. 114, 54 Pac. 536; Swift v. Occidental etc. Co., 141 Cal. 161, 74 Pac. 700.

otherwise, and is not a specification of the particulars in which the evidence is insufficient.

"If a finding is of an ultimate fact which results from the establishment of several probative facts, these probative facts constitute the particulars from which the ultimate fact is drawn, and, if it is claimed that the evidence is insufficient to establish any of these probative facts, the particulars of such insufficiency should be specified in the statement."

The specifications in De Molera v. Martin thus appear to have been rejected on two grounds: First, as being merely a repetition of the general phraseology of the notice; and second, as being a specification of an ultimate fact, whereas, in accordance with the rulings of the supreme court, it should have been a specification of the probative facts upon which the ultimate fact was supported. As to the first of these grounds, it was noted in the opinion of the court that a specification in almost the identical form had been in the case of Wise v. Burton [5c] declared sufficient, chiefly for the reason that the court in the last-cited case was merely following a line of cases that had not then been overruled.[5d] As to the second ground, it is needful only to direct attention to the later decisions of the supreme court,[5e] where the distinction between probative and ultimate facts, and the method of specifying the same, was unequivocally eliminated. In Bell v. Staacke,[5f] although the decision in De Molera v. Martin was upheld in general, Mr. Justice Shaw, in his concurring opinion, made use of the following language:

"I concur in the opinion of Justice Lorigan. I desire, in addition, to say, plainly and unequivocally, that it is entirely immaterial whether a specification of a particular wherein the evidence is claimed to be insufficient to justify a verdict or decision points to a probative or an ultimate fact. In either case the specification is sufficient as to the particular fact pointed out, and challenges the sufficiency of the evidence to sustain it."

[5c] 73 Cal. 166, 14 Pac. 678. In this case the findings were general, and it was held that specifications following the findings were sufficient, where the findings were general. The authorities referred to as sustaining this decision are Morris v. De Celis, 51 Cal. 55, and Du Brutz v. Jessup, 54 Cal. 118. The court said, however: "Counsel, however, by following Eddelbuttel v. Durrell, 55 Cal. 277, would obviate all difficulty on this point, and be secured in having their cases considered. (See, also, Kelly v. Mack, 49 Cal. 523.)"

[5d] See previous note.

[5e] See Bell v. Staacke, 141 Cal. 186, 74 Pac. 774; Harris v. Duarte, 141 Cal. 497, 70 Pac. 298, 75 Pac. 58.

[5f] 141 Cal. 186, 74 Pac. 774.

This concurring opinion received the assent of Justices Angellotti and Henshaw, and must be taken to foreshadow the decision of the court in Harris v. Duarte,[5g] when De Molera v. Martin was overruled in terms as to the distinction it outlined between the method of specifying probative and ultimate facts, and the rule of common sense and liberality adopted in the place of the stringent requirements which had gradually become the chief characteristics of the practice. The situation thus brought to pass is thus described in the case of Porter v. Counts:[5h]

"In Drathman v. Cohen, 139 Cal. 310, [73 Pac. 181], specifications somewhat similar to those in the case at bar were held to be sufficient, and the court, through Mr. Justice Shaw, says: 'The strongest case, and the one usually cited upon objections to specifications of this character, is De Molera v. Martin, 120 Cal. 548, [52 Pac. 825]. If the decision in that case were followed, perhaps the specification here in question would be declared insufficient; but experience has proven that the rule then laid down was too strict, and that it has been productive of evil and not good. Perhaps some of the other cases cited may tend to establish the same rule. But latterly the court has been more liberal in such matters, and the rule now followed is stated in American etc. Co. v. Packer, 130 Cal. 459, [62 Pac. 744], as follows: Whenever there is a reasonably successful effort to state the particulars, and they are such as may have been sufficient to inform the opposing counsel and the court of the grounds this court ought not to refuse to consider the case on appeal.' "

The rule of American etc. Co. v. Packer, here cited, was followed with approval in a number of cases decided before Bell v. Staacke, and Harris v. Duarte.[5k] Since then it is the recognized authority.[5l] With this fundamental principle in view, no harm can result from a somewhat closer study of the subject in detail.

[5g] 141 Cal. 497, 70 Pac. 298, 75 Pac. 58.

[5h] 6 Cal. App. 550, 92 Pac. 655.

[5k] See Owen v. Pomona etc. Co., 131 Cal. 530, 63 Pac. 850, 64 Pac. 253; Standard Quicksilver Co. v. Habishaw, 132 Cal. 115, 64 Pac. 113; Bledsoe v. Decrow, 132 Cal. 312, 64 Pac. 397; Motz v. Motz, 136 Cal. 558, 69 Pac. 294; Abbott v. Jack, 136 Cal. 513, 69 Pac. 257; Laidlaw v. Pacific Bank, 137 Cal. 392, 70 Pac. 277; Stuart v. Lord, 138 Cal. 672, 72 Pac. 142; Drathman v. Cohen, 139 Cal. 310, 73 Pac. 181; Pendola v. Ramm, 138 Cal. 517, 71 Pac. 624; Gwin v. Caligaris, 139 Cal. 384, 73 Pac. 851; Holmes v. Hoppe, 140 Cal. 210, 73 Pac. 1002; Craig v. Crafton Water Co., 141 Cal. 178, 74 Pac. 762; Swett v. Gray, 141 Cal. 63, 74 Pac. 439.

[5l] See Jones v. Goldtree Bros. & Co., 142 Cal. 383, 77 Pac. 939; Southern Pacific Co. v. Lipman, 148 Cal. 480, 83 Pac. 445; Michaelson v. Fish, 1 Cal. App. 116, 81 Pac. 661; Ahlers v. Barrett, 4 Cal. App. 158, 87 Pac. 232.

It has always been regarded as a matter of some nicety to frame proper specifications of the insufficiency of the evidence. The reports are filled with instances of failure to meet the requirements of the courts. The inherent difficulty was greatly increased by the stringency of those requirements, and until the adoption of the more liberal policy above outlined, no practitioner was ever entirely satisfied that his specifications would pass muster. The want of any definite standard, and the very indefiniteness of the requirements themselves, as expressed in the earlier decisions, was oftentimes a temptation, no doubt, to relax or to tighten the rule of construction in each case in accordance with the individual temperament of the justice who prepared the opinion, or the accepted policy of the court for the time being with respect to liberality or strict construction.

Certain guiding principles have always, however, been recognized. Thus, the statute requires specifications of the insufficiency of the evidence "to justify the verdict or other decision." They must, therefore, be pointed at the verdict or other decision.[5m] Where the verdict is general, and when there are no written findings (either because not required by the statute, or, if required, are waived), the party must determine for himself what are the facts upon which the judgment rests—a matter, in many cases, of no little difficulty. Where there are written findings or a special verdict, the facts are, or should be, apparent upon the record. But it frequently happens that from carelessness or unskillfulness in drawing the findings, the facts upon which the judgment rests are concealed in statements of evidence or disguised in verbiage, so as to require as much care in picking them out as if there were no written findings, or only a general verdict. In any case it is necessary to point the specifications at "the facts," as distinguished from the conclusions of law on the one hand, and mere evidence on the other.[5n] Not only must the specifications be pointed at the facts, but they must be pointed at each separate fact.[5p] Each dis-

5m See Coveny v. Hale, 49 Cal. 552.

5n See Reed v. Bernal, 40 Cal. 628.

5p See Cummings v. Ross, 90 Cal. 68, 27 Pac. 62, where certain specifications were held insufficient because "not directed at any particular one of the numerous findings of fact"; and Baird v. Peall, 92 Cal. 235, 28 Pac. 285, where it was said that "each distinct proposition excepted to on the ground that it is not justified by the evidence should be specified"; and Dawson v. Schloss, 93 Cal. 194, 29 Pac. 31, where it was intimated that a proper specification would require to be directed at each "particular one of the several facts involved" in the verdict or decision; and see, to same effect, Smith

tinct proposition excepted to as not being justified by the evidence should be separately specified, so that it can be seen that the particular grounds relied upon by the moving party are sufficiently pointed out to the adverse party, so that he may be able to prepare such amendments as will fully set forth the evidence on that point.[5q] No particular form of specification is required, but they "should in some form distinguish each particular proposition of fact excepted to from all other facts found by the court, or involved in the general verdict of the jury."[5r]

General expressions of disapproval of the verdict or decision are not such specifications as the statute requires. This has been frequently decided. Thus where the specification was "that the findings and judgment should have been for the defendants instead of the plaintiff," the court said that it "is not a specification in any sense, and is utterly useless as a ground of the motion for a new trial in any sense whatsoever."[6] So a specification that "the verdict is against evidence" was held to be insufficient for any purpose.[7] So a specification "that such decision and judgment are contrary to the evidence: that such decision and judgment are contrary to and against law," is insufficient.[8] So a specification "that the evidence offered and admitted on the trial of this cause is insufficient to justify the findings, and the judgment of the court herein," was held to be of no validity.[9] So a specification that, "first, the decision of the court is against law; second, that upon the facts and evidence the court should have rendered its decision in favor of plaintiff," is of no validity.[10] So the following specification, viz., "that the judgment is inequitable, and against the evidence; that it is against law; that the decision is against equity," was held to be insufficient.[11] So a specification that "the court

v. Ellis, 103 Cal. 294, 37 Pac. 400; De Molera v. Martin, 120 Cal. 544, 52 Pac. 825; Abbott v. Jack, 136 Cal. 510, 69 Pac. 257. And see the earlier cases of McCullough v. Clark, 41 Cal. 298, and Strang v. Ryan, 46 Cal. 33, 1 Morr. Min. Rep. 48.

[5q] See Dawson v. Schloss, 93 Cal. 194, 29 Pac. 31; Smith v. Ellis, 103 Cal. 294, 37 Pac. 400; De Molera v. Martin, 120 Cal. 544, 52 Pac. 825.

[5r] See Drathman v. Cohen, 139 Cal. 310, 73 Pac. 181, where it was said that it was immaterial whether specifications were in the positive or negative form, but that the latter was to be preferred.

[6] Treat v. Forsyth, 40 Cal. 484.

[7] Coleman v. Gilmore, 49 Cal. 340.

[8] Green v. Killey, 38 Cal. 201.

[9] Beans v. Emanuelli, 36 Cal. 117.

[10] Harding v. Vandewater, 40 Cal. 77. See, also, Hutton v. Reed, 25 Cal. 478; Livermore v. Stine, 43 Cal. 274; Hill v. Weisler, 49 Cal. 146; Moore v. Murdock, 26 Cal. 514; Butterfield v. C. P. R. R. Co., 37 Cal. 381; Rider v. Edgar, 54 Cal. 127.

[11] Sanchez v. McMahon, 35 Cal. 218.

erred in ordering judgment for the plaintiff on the findings," was held "not sufficient for any purpose."[11a] So a specification that "the court erred in finding" was held not to "meet the requirements of the code."[11b] So a specification that "the court erred in finding" and "but, on the contrary, should have found," was held to have been insufficient.[11c] So a specification that "the evidence is wholly insufficient to justify or sustain said verdict, and, on the contrary, the evidence shows that said verdict should have been in favor of petitioner," was held "manifestly insufficient as a specification."[11d] So a specification that "there is no evidence to support the verdict as against the defendant Schloss," was held insufficient as a specification of "any particular one of the several facts involved," the court saying: "If this is sufficient, it would be sufficient, in any case tried without a jury, to allege merely that there is no evidence to support the findings of fact even though there be twenty distinct findings of fact."[11e]

Nor will it make any difference that such general expressions are applied to the general divisions of the findings, instead of to the findings as a whole. Thus in Eddelbuttel v. Durrell,[12] the following specification, viz., "first, the first finding of the court is not sustained by the evidence, and it is contrary thereto; second, the second finding is not sustained by the evidence, and it is contrary thereto; third, the third finding is not sustained by the evidence, and it is contrary thereto,"—was held to be insufficient, the court saying: "Appellants might have said in a general way that none of the findings of the court were sustained by the evidence." So in Parker v. Reay,[12a] the following specification was held insufficient: "The evidence is insufficient: 1. To sustain the first finding of fact; 2. Or the second finding of fact; 3. Or the third finding of fact." So in Spotts v. Hanley,[12b] the following specification was held insufficient: "There was no evidence to sustain or justify the second, third, fifth, sixth, seventh, eighth, ninth, tenth, eleventh, twelfth, thirteenth, fourteenth, fifteenth, sixteenth, and seventeenth

[11a] Shepherd v. Jones, 71 Cal. 223, 16 Pac. 711.

[11b] Coglan v. Beard, 67 Cal. 303, 7 Pac. 738.

[11c] Taylor v. Bell, 128 Cal. 306, 60 Pac. 853.

[11d] In re Strock, 128 Cal. 658, 61 Pac. 282; and see to same effect, Kyle v. Craig, 125 Cal. 107, 57 Pac. 791; McLennan v. Wilcox, 126 Cal. 51, 58 Pac. 305.

[11e] Dawson v. Schloss, 93 Cal. 194, 29 Pac. 31.

[12] 55 Cal. 277.

[12a] 76 Cal. 103, 18 Pac. 124.

[12b] 85 Cal. 155, 24 Pac. 738.

findings of fact, or either of them." So in Haight v. Tryon,[12c] the following specification was held insufficient: "To findings 2, 3, 4, 5, 6, and 7, of the court the plaintiff then and there duly excepted, upon the ground that the evidence is insufficient to justify the finding," etc.

But if the finding contains a single statement of fact, it would seem that a reference to it by number and a specification that it is not sufficiently supported by the evidence would be held sufficient. Thus in Abbott v. Jack,[12d] where the finding was "that the defendant never was at any time or at all subscriber for, nor appeared on the books of the County Bank as the owner of, nor did she at any time own 330 shares, or any shares, of the capital stock of said County Bank. That said Nellie Hollister Jack was never at any time a stockholder of the County Bank ," —a specification that the finding was not justified by the evidence was held sufficient, the court saying: "The effect of the finding, though varying in expression, is simply that the defendant is not a stockholder; and where a single fact is thus found, it is sufficient to say in the specification that the finding is not justified by the evidence." But if the finding contains more than a single fact, such specification will not be held to have accomplished the purpose of a valid specification.[12e]

As above stated, the specifications must not be directed at mere conclusions of law. The rule, as often stated, is that if specifications "amount merely to legal propositions,"[13] or constitute nothing more than a mere attack upon the judgment,[13a] they will be

[12c] 112 Cal. 4, 44 Pac. 318.

[12d] 136 Cal. 510, 69 Pac. 257. And see Strang v. Ryan, 46 Cal. 33, 1 Morr. Min. Rep. 48, where the same principle seems to have guided the court.

[12e] See Anthony v. Jillson, 83 Cal. 296, 23 Pac. 419, 16 Morr. Min. Rep. 26. But see Strang v. Ryan, 46 Cal. 33, 1 Morr. Min. Rep. 48, where it was said that if the finding is confined to one or two facts, a general reference to the finding was sufficient; but this is believed to be merely loose *dicta*.

[13] Moyes v. Griffith, 35 Cal. 556.

[13a] See Mazkewitz v. Pimental, 83 Cal. 450, 23 Pac. 527, where the bill of exceptions contained a copy of the notice of intention, in which were set out the grounds upon which the motion was to be made apparently by way of specifications, as prescribed by the code for cases where the motion is to be made upon the minutes of the court. These specifications, if they were intended as specifications (and there were no others), were as follows: "1. Insufficiency of the evidence to support the judgment; 2. The judgment is against law," etc. This is what is meant by an "attack upon the judgment." Specifications of this description in notices of intention were quite frequent in the early practice; but whether in the notice or the statement or bill of exceptions, they are meaningless. See Martin v. Matfield, 49 Cal. 42; Quinn v. Smith, 49 Cal. 163; Kelly v. Mack, 49 Cal. 523; Coveny v. Hale, 49 Cal. 552; Young v. Wright, 52 Cal. 407; Sawyer v. Sar-

disregarded. Thus where, in an action of ejectment, the specification was that "the evidence was insufficient to justify the twelfth finding, for that there was no evidence showing, or tending to show, that the defendant, the Enterprise Mining Company, on the fifteenth day of October, 1871, or ever at any time, wrongfully or forcibly entered upon the undivided one-tenth, or any part of said claim, or ejected the plaintiff therefrom," it was held to be insufficient because it pointed "to the character and not to the fact of the entry and ouster."[14] So where a case turned upon the question whether a certain promissory note was common or separate property; and the court below found a series of facts, from which the necessary conclusion, as a matter of law, was that the note was the separate property of the defendant; and the specification was as follows: "The said judgment is contrary to the evidence in this, that the evidence shows that the money for which said note was given was common property," it was held to be insufficient. And the court said: "It is always safer to employ the language used in a statute, but it is not the only objection to the attempted specification, that the word 'judgment' is substituted in it for the word 'decision.' It is evident that the specification, such as it is, is actually addressed to the general conclusion, and not to the findings of fact, or any of them. There is no finding in the transcript that the money for which the note was given was not common property, or that it was the separate property of the wife."[15] So where, in an action of ejectment, the specification was that "the plaintiff showed no right of possession of the premises sued for as against the defendant or at all," it was held to be insufficient, because as a specification it would be "of no more applicability to any one than to any other of the series of alleged facts upon which the plaintiff relied to make out his right to possession."[16] So in an action to foreclose a vendor's lien the following specifications were held insufficient, viz.: "3. The evidence is insufficient to show that plaintiff has a vendor's lien upon the land. 4. The evidence is insufficient to justify the decision that the land shall be sold.

gent, 65 Cal. 259, 3 Pac. 872; Little v. Jacks, 67 Cal. 165, 7 Pac. 449.

And see Cummings v. Ross, 90 Cal. 68, 27 Pac. 62, where there were specifications attacking the judgment, and were for that reason held insufficient. And see Malone v. Del Norte, 77 Cal. 217, 19 Pac. 422, where it was held that a specification that the decision was against law was insufficient.

[14] Doherty v. Enterprise Mining Co., 50 Cal. 187.

[15] Coveny v. Hale, 49 Cal. 552.

[16] Thorne v. Hammond, 46 Cal. 530.

5. The evidence is insufficient to justify the decision that the purchaser shall be let into the possession of the land upon production of the sheriff's deed."[17] So in an action to determine the right to a patent to certain placer mining ground, where there was a finding that the plaintiff "did not mark out upon the ground the limits of such claim by either stakes or monuments defining his boundaries," a specification that this finding "is contrary to the evidence in this, to wit, that the evidence shows that plaintiff Frank Anthony, in locating the ground therein described, fully complied with the laws and statutes of the United States with reference to the location of placer mining claims, and that there were no local rules or laws in force," was held insufficient, the court saying that it "amounted merely to a legal proposition, and did not point to any finding of fact."[17a]

On the other hand, the party must be careful not to point his specifications at matters of mere evidence. In Barstow v. Newman,[18] which was an action of ejectment, the specification under the head of insufficiency of the evidence was, "that there was no evidence tending to show that plaintiff or his grantors ever resided on the ground." This was held to be insufficient, the court saying: "It is true as a matter of fact that there was no evidence of a personal residence by the plaintiff on the land. Personal residence, though an act of possession, is not a *sine qua non* to that result, as the objection supposes. Possession by a tenant is equally significant and available." So in Goodrich v. Van Landigham,[19] which was an action of forcible entry and detainer, the specification was as follows: "That the evidence is insufficient to justify the verdict, there being no evidence even upon the part of the plaintiff showing that the land in controversy was actually inclosed by a good or substantial fence, or that the plaintiff resided upon it at the time of the entry of the defendant." This was held to be insufficient, the court saying: "Neither a good and substantial fence nor a residence upon the premises was necessary to a peaceable and actual possession of the land. Fences are a means by which the possession of land may be taken and held, but are not the only means. It is well settled that there may be an actual possession without fences or inclosure of any kind." So in Menk

[17] Kelly v. Mack, 49 Cal. 523.
[17a] Anthony v. Jillson, 83 Cal. 296, 23 Pac. 419, 16 Morr. Min. Rep. 26.
[18] 34 Cal. 90.
[19] 46 Cal. 601.

v. Home Ins. Co.,[19a] a specification containing a general statement that there was no evidence which proved, or tended to prove, that the plaintiff at any time complied with or performed all the conditions or any of the conditions of the contract of insurance by him to be performed, was held insufficient to raise the particular point that, by the terms of the contract, if the parties could not agree upon the amount of the loss, it should be referred to arbitration. So in Cummings v. Ross,[19b] a specification that "the evidence shows that the entire amount due the plaintiff was not more than the sum of eight hundred and fifty dollars, and that all of such sum had been paid," was held insufficient, the court saying: "This certainly does not intelligently assert that the evidence was insufficient to show upon which story of the building the extra work was proved to have been done." So in Williams v. Dennison,[19c] a specification that "the evidence shows that all amounts of moneys collected by defendant, and all amounts of cash which had been paid him by plaintiff, were more than two years before the commencement of this action, and therefore barred by the statute of limitations, except the seventy dollars paid by Rose Auerbach," was held insufficient to raise any question of fraud on the part of the defendant, resulting in an insufficiency of the evidence to justify the verdict. So in Wise v. Wakefield,[19d] a specification that "the evidence was insufficient for the jury to find that the plaintiffs were only entitled to judgment for the sum of two hundred and eight dollars and six cents," was held insufficient, the court saying that this "was to say no more than that the verdict should have been for a larger sum, and was really no specification at all. Appellants assert that the specification 'is all it could be,' but we think they might at least have made it state, as they have stated in argument, what items of credit in their favor they deemed to have been established without material conflict of evidence."

Formerly it made no difference that the statement showed affirmatively that it contained all the evidence;[19e] but it is now well settled that if the statement contains all the evidence, a general specification is sufficient;[19f] and where there is no evidence at

[19a] 76 Cal. 50, 9 Am. St. Rep. 158, 14 Pac. 837, 18 Pac. 117.
[19b] 90 Cal. 68, 27 Pac. 62.
[19c] 94 Cal. 540, 29 Pac. 946.
[19d] 118 Cal. 107, 50 Pac. 310.
[19e] Brumagim v. Bradshaw, 39 Cal. 24.
[19f] See Livestock etc. Co. v. Union etc. Co., 114 Cal. 447, 46 Pac. 286; Standard Quicksilver Co. v. Habishaw, 132 Cal. 115, 64 Pac. 113; Bledsoe v. Decrow, 132 Cal. 312, 64 Pac. 397; Laidlaw v. Pacific Bank, 137 Cal. 392, 70 Pac. 277; Di Nola v. Allison, 143

all, a specification to that effect will be all that is required.[19g] If there is no evidence at all, the complaining party should certainly be excused from specifying it. In such a case it is said that the burden is upon the party sustaining the finding to call attention, presumably by way of amendment, to enough evidence to justify it.[19h]

It is seldom proper to make a statement a mere transcript of the reporter's notes, introduced after such phrases as "Defendants introduced evidence tending to prove the following facts." It has been said that this might be proper where the exception goes to some ruling upon a question of law, and where the weight or the conclusiveness of the evidence is not involved, but merely the fact that some evidence has been introduced upon a particular point.[19k]

It is necessary, therefore, to avoid on the one hand conclusions of law, and on the other mere evidence, and to point the specifications at the facts. As will be shown in the chapter on findings, the findings may be either of the ultimate facts, or of "secondary facts" from which the conclusion follows necessarily. If the findings be of the ultimate facts, it is sufficient to point the specifications at such facts. If the findings be of "secondary facts," it is more prudent to point the specifications at such facts, taking care to attack the facts upon which the obnoxious conclusion depends. For the line of demarcation between ultimate facts and conclusions of law is sometimes so shadowy that it is difficult to distinguish between them. If, therefore, secondary facts are found, they are the ones which should be specified as unsustained by evidence;[20] if ultimate facts, the specifications should be pointed at them. The rule requiring specifications to be pointed at the probative, or secondary, facts, is one of prudence and convenience, and has long been followed by careful practitioners. As a guiding principle of law, however, the courts have, since the decisions in Bell v. Staacke, and Harris v. Duarte, *supra*, ceased to recognize its im-

Cal. 106, 101 Am. St. Rep. 76; Jones v. Goldtree Bros. Co., 142 Cal. 383, 77 Pac. 939; Southern Pacific Co. v. Lipman, 148 Cal. 480, 83 Pac. 445; Michaelson v. Fish, 1 Cal. App. 116, 81 Pac. 661.

[19g] Knott v. Peden, 84 Cal. 299, 24 Pac. 160; Dawson v. Schloss, 93 Cal. 194, 29 Pac. 31; San Luis Obispo Water Co. v. Estrada, 117 Cal. 168, 48 Pac. 1075; De Molera v. Martin, 120 Cal. 544, 52 Pac. 825; Owen v. Pomona etc. Co., 131 Cal. 530, 63 Pac. 850, 64 Pac. 253.

[19h] San Luis Obispo Water Co. v. Estrada, 117 Cal. 168, 48 Pac. 1075.

[19k] See Orton v. Brown, 113 Cal. 561, 45 Pac. 835; and see section 151, *post*, notes 31 and 33.

[20] Leroy v. Rogers, 30 Cal. 229, 89 Am. Dec. 88; and see Coveny v. Hale, 49 Cal. 552.

portance. Since those decisions, specifications have ceased to be regarded as a pleading, "a sort of complaint in error, where all the intendments are against the pleader," but purely as a notice, "the sufficiency of which should be tested by inquiring whether the opposite party has been injured by its defects," and "whenever there is a reasonably successful effort to state 'the particulars,' and they are such as have been sufficient to inform the opposing counsel and the court of the grounds,"[20a] its purpose is to be regarded as fully met, whether the specifications are pointed at each particular fact, or all the facts contained in a general verdict, at probative or at ultimate facts. What is above said, therefore, is not to be regarded as an *ultima ratio*, but merely as a convenient guide to the preparation of specifications which shall accomplish their purpose, and insure consideration of a motion for new trial or an appeal from an order thereupon.

It is also said that it is not necessary that the specification should state what the evidence shows. Such a statement is insufficient if standing alone, and surplusage, if joined to a proper statement.[20b] As above stated, it is only necessary to designate some particular fact, and aver that it is not justified by, or not sustained by, or is contrary to, the evidence. Thus in an action for the price of land, and to foreclose a vendor's lien thereon, it was held that a specification that "the evidence is insufficient to show that plaintiff was the owner of the land at the time of the sale," was sufficient to enable the court to examine the point.[21] So a specification that "there is no evidence to show that the title ever has been in the defendants" was held sufficient to enable the court to examine whether the defendant had title by adverse possession.[22] So, where the court found in general terms that the plaintiffs were, at a day anterior to the commencement of the action, the owners and seised in fee and possessed of the land in controversy, and that the defendant had on the day in question wrongfully ejected them from such possession, a specification that the evidence was insufficient to show that the plaintiffs, or either of them, was the owner, or

[20a] American Type etc. Co. v. Packer, 130 Cal. 459, 62 Pac. 744. The language quoted in the text is from Judge Temple's opinion in this case, which is regarded as the foundation of the present liberal policy of the court.

[20b] See Spotts v. Hanley, 85 Cal. 155, 24 Pac. 738; Adams v. Helbing, 107 Cal. 298, 40 Pac. 422; Kumle v. Grand Lodge, 110 Cal. 204, 42 Pac. 634; Haight v. Tryon, 112 Cal. 4, 44 Pac. 318.

[21] Kelly v. Mack, 49 Cal. 523. The judgment was affirmed, however.

[22] Morris v. De Celis, 51 Cal. 55.

that the defendant ever ejected them from the land, was held sufficient.[22a] So where there was a finding, "That on or about August 1, 1892, and on or about September 1, 1892, the defendant did commit adultery by having carnal, sexual, and adulterous intercourse on each of the said dates with one Jeff Harlan," a specification that "The evidence introduced in this action fails to show that the defendant at the times stated was guilty of adultery with one Jeff Harlan," was held sufficient for the purpose of bringing before the mind of the court and the adverse party the particular point the aggrieved party desired to have reviewed, and that therefore the purpose of the statute was fully met thereby.[22b] So a specification that "The evidence is insufficient to justify the decision in each and every one of the following particulars, respectively: 1. Allowing $500, or any sum to Henley & MacSherry; 2. Allowing $343.91, or any sum to said administrator for commissions; 3. Allowing said item of $50 alleged to have been paid to Dr. C. F. Buckley," was held sufficient, the court saying, "The account is itself a bill of items, and when the respondent was informed by the specifications of the several items which appellant deemed to have been unsupported by the evidence, he certainly was advised of the particulars wherein he should take note whether the evidence, if any, sustaining the account, appeared in the bill of exceptions when proposed; and this we understand to be a main object of the requirements of such specifications by the statute."[22c]

The specification considered in the case of Harnett v. Central Pacific R. R. Co.[22d] has always been regarded as a clear illustration of what is required in specifications of insufficiency of the evidence. That specification was in the following language:

"The evidence was insufficient to show that the plaintiff was by any servant or employee of the defendant negligently or carelessly pushed, shoved, forced, or driven from said engine. On the

[22a] Wise v. Burton, 73 Cal. 166, 14 Pac. 678. This decision was overruled in terms by the court in De Molera v. Martin, 120 Cal. 544, 52 Pac. 825, but was subsequently re-established as an authority in the subsequent cases of Bell v. Staacke, and Harris v. Duarte, *supra*.

[22b] Brenot v. Brenot, 102 Cal. 294, 36 Pac. 672.

[22c] In re Levinson, 108 Cal. 450, 41 Pac. 483, 42 Pac. 479.

[22d] 78 Cal. 31, 20 Pac. 154. And see In re Yoakam, 103 Cal. 503, 37 Pac. 485, where similar specifications were upheld, upon the authority of the Harnett case, in a motion for a new trial on the minutes of the court, where the specifications were set out in the notice of intention.

See, also, Strasburger v. Beecher, 20 Mont. 143, 49 Pac. 740; Patten v. Hyde, 23 Mont. 23, 57 Pac. 407; Gillies v. Clark, 32 Mont. 320, 80 Pac. 370; also, Bank v. Roberts, 9 Mont. 323, 23 Pac. 718.

contrary, the evidence established that the plaintiff, with his companions, contrary to the orders of persons in charge of the switch engine No. 44, got upon the footboard in front of said engine, which was a place of great peril to him, and attempted to steal a ride thereon. The evidence showed that as soon as they were discovered the engineer in charge of said engine slowed down the same, intending to come to a full stop, and then remove the plaintiff and his companions from the position of danger which they occupied. The evidence showed that the plaintiff and his companions jumped from said engine before it had been stopped, and thereby received the injuries complained of. The evidence showed that the injuries received by the plaintiff were caused proximately by his own negligence and willful disregard of the orders and directions of the servants and employees of the defendant, and not in consequence of any act or omission of the defendant, or its servants or employees. The whole case showed no negligence, either in fact or in law, of the defendant."

The court, in sustaining the specification, said: "It would be difficult to state in more specific terms the particular points of insufficiency on which the moving party proposed to rely in its proceeding for a new trial. It gave the plaintiff notice, in plain and direct language, of the matters that would be urged on the hearing of the motion—which is the object of the statute requiring such specifications—and could not have misled him in preparing his amendments to the proposed statement."

The present policy of liberality in dealing with specifications of the insufficiency of the evidence has always governed in the matter of specifications of the insufficiency of the evidence to justify damages for breach of contract or for tort-feasance, which are alleged to be excessive or inadequate. The reason for this apparent exception to a general rule is not entirely clear, unless it is because the verdict is, in a sense, purely discretionary with the jury, and the amount of the damages based upon reasons or standards of measurement which are, in their nature, incapable of being defined or recorded. It is therefore difficult, if not indeed impossible, to specify particular facts which enter into such a verdict. The rule itself, however, is of long standing, whether it rests in reason or in convenience or necessity. Thus in an action upon contract the jury found a verdict for two hundred and fifty dollars damages, and the defendant's specification was, "The said

verdict in respect to said damages is not sustained by the evidence, and is contrary to the law and evidence"; it was held sufficient.[23] So where the verdict was for a sum claimed by the plaintiff to be inadequate, and the specification was to the effect that it appeared from the evidence that the plaintiff's injuries were very serious, and that the sum found by the jury was unreasonably and grossly inadequate, the specification was held sufficient.[23a] So where the specification, after setting out the evidence as to age, health, ability to earn a livelihood and certain wages, and as to the character and extent of the injuries sustained and their effect upon his health, his earning capacity and his mind, averred that "the verdict of five hundred dollars returned will not compensate plaintiff for the detriment proximately caused by such injury and is not equivalent to the amount plaintiff will lose in one year in earning capacity alone," and that "the amount of the verdict is wholly inadequate and insignificant as compensation for the damage sustained from said injury," it was held sufficient.[23b]

In any case, however, the specifications must purport to be of the insufficiency of the evidence, and not of errors of law. Where the specification began as follows, "Defendant specifies the following particulars in which the court erred," and then were stated certain particulars in which the evidence was insufficient, it was held that it could not be considered either as a specification of errors of law, or of insufficiency of the evidence.[24] So where, after the evidence and rulings in the statement, appeared the following: "And the defendant assigns and specifies the following as errors occurring at the trial," and then follows a statement of twenty-one instances in which the court erred, and among these are, "The court erred in finding in its findings of fact that the

[23] Du Brutz v. Jessup, 54 Cal. 118.

[23a] Bennett v. Hobro, 72 Cal. 178, 13 Pac. 473.

[23b] Townsend v. Briggs, 88 Cal. 230, 26 Pac. 108.

[24] Smith v. Christian, 47 Cal. 18. And see Shepherd v. Jones, 71 Cal. 223, 16 Pac. 711; also Adams v. Helbing, 107 Cal. 298, 40 Pac. 422, where, under the head of "Specification of Errors," were certain statements of what the evidence shows, etc., and the specifications were held insufficient.

But "there is nothing in the statute which requires a specification of the insufficiency of the evidence to be inserted in any particular place in the statement, nor under any particular subheading. Stuart v. Lord, 138 Cal. 672, 72 Pac. 142. See, also, Gillies v. Clarke etc. Co., 32 Mont. 320, 80 Pac. 370, where specifications of insufficiency were held to be sufficient although included with specifications of errors under the head, "Specifications of Errors Occurring at Said Trial." Also see Bardwell v. Anderson, 18 Mont. 528, 46 Pac. 443, and Schilling v. Curran, 30 Mont. 370, 76 Pac. 998, in both of which the specifications were held to have been improperly designated.

diversions of water," etc., "and in not finding to the contrary," and "the court erred in its findings of law that the cause of action was not barred by the statute of limitations," the court said: "It is evident that the specifications above noted are quite insufficient to meet the requirements of the code, and they must therefore be disregarded. (Smith v. Christian, 47 Cal. 18; Shepherd v. Jones, 71 Cal. 223, 16 Pac. 711.)"[25]

When the motion is to be heard on the minutes of the court, the statute prescribes that the notice of intention shall contain the usual specifications of error and of insufficiency of the evidence set out in the statement. Having the same purpose, it is obvious that they are required to be expressed with equal clearness and according to the rules above suggested.[26]

As stated with respect to specifications of errors of law, the specification must be contained in the statement, except, as shown in the last paragraph, where the motion is to be heard on the minutes of the court.[27]

As to requirements with respect to bills of exceptions in the matter of exceptions to a verdict or decision on the ground of insufficiency of the evidence, see sections 258 and 259, *post;* and as to evidence required to be set out, see next section.

§ 151. What the Statement Should Contain—Evidence and Other Matter—How Set Forth.—In reference to the contents of a statement, Burnett, J., delivering the opinion in Reynolds v. Harris,[1] said: "The code, in requiring a statement to be annexed to the record of the judgment or order appealed from, must have intended that the statement should contain that which was not otherwise matter of record. The object was to make that matter of record which, without the statement, would not be such. For this reason, the code says the statement shall 'contain the grounds

[25] Heilbron v. Ditch Co., 76 Cal. 8, 17 Pac. 932.

[26] See Weyl v. Sonoma Valley etc. Co., 69 Cal. 202, 10 Pac. 510; In re Yoakam, 103 Cal. 503, 37 Pac. 485.

[27] And, as in the case of specification of errors, the specification, being only the act of the attorney for the moving party, annexed to the statement after the trial, it is not, of itself, the equivalent of a substantive showing of what happened at the trial. The statement, therefore, must contain, in addition to the specification, so much of the evidence or other proceedings as is necessary to support and illustrate the specification. See People v. Faulke, 96 Cal. 17, 30 Pac. 837; Braverman v. Fresno Canal etc. Co., 101 Cal. 644, 36 Pac. 386.

[1] 8 Cal. 617. And see Graham v. Stewart, 68 Cal. 374, 9 Pac. 355, where the office of a statement was explained.

on which the appellant intends to rely on the appeal, and so much of the evidence as may be necessary to explain the grounds, and no more.' Whatever, therefore, would be matter of record without the statement need not be included in it." The principle thus laid down is undoubtedly correct. And such being the case, it follows that matters such as the pleadings, the verdict or findings,[2] and other parts of the judgment-roll,[3] have no place in the statement.[3a] But matters which are not of record, such as the evidence and other matter to explain the points specified,[3b] the notice of intention,[4] and matter in explanation of any irreg-

[2] Reynolds v. Harris, 8 Cal. 617.

[3] Butterfield v. C. P. R. R. Co., 37 Cal. 381.

[3a] Statements should not contain pleadings, depositions, documents and minutes on file. Gregory v. Frothingham, 1 Nev. 253. But the rule thus stated with respect to depositions, etc., does not apply in all jurisdictions. See section 230, *post*.

[3b] The supreme court will not consider the evidence in the absence of a regular statement on motion for new trial. State v. Sadler, 21 Nev. 13, 23 Pac. 799; and see section 230, *post*.

[4] See Hook v. Hall, 68 Cal. 22, 8 Pac. 596; Girdner v. Beswick, 69 Cal. 112, 10 Pac. 278; Heine v. Treadwell, 72 Cal. 217, 13 Pac. 503; Dominguez v. Mascotti, 74 Cal. 269, 15 Pac. 773; Pico v. Cohn, 78 Cal. 384, 20 Pac. 706; Gage v. Downey, 79 Cal. 140, 21 Pac. 521, 555; Ameroach v. McGovern, 79 Cal. 268, 21 Pac. 837; McShane v. Carter, 80 Cal. 310, 22 Pac. 178; Scott v. Wood, 81 Cal. 398, 22 Pac. 871; Monterey v. Cushing, 83 Cal. 507, 23 Pac. 700; Richardson v. Eureka, 92 Cal. 64, 28 Pac. 102; Nye v. Marysville etc. Co., 97 Cal. 461, 32 Pac. 530; Southern Pacific Co. v. Superior Court, 105 Cal. 84, 38 Pac. 627; Kahn v. Wilson, 120 Cal. 643, 53 Pac. 24; Nippert v. Warneke, 128 Cal. 501, 61 Pac. 96, 270; Reclamation Co. v. Thisby, 131 Cal. 572, 63 Pac. 918; Schneider v. Market Street Ry. Co., 134 Cal. 482, 66 Pac. 734; Williams v. Hawley, 144 Cal. 97, 77 Pac. 762; Skinner v. Horn, 146 Cal. 62, 79 Pac. 597; Great Western Gold Co. v. Chambers, 153 Cal. 307, 95 Pac. 151.

The case of Pico v. Cohn, *supra*, is the leading authority upon the point, and clearly indicates both the reason and the chronology of the rule which withdrew the notice of intention from its place in the judgment-roll and relegated it to a somewhat equivocal position in the statement or bill of exceptions:

"Formerly the notice was made a part of the record on appeal by express statutory provision. But it is not so under the present code. Code Civ. Proc., sec. 670; Girdner v. Beswick, 69 Cal. 112, 10 Pac. 278; Dominguez v. Mascotti, 74 Cal. 269, 15 Pac. 773. Nor is there any provision of the code requiring that such notice shall be brought to this court by including it in the statement, or in any other manner. The papers necessary to be brought up are set out in sections 661 and 952 of the Code of Civil Procedure, and the notice of intention is not one of them. The former statute having made the notice of intention a part of the record, we must assume that it was omitted from the present code with a purpose. Being omitted from the section providing what papers shall constitute the record on appeal, and no provision being made for bringing it up in any other way, it is fair to presume that it was not intended to require it to be brought to this court at all. It has been held by this court in a number of cases that it must be made to appear by the statement that a notice of intention has been given, or that the giving of such notice has been waived. Calderwood v. Brooks, 28 Cal. 151; Wright v.

ularity in the preparation of the statement,[5] should be placed therein.

The largest portion of every statement is the evidence and other matter necessary to explain and support the specifications. In setting forth the evidence and other matter, three things should be borne in mind, viz., that the statement should contain no evidence which is not in explanation of the specifications; but that it should contain enough to explain them; and that what it contains should be set forth with the utmost brevity consistent with precision. These propositions will be considered separately.

1. *The Statement Should Contain No Evidence Which is not in Explanation of the Specifications.*—As stated by Field, C. J., in Barrett v. Tewksbury,[6] "the specification of the grounds is the essential element of a statement, the evidence is the mere incident." As to points not specified, the conclusive presumption is that the decision of the court below was correct, and was acquiesced in.[7] Therefore matter which has no tendency to explain the specifications is a useless encumbrance of the record, and should be omitted. Such has always been the express provision of the statute. Section 195 of the old Practice Act provided that "the

Snowball, 45 Cal. 654; Dominguez v. Mascotti, 74 Cal. 269, 15 Pac. 773. There may be other cases to the same effect. The legislature has said in effect that the notice need not come to this court as a part of the judgment-roll, and has made no provision for bringing it here in any other way. The conclusion that must necessarily be drawn from this is, that it was not the intention that it should come to this court at all, and we so hold."

But whenever the notice is a necessary element of an appellant's case, it should be incorporated in the statement. The rule is, or should be, that the notice is not a necessary part of the record on appeal, but it may be a highly essential part of the record in the trial court, and if so, it must necessarily be incorporated in the statement or a bill of exceptions, and so become a part of the record on appeal. If, for example, any question should be raised touching the validity of the notice which could be met by the presentation of the notice itself, it would be proper to refer to it at the hearing of the motion, and afterward to incorporate it in the statement. Out of caution, it may be the better practice to incorporate the notice in the statement, even though there may not appear to be any real necessity for it; but this is seldom done, and the reports contain few, if any, cases where a party has been injured by a failure to do so.

So if, when the statement or bill of exceptions comes up for settlement, there should arise any question as to the validity of the notice, which may be determined by reference to the notice itself, a copy of it should be incorporated in the bill or statement, so that upon the hearing of the motion the particular question may have all possible light thrown upon it.

[5] Higgins v. Mahoney, 50 Cal. 444; Connor v. Southern Cal. Motor Road Co., 101 Cal. 429, 35 Pac. 990; Henry v. Merguire, 106 Cal. 142, 39 Pac. 599; Wheeler v. Karnes, 125 Cal. 51, 57 Pac. 893; Estate of Kruger, 130 Cal. 621, 63 Pac. 31.

[6] 15 Cal. 354.

[7] Hidden v. Jordan, 28 Cal. 301; look at section 149, *ante*, and section 258, *post*.

statement shall contain so much of the evidence or reference thereto as may be necessary to explain the particular points thus specified, *and no more.*"[8] The corresponding section of the code,[9] as amended in 1874, does not contain the above provision, but it provides that "it is the duty of the judge or referee in settling the statement to strike out of it all redundant and useless matter, and to make the statement truly represent the case, notwithstanding the assent of the parties to such redundant or useless matter, or to any inaccurate statement." And section 648 provides that "no particular form of exception is required; but when the exception is to the verdict or decision upon the ground of the insufficiency of the evidence to justify it, the objection must specify the particulars in which such evidence is alleged to be insufficient. The objection must be stated with so much of the evidence or other matter as is necessary to explain it, *and no more.*"[10] This requirement is in consequence of the provision that the moving party shall specify the errors of law upon which he relies, and the particulars in which he claims the evidence is insufficient.[11]

2. *The Statement Should Contain Enough of the Evidence and Other Matter to Explain the Specifications.*—While it is true, as stated above, that the statement should contain no evidence which is not in explanation of the points specified, the moving party should be careful to see that his statement contains matter enough to explain such points; for, as will be shown in another place, the

[8] This is the language of the act of 1863. The provision as it previously stood was not materially different. See Laws of 1861, p. 590; Laws of 1851, p. 81.

[9] Section 659, subdivision 3, California Code of Civil Procedure.

[10] It is manifest that the word "objection" in the last sentence above quoted is used as equivalent to "exceptions," and the California code recognizes "exceptions" on the ground of insufficiency of the evidence (sections 648 and 647, Code of Civil Procedure) as well as exceptions on the ground of error in law. Section 646, same code.

[11] See sections 149 and 150, *ante;* and People v. C. P. R. R. Co., 43 Cal. 398; Hutton v. Reed, 25 Cal. 478; Harper v. Minor, 27 Cal. 107. And see to same effect, Spotts v. Hanley, 85 Cal. 155, 24 Pac. 738; Dawson v. Schloss, 93 Cal. 194, 29 Pac. 31; Haight v. Tryon, 112 Cal. 4, 44 Pac. 318. Also In re Levinson, 108 Cal. 450, 41 Pac. 483, 42 Pac. 479; Reclamation District v. Hamilton, 112 Cal. 603, 43 Pac. 1117; Vatcher v. Wilbur, 144 Cal. 536, 78 Pac. 14; and see Bell v. Staacke, 141 Cal. 186, 74 Pac. 774. See, also, sections 660 and 661, California Code of Civil Procedure, as to what is required in statements made subsequently to the hearing when the latter is upon the minutes of the court.

In South Dakota the rule that only evidence necessary to explain specifications is required to be set out is well settled. See Holcomb v. Keliher, 3 S. D. 497, 54 N. W. 535; Randall v. Burk Township, 4 S. D. 337, 57 N. W. 4.

presumption is in support of the action of the court below, and the record must contain enough to make the error affirmatively appear.[12] Thus if a ruling be complained of the record should distinctly show that it was made. An instance of obscurity in this regard is to be found in the Estate of Brooks,[13] and is given by Sharpstein, J., delivering the opinion, as follows: "After the witness had testified to all that proponent had said upon that subject, the court said: 'That is not evidence. Declarations of Reid (proponent) before the date of the will, unless they are a part of the *res gestae* to show undue influence, are not evidence in this case, whether they come in directly or indirectly.' Whereupon one of the counsel for the contestant said: 'We except to that.' And there the matter ended. Neither side moved to have the evidence stricken out, and it comes here with the other evidence in the transcript, and, for anything that appears to the contrary, may have been considered by the court with the other evidence in deciding the case. It was objectionable on the ground of being hearsay evidence; but whether it was excluded or not is more than we can determine from the bill of exceptions before us." And the record must not only show that a ruling was made, but must show what it was and all the circumstances in regard to it. Thus where the error alleged is the admission of a judgment-roll in evidence, the statement must either set forth the roll or give an abstract of its contents; for it cannot be inferred from the fact that objections were made that the roll was open to them.[14] So objections to the admissibility of a deed cannot be considered if the deed is not shown in the record.[15] And the same is true of other documents.[16] So if an objection to a question be erroneously overruled, the record must show that the question was answered,[17] and what the answer was. Where the testimony of witness might be proper under certain circumstances, and the record does not show what the testimony was, it will not be presumed that it was improper.[17a] So where the error alleged is the ruling out of

[12] See section 285, *post*.

[13] 54 Cal. 471.

[14] Doyle v. Franklin, 48 Cal. 537. And the same holds where a judgment-roll offered was excluded. Crosby v. McDermit, 7 Cal. 146.

[15] Canfield v. Thompson, 49 Cal. 210.

[16] See Dwinelle v. Henriquez, 1 Cal. 387.

[17] Treat v. Reilly, 35 Cal. 129; People v. Williams, 45 Cal. 25; Hansen v. Martin, 54 Cal. 394; Shay v. Tuolumne Water Co., 6 Cal. 73, 5 Morr. Min. Rep. 587; People v. Graham, 21 Cal. 261.

[17a] Leet v. Wilson, 24 Cal. 398.

a certain declaration, the record must show what the declaration was.[18] So where the statement showed that when certain deeds were offered in evidence (more than sixteen years after they were made) they bore no seals, and that an objection that "they appeared never to have been sealed by the said Hayes" was overruled, but failed to show whether or not they were in fact sealed when made, it was held that the ruling could not be disturbed, because "upon inspection it may have appeared to the court below that the deeds were sealed, and that the seals had become detached."[18a] So where, in an action upon an injunction bond, it is sought to be proved that the injunction suit was suspended by an appeal, it is not enough to show an order directing the court below to fix the amount of an appeal bond.[19] So if the effect to be given to a contract depends upon whether notice of its assignment was given, the fact that no such notice was given must appear in the record. The court is "not authorized from the mere statement of the plaintiff's ground of objection to the admission of the contract and its assignment to presume that no evidence was given during the trial of notice to the plaintiff."[20] So where certain declarations were admissible if made before a transfer, but inadmissible if made afterward, and the record did not show when they were made, it was held that the ruling excluding them could not be disturbed.[20a] So in a criminal case, where the admissibility in evidence of certain burglar's tools depended upon whether it had been first shown that the entry had been effected by means of tools, and the record was silent as to this, it was held that the ruling admitting the tools in evidence could not be disturbed.[20b] So in an action of trespass, where the admissibility of evidence concerning the taking of certain asphaltum depended upon whether the land from which it was taken was above or below high-water mark, and the record did not show how the fact was, it was held that the ruling admitting the evidence would not be disturbed.[21] So where the record does not give the direct examination of a witness, it will be presumed that there was foundation for a question asked on cross-examination.[22] So

[18] Cohn v. Mulford, 15 Cal. 50.
[18a] Clark v. Sawyer, 48 Cal. 133.
[19] Woodbury v. Bowman, 13 Cal. 634.
[20] Doll v. Anderson, 27 Cal. 248.
[20a] Kilburn v. Ritchie, 2 Cal. 145, 56 Am. Dec. 326.
[20b] People v. Winters, 29 Cal. 658.
[21] Moore v. Massini, 43 Cal. 389.
[22] Hansen v. Martin, 54 Cal. 394, 5 Morr. Min. Rep. 643; and look at People v. Butler, 8 Cal. 435.

where both of the subscribing witnesses to a will were not called upon a contest of the will, it was held that it would be presumed, in the absence of anything in the record showing the contrary, that they were out of the county, or dead, or of unsound mind.[23] So if the evidence in a cause be not in the record, exceptions to instructions cannot be considered unless the instructions are erroneous in every conceivable state of the evidence.[23a] So in an action of ejectment where one link in the chain of title was a patent, which was disregarded by the court below, and the statement of the record in regard to the matter was that the appellant "offered a patent from the United States of America to Thomas S. Page and others, dated ——, purporting to convey the premises described in the complaint, pursuant to the provisions of an act of Congress, approved March 3, 1863, entitled an act, etc., ... to the parties therein named, according to their respective interests as purchasers from Vallejo, or his assigns. Said patent also described the land as Case No. ——, in the report of the register and receiver, dated January 2, 1865," the supreme court affirmed the judgment of nonsuit, and Crockett, J., delivering the opinion, said: "It does not appear that the patent was put in evidence, but only that it was 'offered,' and though it is probable this term was employed in the bill of exceptions as equivalent to the averment that it was put in evidence, we cannot but express our disapprobation of this loose mode of expression in detailing the history of the case. It leaves us in doubt whether or not the patent was read in evidence; but if it was it does not help the plaintiff's case, inasmuch as it does not appear from the record that it issued before the commencement of the action. The date of the patent is not given, nor have we any data from which it can be inferred that it issued before suit brought. If issued afterward it was too late to aid the plaintiff in this action (Kile v. Tubbs, 32 Cal. 332); nor does it satisfactorily appear from the bill of exceptions that the particular tract in contest was conveyed by the patent *to the plaintiff*. The statement is that the patent is 'to Thomas S. Page and others, dated ——, purporting to convey the premises described in the complaint, pursuant to the provisions of the act of Congress referred to, etc., to the parties named therein, *according to their respective interests as pur-*

[23] Estate of McCarty, 58 Cal. 335.
[23a] See sections 130 and 132, *ante*, and 285, *post*.

chasers from Vallejo, or his assigns.' But whether it conveyed to them as tenants in common or in severalty does not appear."[23b]

So where error in refusing an instruction is charged, it must appear that it was requested.[23c] So where the absence of the trial judge upon a view of the *locus in quo*, or that the jury were in charge of an unauthorized official, is alleged, such facts must appear in the statement or bill of exceptions. They will not be presumed.[23d] So where advantage is sought from a variance in defendant's name, the fact of such variance must be made to appear in the record.[23e] So an objection to the method of drawing the jury will not avail if the record fails to make it appear that the drawing took place in the manner complained of.[23f]

A statement that an objection to evidence was overruled is equivalent to a statement that the evidence was admitted; but "a direct statement to that effect would be more satisfactory."[23g]

In fine, it may be stated that the presumption is that the action of the court below was correct and regular, and that error must be affirmatively shown.[23h] Consequently, the statement must not only show that a ruling was made, but what it was, and how it may have affected the result. If the record shows an error which may have affected the result, there must be a reversal; for, as is

[23b] Page v. O'Brien, 36 Cal. 559; and look at Provost v. Piper, 9 Cal. 552; Nims v. Johnson, 7 Cal. 110.

[23c] See People v. Marks, 72 Cal. 46, 13 Pac. 149; Harris v. Barnhart, 97 Cal. 546, 32 Pac. 589; and see section 130, *ante*.

Of course, the rule would not apply if the instruction were one to give which is the statutory duty of the court. It is only necessary to show that such an instruction was not given.

[23d] See People v. Huff, 72 Cal. 117, 13 Pac. 168.

[23e] See People v. Leong Sing, 77 Cal. 117, 19 Pac. 254.

[23f] See Bostwick v. Mahoney, 73 Cal. 238, 14 Pac. 832.

The rule requiring the evidence, or so much thereof as is material and necessary, to be set out in a statement or bill of exceptions, when the insufficiency thereof to justify the decision is advanced as a ground for reversal, is an essential rule of practice in all the other states. Zion's etc. Co. v. Armstrong, 6 Idaho, 464, 56 Pac. 168; also, Beck v. Schmidt, 13 Cal. App. 448, 110 Pac. 455; Finnall v. Merriman, 13 Cal. App. 609, 110 Pac. 462; Gill v. Schneider, 48 Colo. 382, 110 Pac. 62; In re Initiative Petition No. 3, 26 Okl. 487, 109 Pac. 732; Howell v. Wheeler (Or.), 109 Pac. 865; Price v. Immel, 48 Colo. 163, 109 Pac. 941; Desserich v. Merle etc. Co., 48 Colo. 370, 109 Pac. 949; Terrapin v. Barker, 26 Okl. 93, 109 Pac. 931; Southern Pacific Co. v. Richey (Ariz.), 108 Pac. 225; Reed v. Harshall, 12 Cal. App. 697, 108 Pac. 719; Render v. Hocker, 26 Okl. 242, 108 Pac. 1105; Jerman v. Misner (Or.), 108 Pac. 179; Kirk v. Santa Barbara, 157 Cal. 591, 108 Pac. 509; Neal v. Roach (Or.), 107 Pac. 475; Pack v. Peabody, 58 Wash. 76, 107 Pac. 839; Peterson v. Lone Lake Co., 58 Wash. 72, 107 Pac. 857.

See note 6, section 152, *post*.

[23g] Montgomery v. Donelly, 57 Cal. 68; and see Clark v. Fowler, 57 Cal. 142; and Landers v. Bolton, 26 Cal. 393.

[23h] See section 285, *post*.

shown in another place,[23k] the rule is that where error is shown injury is presumed, unless the court can see from the record that there was no injury.

The presumption is, however, that the statement or bill of exceptions contains everything material to the specifications, unless there is something in the record from which the contrary is to be inferred.[23l]

It is not necessary to set out evidence in reference to a matter not in issue.[23m]

3. *The Evidence and Other Matter must be Set Forth With the Utmost Brevity Consistent With Precision.*—The Code of Civil Procedure, as amended in 1876, provides, in relation to exceptions, that "only the substance of the reporter's notes of the evidence shall be stated. Documents on file in the action or proceeding may be copied, or the substance thereof stated, or a reference thereto sufficient to identify them may be made."[23n] The previous statutes did not contain this provision. But it never was required that the precise language of the witness should have been given

[23k] See section 287, *post*.

[23l] See section 152, *post*.

[23m] Flinn v. Mowry, 131 Cal. 481, 63 Pac. 724, 1006. The statement must be complete, however, and where reference is made to a map which is not included in the record, everything pertaining thereto must be disregarded. Hamburg etc. Co. v. Stephenson, 17 Nev. 449, 30 Pac. 1088; also, to same effect, Cohen v. Railroad Co., 14 Nev. 376.

[23n] Section 648, California Code of Civil Procedure. This section applies, to the preparation of a record on appeal from the judgment. Rather it applies to the preparation of bills of exceptions instead of to statements on motion for new trial. Its provisions may, however, be taken as a proper guide in both bills and statements. Besides, the section has been sometimes treated as applicable to statements. Thus: "We cannot consider the statement on motion for new trial to determine whether or not the evidence is insufficient to justify the findings and decision, for the reason that the statement contains no specifications of error, as provided by section 648 of the Code of Civil Procedure." Meek v. Southern California Ry. Co., 7 Cal. App. 606, 95 Pac. 166. It is probable, however, that this was an inadvertence, and that the court intended to refer to the provisions of section 659 of the same code.

This section does not mean that the precise language of the witness shall in no case be given. Nor does it mean that a simple reference to the reporter's notes, or the substance thereof, is ever sufficient. Frazer v. Superior Court, 62 Cal. 49. There is a convenient mean between these two extremes, and the circumstances of each case may be safely adopted as a measure of the requirements of that case. In many instances it is necessary to give the questions exactly as they were put, and the answers exactly as they were given, in order to convey the precise shades of meaning. The "substance" of the reporter's notes may be arrived at by leaving out irrelevant questions and answers, repetitions, remarks of counsel, etc., as well as by condensing the language used. In many cases, however, it is convenient to give the substance of the testimony in narrative form.

in all cases. As was said in Ross v. Roadhouse,[24] "the brief statement of the substance of the evidence bearing upon the point specified, instead of setting it out in full, relevant and irrelevant, in the precise language of the witnesses, is proper." And the court frequently and in forcible language announced its views as to the necessity of abbreviations and condensations, whenever they could properly be made. Thus in Knowles v. Inches,[25] Baldwin, J., delivering the opinion, said: "We must reprehend the practice, which is too common, of stuffing a transcript with irrelevant and unnecessary matter. The present case affords a remarkable illustration. The transcript contains some two hundred and thirty-three pages, when everything essential to a review of the case might easily have been given in fifty. Besides the delays, unnecessary expense, and labor thus created, the points are hid in this mass of superfluous matter, and it frequently becomes more difficult to find out what they are, than to decide them when found. The Practice Act, so far from sanctioning any such course of proceeding, by implication rebukes it. Instead of copying into a statement for a new trial, or on an appeal, deeds and transcripts of records, when no point is made on the construction of the language, a brief statement of the instrument answers every purpose. There is no sense in copying a judgment execution and the like, in cases where no question arises as to the form, or the particular words of them; but a short description of the paper, giving the sums, date, court, etc., is sufficient. If proper attention were given to the making up of statements, we are convinced that the transcripts in this court might on an average be reduced to less than one-half of the present size."[26] So in Conroy v. Duane,[27] Crockett, J., delivering the opinion, said: "I deem it necessary to notice only a few of the numerous grounds of error, relied upon by the defendant and contained in the voluminous record of three hundred and thirty-eight printed pages, which has been swollen into its present enormous proportions by the insertion of conveyances, and records at full length, instead of stating briefly their substance and effect, and by copying verbatim the testimony of numerous witnesses by questions and answers, instead of stating so much of the substance of the evidence as relates to the errors assigned.

[24] 36 Cal. 580. See, also, Battersby v. Abbott, 9 Cal. 565, and People v. York, 9 Cal. 421.

[25] 12 Cal. 212.

[26] Look at section 265, *post*.

[27] 45 Cal. 597.

This method of bringing up a case imposes unnecessary labor on the court, and a great additional expense upon the parties, and cannot be too strongly condemned." So in McMinn v. Whelan,[28] Currey, J., delivering the opinion, said: "Instead of the statement in this case conforming to the provisions of the statute, or with any of them, the district court reporter's minutes of the testimony is embodied in gross, with every remark made by the court or counsel, whether important or otherwise, during the progress of the trial; and besides this long documents are set out in full, when a brief abstract in respect to most of them would have served as useful a purpose as the documents at length, and would have been much more convenient, as well as more economical of time and money. We are aware that it is not unfrequently the case, where statements and bills of exception are prepared according to the letter and spirit of the statute, attorneys for respondents insist by way of amendment that all the evidence given, and all that transpired at the trial shall be set forth in the statement or bill of exceptions, and the judge who may have tried the cause is asked not in vain generally to order the statement to be so amended and engrossed. This course of conduct is sometimes adopted on the part of respondents to embarrass and oppress appellants. Such conduct and such a practice should be discountenanced, not only by courts having power in the premises, but also by all honorable men engaged in the practice of the law. While it is the duty of courts in settling statements to see that so much of the evidence as may be necessary to explain the grounds assigned as error is stated fully and fairly, we may suggest that a great reform might be effected by exacting a compliance with the law on the subject."[29]

[28] 27 Cal. 300.

[29] As to the practice in this respect in criminal cases, see People v. Getty, 49 Cal. 581; People v. Padilia, 42 Cal. 535; People v. Sprague, 53 Cal. 422; Frazer v. Superior Court, 62 Cal. 49; Valleau v. Superior Court, 62 Cal. 290; January v. Superior Court, 73 Cal. 537, 15 Pac. 108; Sansome v. Myres, 77 Cal. 353, 19 Pac. 577, 80 Cal. 483, 22 Pac. 212; Visher v. Smith, 92 Cal. 60, 28 Pac. 94; Cohen v. Wallace, 107 Cal. 133, 40 Pac. 401; Winters v. Buck, 121 Cal. 279, 53 Pac. 799. And see Walker v. Superior Court, 135 Cal. 369, 67 Pac. 336; People v. Coulter, 145 Cal. 66, 78 Pac. 348.

In this class of cases it was formerly the rule to refuse to settle bills of exceptions which were either mere "skeletons" or mere transcripts of the reporters' notes. The rule was relaxed in Cohen v. Wallace, *supra*, however, and has since been more in accord with the rule in civil cases.

It is sometimes said that the duty of the court and counsel to make up the statement or bill of exceptions can-

And in Caldwell v. Parks [30] the court disregarded a bill of exceptions because it was a mere transcript of the reporter's notes, and did not intelligibly present the questions involved.

The case of Vatcher v. Wilbur [30a] clearly outlines the character of statement best designed to meet the requirement that the evi-

not be imposed upon the clerk. (See note 22, section 156, *post*.) They cannot safely or properly content themselves with the preparation of a "skeleton" paper, and leave blank spaces therein to be filled out by the clerk. Specific documents or papers may be thus settled by reference, but this cannot be done as to the testimony. The reason for the distinction was thus expressed by the supreme court of Montana, in State v. Napton, 28 Mont. 336, 72 Pac. 676: "Under section 1152, Code of Civil Procedure, it was the duty of counsel to incorporate in their bill so much of the evidence, in substance, as was necessary to explain the objection and exception reserved thereon. Under this section reference may be made to the documents on file in the action when such reference will sufficiently present the objection and exception relied on; and, so far as these are concerned, the bill may be presented for settlement in skeleton form. But this provision does not apply to the evidence, for the obvious reason that the evidence introduced upon the hearing must be reproduced from the stenographer's notes, and settled by the judge or referee, in order that the record may conform to the proof. To produce the evidence is the duty of the party desiring to preserve it in the record to be used on his motion or upon appeal. The determination of what evidence was introduced on the trial and the reduction of it to proper form may not be left to the clerk, for the clerk may not be allowed to determine what evidence was used, or whether the form in which it is sought to be incorporated in the bill meets the requirements of the statute."

In Keady v. United Railways Co. (Or.), 108 Pac. 197, where the bill of exceptions consisted of "a transcript of the reporter's notes of the oral testimony and proceedings of the trial," covering three hundred and twenty-four pages of typewritten matter, certified by the trial judge to be "a true and correct statement of all the proceedings had in said case, and together with the exhibits attached contains all the evidence introduced upon the trial," the court declined to examine the assignments of error based upon rulings of the trial court on the admission or rejection of testimony, or the instructions given or refused, involving an examination of the so-called bill of exceptions. It was there said:

"It has been many times held by this court that such a transcript of the proceedings of a trial does not conform to the requirements of the statute, and is not a bill of exceptions. Counsel for appellants may term it a bill of exceptions, and so label it, but it is not one in fact. In some previous cases in this court even where the infraction of the statute in such matters was not so extreme and the burdens upon the court not so great, this court has, of its own motion, refused to search through such a record to ascertain if error could be found. But in this case opposing counsel has entered an objection to the sufficiency of the bill of exceptions. Under such circumstances, we cannot do otherwise than apply the reasoning found in the numerous previous rulings of the court announced in the following cases: Beadle v. Paine, 46 Or. 424, 80 Pac. 903; Nosler v. Coos Bay etc. Co., 40 Or. 305, 63 Pac. 1050, 64 Pac. 855; MacMahon v. Duffy, 36 Or. 150, 59 Pac. 184; O'Connor v. Van Hoy, 29 Or. 505, 45 Pac. 762; Hamilton & O'Rourke v. Gordon, 22 Or. 557, 30 Pac. 495; Eaton v. Oregon etc. Co., 22 Or. 497, 30 Pac. 311; Janeway v. Holston, 19 Or. 97, 23 Pac. 850; Tucker v. Salem etc. Co., 15 Or. 581, 16 Pac. 426; State v. Murray, 11 Or. 413, 414, 5 Pac. 55."

[30] 50 Cal. 502.

[30a] 144 Cal. 536, 78 Pac. 14. And see the following decisions: In re Sanderson, 74 Cal. 199, 15 Pac. 753; Adams v. Lambard, 80 Cal. 426, 22

dence should be set forth as briefly as possible consistent with the necessity of showing error. In that case, which was a will contest, Vatcher, the proponent of the will latest in date, which had been refused probate on the ground that the testate was of unsound mind at the time it was executed, prepared a statement on motion for a new trial on the ground of insufficiency of the evidence to justify the decision, in which all the evidence in the case was substantially set forth, covering about twenty pages of typewritten matter. The adverse party made no objection to the statement at the time it was served, and did not propose any amendments thereto. Subsequently, however, such party moved to strike out the statement on the ground that it was not a fair and correct statement of the testimony given at the trial. This motion was denied. Thereupon a motion was made requiring Vatcher to procure a complete transcript of the testimony from the reporter's notes and prepare therefrom a new statement. This motion was taken under advisement, and afterward, in the absence of Vatcher,

Pac. 180; Walkerly v. Greene, 104 Cal. 208, 37 Pac. 890; Orton v. Brown, 113 Cal. 561, 45 Pac. 835; Santa Ana v. Ballard, 126 Cal. 677, 59 Pac. 133; and see supplementary opinion of Angellotti, J., in People v. Coulter, 145 Cal. 66, 78 Pac. 348.

In some states express provision is made by statute requiring the evidence to be set out in a narrative form, instead of by question and answer, as would be the case if a *verbatim* transcript of the reporter's notes should be extended in the form of a statement or bill of exceptions as is sometimes done. See section 1491, Revised Statutes of Arizona. In section 6785, Revised Codes of Montana, it is provided that only the substance of the reporter's notes of the evidence shall be stated or used in the bill of exceptions, but in the following section, 6786 (section 1153, Code of Civil Procedure), it is provided that "if, in the opinion of the court, or judge, the questions and answers in full as given at the trial are necessary to clearly present the objections, and the grounds thereof, the court or judge shall order the stenographer to make a complete transcript of his notes of the evidence and such notes shall be used in the bill of exceptions."

As a rule, however, the evidence should be set out, or so much as is necessary, in narrative form; but courts always tend to discourage the making of a bill or statement out of the transcript of the reporter's notes, whether in the one form or the other; and the evidence has frequently for this reason been disregarded. Montana R. R. Co. v. Warren, 6 Mont. 275, 12 Pac. 641; Fant v. Tandy, 7 Mont. 443, 17 Pac. 560; Sherman v. Higgins, 7 Mont. 479, 17 Pac. 561; Raymond v. Thexton, 7 Mont. 299, 17 Pac. 258; Barger v. Halford, 10 Mont. 57, 24 Pac. 699; Rodoni v. Lytle, 13 Mont. 123, 32 Pac. 491; Penn etc. Co. v. Schreiner, 14 Mont. 121, 35 Pac. 878; Conklin v. Cullen, 25 Mont. 214, 64 Pac. 502. See, also, Barber v. Briscoe, 8 Mont. 214, 19 Pac. 589; McLeod v. Dickinson, 11 Mont. 438, 28 Pac. 551; State v. Shepphard, 23 Mont. 323, 58 Pac. 868; State v. Court, 13 Wash. 514, 43 Pac. 636. In Delaski v. Northwestern etc. Co., 61 Wash. 255, 112 Pac. 341, the evidence was set out in "a condensed and narrative form," and the court held that this was properly done.

In Wood v. Nissen, 2 N. D. 26, 49 N. W. 103, it was held that a transcript of the reporter's notes was not a bill of exceptions.

an order was made requiring him to procure such a transcript, and giving him thirty days to prepare and present a new statement therefrom. The petition for a writ of mandate to compel the settlement of the original statement showed that such a transcript as Vatcher was required to procure would cost about two hundred and seventy-five dollars, and that the total amount of the estate involved was not in excess of six hundred. In granting the petition, the supreme court said:

"It is not necessary in preparing a statement or bill of exceptions for use in this court to give the evidence in full, where the question to be presented is solely as to the sufficiency of the evidence to sustain a particular finding. All that is required is, that a sufficient amount of the evidence be inserted bearing upon each side of the question to show a substantial conflict, for in such a case this court does not interfere with the decision of the court below. It is quite true, as claimed by the respondent and attorney for said Lizzie Clapp, that the duty devolved upon the petitioner herein to prepare a proper statement or bill of exceptions so as to sustain his contention of the insufficiency of the evidence to justify the decision of the trial court upon the point in question, but this does not mean that the statement or bill of exceptions should embody all the reporter's notes. It is also equally true that if the proposed statement had failed in this respect, it was the duty of the attorney of the petitioner Lizzie Clapp to propose amendments to said statement, and not, by failing to do so, to throw the labor of proposing amendments upon the judge who tried the cause. In fact, the law is plainly against any such practice. The code declares that in preparing the bill of exceptions the objection must be stated 'with so much of the evidence or other matter as is necessary to explain it, and no more.' (Code Civ. Proc., sec. 648.) And it is made the duty of the judge, 'in settling the bill, to strike out of it all redundant and useless matter, so that the exceptions may be presented as briefly as possible.' (Code Civ. Proc., sec. 650.) On motion for a new trial 'the same proceedings for the settlement of the statement shall be taken by the parties, and clerk, and judge, as are required for the settlement of bills of exceptions by section 650,' and it is made the duty of the judge 'in settling the statement to strike out of it all redundant matter.' (Code Civ. Proc., sec. 659.) The constant neglect or failure to observe these plain provisions of the code

results in our records being many times larger than there is any necessity for, and very greatly increases the cost to litigants as well as the labor of this court, without any correspondent benefit. The respondent judge of the court below, in making his order directing the contestant to procure a transcript of the reporter's notes, stated within the space of a page of typewriting sufficient facts, in connection with those given in the statement, to support the finding upon the question of the insanity of the deceased. He could have added an amendment to the proposed statement which would have sufficiently preserved the evidence in the case for the benefit of the proponent of the will with as little labor as was required to make the order in question. For instance, the court could have added to the statement the following: 'Other evidence was given on behalf of the proponent of the will to the effect that the testator, within two years before his death, frequently complained of an affection in his head and had at times fits or fainting spells, during which he was unconscious; that shortly before his death, and without cause, he had changed his feelings toward the witness John A. Wood from that of friendship to one of hatred; that he was addicted to excessive drunkenness; that his feelings toward his wife were subject to sudden fluctuations from affection to hatred; that he had at times a desire to injure his wife; that he had made threats to commit suicide both before and after March 16, 1903, the date of the later will and deed in question; and that he did, in fact, commit suicide on April 1, 1903, fifteen days after the execution of said later will and deed.' "

It is not sufficient to set out what the evidence "showed" or "tended to show." The evidence itself must be set forth, and conclusions therefrom will be disregarded.[30b] And the evidence so set forth, as well as the documents and papers copied into the statement, must appear to have been actually offered or read and considered at the trial in the court below, otherwise it cannot be considered on appeal.[30c]

As to making documents, etc., a part of the statement by reference, see section 156, *post*.[30d]

[30b] Hyde v. Boyle, 93 Cal. 1, 29 Pac. 247; Orton v. Brown, 113 Cal. 561, 45 Pac. 835.

[30c] Hyde v. Boyle, 93 Cal. 1, 29 Pac. 247; Bertz v. Turner, 102 Cal. 672, 36 Pac. 1014.

[30d] And see section 230, *post*, as to what is and what is not, *per se*, a part of the judgment-roll, and particularly note 19h, with respect to testimony.

§ 152. Presumption That the Statement Contains All the Evidence Which is Material to the Points Specified.—It was at one time supposed to be necessary that the statement should show affirmatively that it contained all the evidence given on the trial in relation to the alleged errors. This rule, it is believed, was first announced in Ford v. Holton.[1] It is difficult to perceive what beneficial operation the rule was supposed to have. For the only result it could have would be the insertion of a simple statement that the record did contain all the evidence. Nevertheless, the rule was referred to as an existing one in a series of cases,[2] and was distinctly laid down and acted upon in Owen v. Morton.[3] That case, however, was overruled and repudiated in Hidden v. Jordan.[4] Since that decision the rule has been that, in civil cases, it will be presumed that the statement contains all the evidence given, which is material to the points specified,[5] unless the contrary affirmatively appear. In this regard in the Abbey Homestead Assn. v. Willard,[5a] Rhodes, J., delivering the opinion, said: "The plaintiff con-

[1] 5 Cal. 319.

[2] Naglee v. Lyman, 14 Cal. 450; McGarvey v. Little, 15 Cal. 27; Loucks v. Edmonson, 18 Cal. 203; Moore v. Tice, 22 Cal. 513; Dawley v. Hovious, 23 Cal. 103.

[3] 24 Cal. 373.

[4] 28 Cal. 301.

[5] Smith v. Athearn, 34 Cal. 506; Clark v. Gridley, 35 Cal. 398; Grigsby v. Clear Lake Co., 40 Cal. 396; Judson v. Lyford, 84 Cal. 505, 24 Pac. 286; Estate of Taylor, 131 Cal. 180, 63 Pac. 345; and see Richardson v. Eureka, 96 Cal. 443, 31 Pac. 458; also, Sullivan v. Washburne etc. Co., 139 Cal. 257, 72 Pac. 992. And see cases cited below, as to application of the rule in criminal cases. And see Randall v. Burk Township, 4 S. D. 337, 57 N. W. 4.

[5a] 48 Cal. 614. As to method of setting out the evidence in the statement or bill of exceptions, see section 151, *ante*. In Delaski v. Northwestern etc. Co., 61 Wash. 255, 112 Pac. 341, it was held that a certificate that the statement contains "all the material evidence and testimony introduced at the trial," was sufficient. See, also, to same effect, Murray v. Shoudy, 13 Wash. 33, 42 Pac. 631.

When it is necessary to review the evidence the record must contain all the evidence. If there is no affirmative showing therein that the record does contain all the evidence pertinent to the questions brought up for review, the general rule is that the appellate court will presume that the appellant, in pursuit of his advantage, has incorporated therein all the evidence that would assist his case, and that the respondent has done likewise, with the like object, and under the like influence. But if the record itself discloses the fact that material evidence, as documents and account-books offered at the trial, is wanting, recitals in the certificate of the trial judge to the contrary will not prevail. Ragains v. Geiser Mfg. Co., 10 Okl. 544, 63 Pac. 687; Anderst v. Atchison etc. Co., 19 Okl. 206, 91 Pac. 894; Arnold v. Moss, 27 Okl. 524, 112 Pac. 995. If, in fact, the record (statement, case, case-made, bill of exceptions, or what not) does not contain all the evidence necessary or pertinent to the assignment of error, introduced at the trial, the court will not review such assignment. Pierce v. Engelkemeier, 10 Okl. 308, 61 Pac. 1047; Blackwell v. Hatch, 13 Okl. 169, 73 Pac. 933; Garretson v. Witherspoon, 15 Okl. 473, 83 Pac. 415; Arnold v. Moss, *supra*. And the Oklahoma rule goes further, and requires that there be a positive recital in the case-made that it contains all

tends that the question as to the insufficiency of the evidence to justify the decision on any issue cannot be entertained, because the statement does not purport to contain all the evidence given at the trial; and as this point is often presented, the rule will again be stated, though it has so often been repeated that it has become trite. The moving party is required to set forth so much

the evidence taken at the trial pertinent to the assignment of error presented for review. Frame v. Ryel, 14 Okl. 536, 79 Pac. 97; Board v. Hubble, 8 Okl. 169, 56 Pac. 1058; Exendine v. Goldstine, 14 Okl. 100, 77 Pac. 45; Sawyer & Austin Lumber Co. v. Champlain Lumber Co., 16 Okl. 90, 84 Pac. 1093; Martin v. Gassert, 17 Okl. 177, 87 Pac. 586; Schriber v. Buckner, 18 Okl. 298, 90 Pac. 10; Wagner v. Sattley, 23 Okl. 52, 99 Pac. 643; American Steel & Wire Co. v. Coover, 27 Okl. 131, 111 Pac. 217; Finch v. Brown, 27 Okl. 217, 111 Pac. 391. (See particularly, Martin v. Gassert, *supra*, where the subject is discussed in detail.) This omission is distinct from, and cannot be supplied by, the certificate of the stenographer that his report contains all the evidence. Tootle etc. v. Floyd (Okl.), 114 Pac. 259 (referred to in Finch v. Brown, 27 Okl. 217, 111 Pac. 391); Martin v. Gassert, 17 Okl. 177, 87 Pac. 586.

"To review alleged error in refusing a motion for an involuntary nonsuit, the bill of exceptions must affirmatively show that it contains all the evidence before the court at the time the motion was made. National Bank v. Fire Assn., 33 Or. 172, 50 Pac. 568, 53 Pac. 8; Carney v. Duniway, 35 Or. 131, 57 Pac. 192, 58 Pac. 105; Adkins v. Monmouth, 41 Or. 266, 68 Pac. 737." Keady v. United Railways (Or.), 108 Pac. 197.

It is sufficient if there is a recital in the bill of exceptions, and such recital need not appear in the certificate. Pacific etc. Co. of California v. Van Fleet, 47 Colo. 401, 107 Pac. 1087.

The Utah supreme court have also construed the statutes of that state to require that the certificate of the judge should show affirmatively that the bill of exceptions "represents all the proceedings had and contains all the evidence introduced at the trial, or in the cause," when the assignment of error is the insufficiency of the evidence. A bill of exceptions not so certified is not such a bill as the law contemplates. It is "clearly contrary to law, and can serve no useful purpose," and will be stricken from the transcript. See Hannan v. Waltenspiel, 29 Utah, 466, 82 Pac. 859.

Under the construction given by the supreme court of Oregon to section 827, B. & C. Comp., section 838, Lord's Oregon Laws, where the law requires testimony to be taken in shorthand and afterward extended and certified to be true and correct by the stenographer, a certificate by the official stenographer, appointed for that purpose, that the transcript is a true and correct copy of his notes taken at the trial, and of the whole thereof, was sufficient to raise the presumption that all the testimony taken at the trial was included. Sanborn v. Fitzpatrick, 51 Or. 457, 91 Pac. 540.

In Montana the subject was considered in Hickey v. Anaconda etc. Co., 33 Mont. 46, 81 Pac. 806, and it was held that under section 1173 of the Code of Civil Procedure, requiring the trial judge to strike out all redundant matter, and make the statement truly represent the case, the certificate of such judge that the statement contained all the evidence will be accepted as a verity.

In Sherwood v. Sissa, 5 Nev. 349, it was held that if the certificate contained a recital that the statement contained all the evidence, the certificate is sufficient to establish that fact; but the recital that the statement is correct does not sufficiently show that it contains all the evidence when the fact is not so stated. Nor does the stipulation of the attorney that the statement is correct carry with it a certification sufficient to meet the requisites of the rule where the statement itself does not purport to contain all the evidence. Such a stipulation

of the evidence (and no more) as may be necessary to explain the points specified in his statement or bill of exceptions; and when such statement or bill of exceptions is settled, it will be presumed that it contains all the evidence given in the cause which was necessary to be stated in order to explain the points specified; and that it would not have presented a different case in respect to the specified points, had it contained also the omitted evidence. It is desirable that counsel should consider this point as settled."

As to what presumption shall attend bills of exceptions in criminal cases, there has been considerable fluctuation of judicial opinion, due largely to the difference between the statutory provisions governing the form and contents of statements and bills of exceptions on motion for a new trial in civil actions, and those relating to bills of exceptions on appeal from new trial orders in criminal proceedings.

In criminal cases no statement or bill of exceptions is settled before the hearing of a motion for a new trial. On such hearing the defendant, who is the only party entitled to apply for a new trial (Penal Code, sec. 1181), if he is moving on the ground that the verdict against him is contrary to the evidence, as he may do under subdivision 6 of that section, may rely on the insufficiency of the evidence in any respect.[6]

If the motion is decided against him, he may take an exception (Penal Code, section 1172, subdivision 4), and must then prepare the draft of a bill of exceptions (Penal Code, section 1174), which, under the provisions of section 1175 of the Penal Code,

can only be held to be an admission that the evidence, so far as it goes, is stated correctly. It does not negative the idea that other evidence was given which is not included in the statement. Howard v. Winters, 3 Nev. 539. The rule seems to be well settled that the statement must contain all the evidence when the sufficiency thereof is attacked, and it has been frequently held that where the statement does not show that it contains all the evidence, it will be presumed that the findings were duly supported. Gammans v. Roussell, 14 Nev. 171; Mandlebaum v. Liebes, 17 Nev. 131, 24 Pac. 1040; W. P. Co. v. Herrick, 19 Nev. 311, 10 Pac. 215; Howard v. Winters, 3 Nev. 539; Terry v. Berry, 13 Nev. 514; Greeley v. Holland, 14 Nev. 320; Bowker v. Goodwin, 7 Nev. 135, 10 Morr. Min. Rep. 149; Libby v. Dalton, 9 Nev. 23; Lonkey v. Wells, 16 Nev. 271; McLeod v. Lee, 17 Nev. 103, 28 Pac. 124; Caples v. C. P. R. R. Co., 6 Nev. 265; In re Winkleman, 9 Nev. 303; and see Bailey v. Papina, 20 Nev. 177, 19 Pac. 33.

If the appellant does not rely upon the insufficiency of the evidence, however, it is not necessary to insert in the statement any more of the evidence than is necessary to explain the particular errors relied upon. Rose v. Richmond, 17 Nev. 25, 27 Pac. 1105.

[6] People v. Fisher, 51 Cal. 319.

need not contain a specification of the particulars in which he claims that the verdict is contrary to the evidence, or that the evidence is insufficient to justify the verdict.

In People v. Fisher, *supra*, where the bill of exceptions did not purport to contain all the evidence, but stated what the several witnesses "testified in substance," it was held that the presumption of the appellate court would be that there was no evidence introduced in support of a fact in issue unless the bill contained the substance of the evidence introduced to prove the fact, or stated that the fact was proven, or that evidence was introduced tending to prove the fact. Under this decision, the burden and duty of inserting these recitals in the bill was cast upon the district attorney. As the bill in that case was silent as to the venue, the court presumed that the fact had not been proved, and accordingly reversed the judgment.

To the same effect was the case of People v. English.[6a]

In People v. Marks,[6b] however, where there was no recital in the bill that it contained all the evidence, nor anything showing that evidence of the venue had been given, the court, in apparent disregard of the rule in the Fisher case, presumed that the fact had been proved, and held that, if that was not so, it was the duty of the defendant to have affirmatively shown it.

A similar ruling was made in People v. Huff,[6c] People v. Leong Ring,[6d] People v. Carroll[6e] and People v. Tonielli,[6f] in none of which cases did the bill recite that it contained all the evidence, and in all of which the court held that a fact essential for the support of the verdict, as to which the bill was silent, must be presumed to have been proved.

In People v. Buckley[6g] and People v. Griffith[6h] the court reversed itself once more and returned to the rule of the cases of Fisher and English, above cited, holding that the presumption must be that the bill contains all the evidence, even when there is no recital to that effect, and again casting upon the people the duty of seeing that the bill contains all the evidence, or, at least, some evidence or recital tending to support every fact material for the prosecution.

[6a] 52 Cal. 211.
[6b] 72 Cal. 46, 13 Pac. 149.
[6c] 72 Cal. 117, 13 Pac. 168.
[6d] 77 Cal. 117, 19 Pac. 254.
[6e] 80 Cal. 153, 22 Pac. 129.
[6f] 81 Cal. 275, 22 Pac. 678.
[6g] 116 Cal. 146, 47 Pac. 1009.
[6h] 122 Cal. 212, 54 Pac. 725.

Finally, in People v. Coulter,[ek] the supreme court, while adhering to the rule recognized and acted upon in the cases of Fisher, English, Buckley and Griffith, as a general proposition, refused to apply it in a case where the bill in terms purported to give the evidence as to only one matter or issue out of many, and was expressly confined to that purpose. The bill there stated that three witnesses were examined on behalf of the people, twelve on behalf of the defendant, and five for the people in rebuttal, but gave only a few words of the testimony of two of them. Upon this state of the record the court held that the presumption as to the completeness of the bill could only extend to the matter as to which the testimony set forth referred, and that there could be no presumption that no testimony had been given as to other facts essential to the case of the prosecution. The court, in coming to this conclusion, pointed out that in both the Buckley and Griffith cases the bills contained expressions to the effect that the evidence set forth in the bills was all that was given at the trial. Of course, any such expression as this, like the statement that the bill contains all the evidence, leaves no room for any presumption at all as to whether any testimony was given concerning a fact not mentioned in the bill.

The decision in the Coulter case met with a vigorous protest from the minority of the court, but until and unless it be overruled the practice may be considered as now settled in conformity with a principle which may be thus stated: If the bill shows that evidence was given as to one or more, but not all, of the facts essential to a verdict for the people, and contains no expression to the effect that other evidence was given on the trial, it will be presumed that no evidence was given of the facts upon which the bill is silent; if, on the contrary, the bill affirmatively shows that it contains only a partial statement of the evidence, the presumption will be that there was no other evidence concerning the facts dealt with by the bill, but that all the other facts essential to the verdict were proved.

The result of the Coulter case is to impose upon the defendant the necessity of assuming the burden of establishing a negative proposition, instead of leaving the matter, as formerly, to the district attorney.

[ek] 145 Cal. 66, 78 Pac. 348.

In civil cases, it may happen that a statement will affirmatively show that material evidence has been omitted,[7] and in such case, as a matter of course, the presumption that such evidence was not given cannot arise. But in order to rebut the presumption it must be affirmatively shown, not merely that evidence has been omitted, but that evidence has been omitted which is material to the errors specified. For, under the rules already explained, nearly every statement, which is properly prepared, omits a considerable portion of the evidence, and unless the contrary be shown, it will be presumed that the portion which appears to have been omitted was not material to the specifications.[8]

§ 153. Presentation of the Proposed Statement and Amendments for Settlement.—As will be hereafter shown,[1] the Code of Civil Procedure, as amended in 1874, requires the statement to be settled by the judge in all cases, whether amendments are proposed or not, and if proposed, whether they are agreed to or not. There must therefore be a presentation for settlement in all cases. Such presentation is the next thing in order after the amendments are in, or if there be no amendments, after the time for proposing them has expired. There is not the slightest use in serving a notice that the party does not agree to the amendments, as some practitioners are in the habit of doing.[2] The only thing necessary is to take steps for the presentation of the statement for settlement. The provision of the act of 1851 was that[3] "such statement, when containing any portion of the evidence of the case,

[7] See cases cited in subdivision 2 of the preceding section.

[8] In Owen v. Morton, overruled in Hidden v. Jordan, above cited, it affirmatively appeared that some of the evidence had been omitted. And see Sullivan v. Washburne etc. Co., 139 Cal. 257, 72 Pac. 992.

[1] See sections 157 and 158, *post*.

[2] Many practitioners are in the habit, when a statement is proposed, of serving and filing a notice to the moving party that the proposed statement is not agreed to, and when amendments are proposed, of serving and filing a notice to the party proposing them that they are not agreed to. This practice was probably, in its origin, to prevent an implied agreement to the statement or amendments as proposed. The implied authentication theory was put an end to in 1863. Properly speaking, it applied only to statements on appeal, and not to statements on motion for new trial. And even in relation to statements on appeal, the practice was unauthorized. For the provision was that if the one party failed to propose amendments, or the other failed to "notify an appearance before the judge," the statement or amendments should be deemed to be agreed to as proposed. See the whole subject explained in section 157, *post*. Since 1863, however, the implied authentication theory has not obtained. And the practice above mentioned can serve no purpose.

[3] Laws of 1851, p. 81, sec. 195.

and not agreed to by the adverse party, shall be sealed by the judge upon notice." This provision stood until 1861, when it was amended so as to read as follows:[4] "Such statement, when not agreed to by the adverse party, shall be settled by the judge upon notice." This language was reproduced in the subsequent amendments.[5] The provision was somewhat indefinite—its only requirement being that the settlement should be "upon notice." The time and manner of the presentation was left to be regulated by rule of court, or by the discretion of the judge in each case. The provision of the code as amended in 1874[6] is more definite. Section 659, as then amended, contains the following:

"Sec. 659 (subd. 3). If the amendments be adopted the statement shall be amended accordingly, and then presented to the judge who tried or heard the cause, for settlement, or be delivered to the clerk of the court for the judge. If not adopted the proposed statement and amendments shall, within ten days thereafter, be presented by the moving party to the judge, upon five days' notice to the adverse party, or be delivered to the clerk of the court for the judge; and thereupon the same proceedings for the settlement of the statement shall be taken by the parties and clerk and judge as are required for the settlement of bills of exceptions by section 650. If the action was heard by a referee, the same proceedings shall be had for the settlement of the statement by him as are required by that section for the settlement of bills of exceptions by a referee. If no amendments are served within the time designated, or if served are allowed, the proposed statement and amendments, if any, may be presented to the judge or referee for settlement, without notice to the adverse party."

And section 650, referred to in the above provision, contains a provision for delivery to the clerk similar to the one above quoted, and then proceeds as follows:

"Sec. 650. When received by the clerk he must immediately deliver them to the judge, if he be in the county; if he be absent from the county, and either party desire the papers to be forwarded to the judge, the clerk must, upon notice in writing of such party, immediately forward them by mail or other safe

[4] Laws of 1861, p. 590, sec. 195.

[5] Laws of 1863, p. 643; Laws of 1863–64, p. 246; Laws of 1865–66, p. 845.

[6] As first adopted, the California code did not provide for statements. For corresponding provisions of other codes, see note 4, section 145, *ante*.

channel; if not thus forwarded, the clerk must deliver them to the judge immediately after his return to the county. When received from the clerk the judge must designate the time at which he will settle the bill, and the clerk must immediately notify the parties of such designation. At the time designated, the judge must settle the bill. The bill must thereupon be engrossed and presented to the judge to be certified, by the party presenting it, within ten days. If the action was tried before a referee, the proposed bill with the amendments, if any, must be presented to such referee for settlement within ten days after service of the amendments, upon notice of five days to the adverse party, and thereupon the referee shall settle the bill. If no amendments are served, or if served are allowed, the proposed bill may be presented, with the amendments, if any, to the judge or referee for settlement, without notice to the adverse party."

The obvious purpose of these provisions has been said to be that the parties may have notice of the time when the statement is to be settled, and to furnish different methods, suited to different conditions, for giving this notice. In Mellor v. Crouch,[6a] which is justly recognized as a leading authority upon the construction of this statute, the court said:

"When the statement and amendments are presented directly to the judge, there is no provision for any notice of the time of settlement to be thereafter given by either the judge or the clerk; and in such case, therefore, the five days' notice mentioned in section 659 must be given by the party himself. But when the papers are delivered to the clerk for the judge, the purpose of the code is effected through the requirement that then the judge must designate a time for settlement, and the clerk must give notice of it. The provision about the five days' notice in section 659 qualifies, we think, only the preceding clause of the sentence, and is not applicable to the case when the statement and amendments are delivered to the clerk for the judge."

And in the late case of Douglas v. Southern Pacific Co.,[6b] the court said:

"The purpose of the provision is twofold: to fix a time when the statement shall be presented, and to provide different methods whereby the adverse party may have notice of the fact. The statement must, unless the time is extended, be presented within ten

[6a] 76 Cal. 594, 18 Pac. 685. [6b] 151 Cal. 242, 90 Pac. 538.

days, but the method of its presentation is optional with the moving party; he may present it on five days' notice to his adversary, or he may deliver it to the clerk for the judge. (Mellor v. Crouch, 76 Cal. 594, [18 Pac. 685].) In the one case the adverse party is actually advised by the notice when it will be presented, which may be at a time earlier than the ten days, and at which time the court may fix the date of settlement; in the other, he has constructive notice of its presentation by the expiration of the time within which the law requires it to be presented, and will receive notice of the date of settlement from the clerk. (Code Civ. Proc., sec. 659.) In either event, however, the main purpose of the provision of the statute is fulfilled—he has notice of its presentation."

Notwithstanding some slight inconsistencies in the foregoing authorities, they agree in the main.[6c] Two courses are manifestly open to the moving party, and upon the course adopted rests the time and manner of giving the notice required in all cases where amendments are proposed and not agreed to. If presentation is made directly to the judge, a notice of such presentation must be given the adverse party within the time fixed (ten days) or some lawful extension thereof;[6d] otherwise, not only does the jurisdiction of the judge to settle the statement fail, but the right of the moving party to have a statement lapses,[6e] and he cannot there-

[6c] It will be observed that in the last-cited case there is an intimation that the five-day notice prescribed by section 659 is merely a notice that an application will be made to the judge to fix a time for the settlement of the statement, instead of, as suggested in Mellor v. Crouch, a notice of the date of actual settlement. The statute is not very clear on the point. It simply provides for presentation to the judge without saying what his subsequent duties are. Nowhere is he expressly required to settle the bill. It is different where the papers reach him through the clerk. In such a case it is expressly provided that the judge shall designate a time to settle the bill, the clerk shall notify both parties of the time so designated, and "at the time designated" the judge shall settle the bill. In the case of the referee the statute expressly points out what that official shall do under analogous circumstances, "*and thereupon the referee shall settle the bill.*" This is believed to be the proper procedure in the case of the judge. No reason has ever been suggested for a different rule. What is the purpose of the five-day notice? Is it merely to ask the judge to set the time when he can settle the statement? It is not denied that the judge may in his discretion postpone such settlement; but it is believed that he may also, in his discretion, settle the bill or statement on the day fixed, without further postponement.

[6d] In Douglas v. Southern Pacific Co., 151 Cal. 242, 90 Pac. 538, the power of the court to extend the time to give the notices provided for in the two sections under consideration was fully upheld under the authority of section 1054, Code of Civil Procedure.

[6e] See Gallardo v. A. & P. T. Co., 49 Cal. 510; Wills v. Rhen Kong, 70 Cal. 548, 11 Pac. 780; Hicks v. Masten, 101 Cal. 651, 36 Pac. 130;

after have one, unless, under the provisions of section 473 of the Code of Civil Procedure, he is enabled to obtain relief from the result of inadvertence, etc.[6f] The simpler course, therefore, and the one involving the smallest degree of responsibility, is to deliver the statement with the amendments to the clerk for the judge.[6g] Such course relieves the moving party from the necessity of giving any notice at all. All that is required of him is a simple delivery to the clerk, without any notice to the adverse party,[6h] and he need not trouble himself to do anything further until he receives a notice from the clerk of the time and place at which the statement will be settled.[6k] But whether presentation

Witter v. Andrews, 122 Cal. 1, 54 Pac. 276; Curtin v. Ingle, 155 Cal. 53, 99 Pac. 480; and see, also, Jue Fook Sam v. Lord, 83 Cal. 159, 23 Pac. 225; Henry v. Merguire, 106 Cal. 142, 39 Pac. 599; and see note 2, section 260, *post*. But the notice may be waived. Cooper v. Burch, 140 Cal. 548, 74 Pac. 37; Hicks v. Masten, 101 Cal. 651, 36 Pac. 130. Having once refused to settle a statement for want of the notice required, the matter is ended so far as the jurisdiction of the judge is concerned; and if, after such refusal, the moving party proceeds, notwithstanding the same, to engross the statement, such engrossed statement becomes in reality a new statement, and the judge is not empowered to settle and allow it. Wills v. Rhen Kong, 70 Cal. 548, 11 Pac. 780.

The rule is the same in Montana. See State v. Court, 28 Mont. 126, 72 Pac. 412.

6f Hicks v. Masten, 101 Cal. 651, 36 Pac. 130; Bollinger v. Bollinger, 153 Cal. 190, 94 Pac. 770; and see Stonesifer v. Armstrong, 86 Cal. 594, 25 Pac. 50; Stonesifer v. Kilburn, 94 Cal. 33, 29 Pac. 332.

6g There is a similar provision as to delivery in the California Penal Code. See People v. Sprague, 53 Cal. 422, and look at Sprague v. Fawcett, 53 Cal. 408; People v. Raschke, 73 Cal. 378, 15 Pac. 13; People v. Goldenson, 76 Cal. 328, 19 Pac. 161. The provision was probably suggested by the remarks of Field, C. J., in People v. Lee, 14 Cal. 510. In that case it was held that the time to file a bill of exceptions in a criminal case was merely directory, but that the direction ought to be followed unless a good excuse was shown; and with reference to the excuse offered in the case, Field, C. J., said: "In the present case the bill was filed with the clerk on the last day of the extended time, and the excuse offered of inability to find the judge was reasonable and sufficient. Indeed, we are of opinion that the proposed statement or bill in a criminal case may, whenever a judge is not found for its presentation to him personally, be delivered to the clerk of the court for him. The clerk's office is the proper place for the deposit of papers for the judge in his absence from his chambers. The clerk should minute on the document the date of its receipt, and hand it to the judge at the earliest convenient opportunity."

6h Possibly an argument that the party should give notice of the delivery to the clerk might be founded upon the somewhat awkward arrangement of the clauses of the sentence. But for what purpose could such a notice be required? The material thing for the prevailing party to know is the time and place of the settlement, and of that he is notified by the clerk. The authorities are the other way. See Mellor v. Crouch, 76 Cal. 594, 18 Pac. 685; Curtin v. Ingle, 155 Cal. 53, 99 Pac. 480.

6k If the judge should neglect to designate the time of the settlement, could the moving party compel action by writ of mandate? Or would it be necessary for him to wait indefinitely the will and pleasure of the judge in the matter?

be made direct to the judge, or delivery to the clerk, such presentation or delivery must, in either case, be within ten days, unless the time be extended.[6m]

If no amendments be proposed, or, if proposed, if they be agreed to, presentation may be made directly to the judge without notice to the adverse party; and such presentation need not be within the ten days prescribed with reference to cases where the amendments are not adopted, but may be within a reasonable time.[7] No provision is made for delivery to the clerk in a case where amendments are not proposed. It is otherwise, however, if amendments be proposed, even though they be agreed to, and the same course is pursued as where the amendments are rejected.

When delivery is made to the clerk, he is required to present the papers to the judge "immediately," if the latter is within the county; otherwise, "immediately after his return to the county." Provision is made for requiring the clerk, upon notice, when the judge is out of the county, to forward the papers to him. In all cases it is made the duty of the judge, when the papers reach him through the clerk, to designate the time at which he will settle them, "and the clerk must immediately notify the parties of such designation."

As the statute merely requires the judge to "designate the time at which he will settle the bill," and the clerk to "immediately notify the parties of such designation," it would seem that there is no limitation upon the time which may be designated. In Horton v. Jack,[8] where the bill was settled in open court, the attorneys for both sides being present, the supreme court held that there was no reason why the judge could not designate the very time of the receipt of the papers. Since the statute does not specify how much notice shall be given, it is a matter wholly within the discretion of the court, and the appellate court will not interfere

[6m] See note 6d, *supra*.

[7] See Pendergrass v. Cross, 73 Cal. 475, 15 Pac. 63; Houghton v. Superior Court, 128 Cal. 352, 60 Pac. 972; Black v. Hilliker, 130 Cal. 190, 62 Pac. 481; Gay v. Torrance, 143 Cal. 14, 76 Pac. 717; and see Horton v. Jack, 115 Cal. 29, 46 Pac. 920.

As to the Idaho rule, see Coast Lumber Co. v. Wood, 18 Idaho, 28, 108 Pac. 338, and cases cited. This opinion covers the rules of practice involved very fully.

The doctrine of reasonable time when amendments are presented and agreed to was upheld in the following decision: Woodard v. Webster, 20 Mont. 279, 50 Pac. 791.

Fifty-seven days' delay was held to be unreasonable in Woodard v. Webster, *supra*.

[8] 115 Cal. 29, 46 Pac. 920.

with the exercise of such discretion except in case of its manifest abuse.

No provision is made for the manner in which amendments are to be accepted or rejected, and no provision is made for notice relative thereto. It has therefore been held that notice need not be given, and that the adoption of amendments may be presumed. If they are agreed to, the statute requires that the statement shall be amended accordingly, and then presented to the judge directly or to the clerk for the judge, but without notice. In Black v. Hilliker[9] the supreme court said:

"It does not appear from the record that the plaintiff ever gave to the defendant any notice whether her amendments were adopted or rejected. It was not necessary for him to give notice that he adopted her amendments, and his failure to give any notice in reference thereto was of itself an admission that they were allowed."

In Gay v. Torrance,[10] amendments were proposed on February 18th. February 28th being Sunday, the ten days' time allowed plaintiff to deliver to the clerk for the judge her statement and the amendments thereto did not expire until February 29th. On that day the attorneys for the respective parties met by appointment for the purpose of considering the proposed amendments, "with the view of facilitating the settlement of the bill." At this meeting a large number of the proposed amendments were consented to, and a smaller number left in suspense. On March 3d plaintiff's attorney notified defendant's attorney that three hundred and eighty of his amendments were accepted and that he (plaintiff's attorney) was satisfied that many of the remainder could be agreed to. On the same day consideration of the amendments was resumed, and a number of them left standing with the words "No" or "Disallowed" left opposite them. On March 7th the bill and the amendments were handed to the clerk for the judge. Attached to the papers was a statement to the effect that the amendments were allowed. The following day plaintiff's attorney stated in open court that by an oversight he had allowed the time to present the bill to lapse, but that he allowed the amendments, and therefore asked that the bill be settled that it might be engrossed. This was refused, but a writ of mandate from the supreme court compelled the judge to settle the bill, the higher

[9] 130 Cal. 190, 62 Pac. 481.

[10] 143 Cal. 14, 76 Pac. 717.

court holding that no notice of the acceptance or rejection of the amendments was required, and, having accepted the amendments, plaintiff was entitled to have his bill settled, if presented within a reasonable time.[10a]

It would seem, therefore, that the result of the failure of the moving party to present his statement or bill with the amendments proposed, within the time required when amendments are rejected, conceding that he is not entitled to relief under section 473 of the Code of Civil Procedure, would be merely to impose upon him the necessity of accepting, willy-nilly, the amendments proposed, trusting to the judge to eliminate such as are objectionable in reality, and not merely unfavorable. And if he has given notice, failure to present the statement or bill according thereto, would perhaps merely render the same nugatory, and impose upon him the necessity of giving a second one; and if there is not time sufficient remaining of the original ten days within which he is required to present the bill or statement, to enable him to give the five days' notice which is also required when the amendments are rejected, he may again save his right to a settlement by accepting the amendments.[10b]

The object of giving notice of the time and place of settlement is to enable the respondent to interpose whatever objections he may have to such settlement; and it is doubtless well settled that failure to give the notice will invalidate the settlement and render the statement itself a nullity.[10c]

[10a] In Collins v. Goodwin (Nev.), 108 Pac. 4, it was held that where no notice was given as to acceptance or rejection of amendments, it would be assumed that they were accepted. And see cases cited.

[10b] Of course the party cannot avoid the necessity of giving the notice, or of presenting the bill or statement within the required time, and at the same time refuse to adopt the amendments. The defendants in Whipple v. Hopkins, 119 Cal. 349, 51 Pac. 535, attempted to do this very thing. The amendments were proposed on the 18th of March. No action was taken by the moving party until the 21st of August, when they gave notice that they would ask the court to disallow the amendments and settle the bill as originally proposed. The court said: "As the defendants refused to adopt the amendments, they were required under section 650 of the Code of Civil Procedure, within ten days after receiving the proposed amendments, to present them with the proposed bill to the judge who tried the case, for settlement, upon five days' notice to the opposite party, and the failure to do so justified the court in refusing to settle the bill. Henry v. Merguire, 106 Cal. 142, 39 Pac. 599. In Pendergrass v. Cross, 73 Cal. 475, 15 Pac. 63, the moving party adopted the proposed amendments, and there was no occasion to give to the opposite party any notice of settlement."

[10c] First Nat. Bank v. Daniels, 26 Okl. 383, 108 Pac. 748, and cases cited.

When the statement and amendments are presented for settlement, with defendant's objections, it has been held that whether the latter are deemed well founded or not, the judge may properly refuse to settle the statement, or he may settle it and deny the motion.[10d]

As a matter of course, the statement must be presented to the official who is to settle it. It is sometimes not an easy matter to determine who is the proper official. Section 659, subdivision 3, Code of Civil Procedure, provides that presentation shall be made to the judge who tried or heard the cause, for settlement. Further on it provides that settlement shall be by the same proceedings which are prescribed by section 650 in the settlement of bills of exceptions. Section 653 of the same code prescribes that a judge may settle a bill of exceptions after as well as before he ceases to be such. This provision was manifestly intended to cover cases where, after trial or hearing, and pending the proceedings looking to the preparation of a statement, a judge ceases to be such. In Cummings v. Conlan,[11] therefore, the judge who tried the case settled the statement, although he had in the meantime ceased to be judge. Ordinarily, there is no question but that this proceeding is the proper one; but in that case the motion for a new trial was made on the minutes of the court. This necessitated the subsequent preparation of a statement on appeal, instead of the preparation before the hearing of the motion, and as the motion was heard by a different judge, the supreme court held that the latter was the official whose duty it was to settle the bill.

The question, therefore, as to who is authorized to settle the bill or statement, where the judge who tried the case has ceased to hold office, depends upon whether the motion is made on the minutes of the court or upon a statement prepared before the hearing. If the former, the judge who hears the motion must settle it; otherwise, it must be settled by the judge who tried the

[10d] Wright v. Mathews, 28 Mont. 442, 72 Pac. 820; also, Sweeney v. Railway Co., 11 Mont. 34, 27 Pac. 347; Power v. Lenoir, 22 Mont. 169, 56 Pac. 106; Beach v. Spokane etc. Co., 25 Mont. 367, 65 Pac. 106; Burns v. Napton, 26 Mont. 360, 68 Pac. 17; State v. Court, 28 Mont. 123, 72 Pac. 412.

[11] 66 Cal. 403, 5 Pac. 796, 903. This decision was plainly inconsistent with the earlier case of Downey v. Hallman, 58 Cal. 62; and with People v. Hodgdon, 55 Cal. 72, 36 Am. Rep. 30. It is true the latter was a criminal case, which is governed by different provisions of law.

Also Finn v. Spagnoli, 67 Cal. 330, 7 Pac. 746.

case. In either case settlement may be done by either whether he is still a judge, or has ceased to hold office.[12]

If, however, a judge who has ceased to hold office refuses to settle a bill as he is authorized to do under the provisions of section 653 of the Code of Civil Procedure, there can be no remedy by *mandamus*.[12a] In such case the sole remedy is that provided by rule XXVII of the supreme court, adopted under the authority of section 653, which is as follows:

"When the judge before whom an action was tried is dead, or is removed from office, any unsettled bill of exceptions or statement on motion for new trial therein may be settled and certified by his successor in office; or if he be disqualified, by a judge of the same or an adjoining county. And when the judge before whom an action was tried becomes disqualified, is absent from the state, *or refuses to settle* [13] the bill of exceptions or statement on motion for new trial, such bill of exceptions or statement may be settled and certified before a judge of the same or an adjoining county." [14]

[12] Section 653, California Code of Civil Procedure, is as follows:

"Sec. 653. When the decision excepted to was made by any judicial officer, other than a judge, the bill of exceptions shall be presented to such judicial officer, and be settled and signed by him in the same manner as it is required to be presented to, settled, and signed by a court or judge. A judge or judicial officer may settle and sign a bill of exceptions after as well as before he ceases to be such judge or judicial officer. If such judge or judicial officer—before the bill of exceptions is settled—dies, is removed from office, becomes disqualified, is absent from the state, or refuses to settle the bill of exceptions, or if no mode is provided by law for the settlement of the same, it shall be settled and certified in such manner as the supreme court may by its order or rules direct. Judges, judicial officers, and the supreme court shall respectively possess the same power in settling and certifying statements as is by this section conferred upon them in settling and certifying bills of exceptions."

The above section is as it was amended in 1876. Before that it was as follows: "If the judge who presided at the trial ceases to hold office before the bill is tendered or settled, he may nevertheless settle such bill, or the party may, as provided in the preceding section, apply to the supreme court to prove the same."

There is a similar provision in the Oklahoma code, section 4742, Willson's Revised and Annotated Statutes of 1903, which became operative March 10, 1910. See Burnett v. Davis, 27 Okl. 124, 111 Pac. 191; J. W. Ripey Co. v. Art etc. Co., 27 Okl. 600, 112 Pac. 1119. See particularly the first-cited case, where the subject is discussed in detail.

[12a] See Leach v. Aitken, 91 Cal. 484, 28 Pac. 777; Estate of Depeaux, 118 Cal. 522, 50 Pac. 682. And see State v. Allyn, 7 Wash. 285, 34 Pac. 914; but see Montana etc. Co. v. Lindsay, 25 Mont. 24, 63 Pac. 715, where the contrary view was adopted.

[13] The provision of this rule as to what is to be done where the judge "refuses to settle" the statement or bill seems to be in conflict with the statute. But see section 155, *post*.

[14] This was formerly rule XXIX, but renumbering necessitated a change.

If the statement is settled by any other than the judge or other official before whom the proceedings took place, the authority for such settlement must be made to appear.[14a]

Settlement must, of course, take place before the referee who heard the case, but there may also, in the case of a referee, arise the necessity for settlement by another person. In which event it is believed, though there is no decision directly in point, that settlement may be obtained in the manner above outlined in the case of a judge who ceases to hold office.

Substantially the same provisions are to be found in section 1171 of the Penal Code, with reference to the time of presentation of bills of exceptions for settlement or allowance, as are to be found in section 650, Code of Civil Procedure. The same stringency of construction is not followed by the courts, however. inasmuch as the appellant is usually restrained of his liberty, and is almost in every case personally blameless; and this, it is said, should in some measure control judicial discretion, in allowing and settling bills of exception after the expiration of the ten days prescribed.[15]

§ 154. Settlement of the Statement.—The settlement of the statement is the designation by the judge of the matter which is to constitute the statement. It is a different thing from the engrossment,[1] which is the copying out, in proper order, of the parts designated, and it is different from the authentication,[2] which consists of certificate, which is the evidence that the statement has been settled.

In settling the statement the judge is not confined to a selection from the matter proposed by the parties. Even under the old Practice Act, although the parties could, if in accord, dispense with the supervision of the judge, and settle and certify the statement themselves,[3] yet if they had recourse to him, he was empowered to add any matter necessary to the correctness of the statement as to the points specified.[4] Under the code the parties cannot dispense with the supervision of the judge.[5] He is required

[14a] Estate of Carpenter, 127 Cal. 582, 60 Pac. 162; Pereira v. City Savings Bank, 128 Cal. 45, 60 Pac. 524.

[15] See Brown v. Prewett, 94 Cal. 502, 29 Pac. 951.

[1] As to which, see section 156, *post*.

[2] As to which, see sections 157, 158, *post*.

[3] See section 157, *post*.

[4] See People v. Kelly, 46 Cal. 355. This was a criminal case.

[5] See section 157, *post*, and cases cited therein.

See, also, Hickey v. Anaconda etc. Co., 33 Mont. 46, 81 Pac. 806, where the court held that, under the code,

to settle the statement whether it is agreed to or not, and it is provided that[6] "it is the duty of the judge or referee in settling the statement to strike out of it all redundant and useless matter, and to make the statement truly represent the case, notwithstanding the assent of the parties to such redundant or useless matter, or to any inaccurate statement." And it is necessary to the discharge of this duty that the judge should have the power of his own motion to add any matter which may be necessary to the correctness of the statement as to the points specified, although such matter be not in the proposed statement or amendments.[6a] And since the judge has the power of his own motion to add such matter, he certainly could allow the parties to suggest it at the settlement. But in this regard the duty of the judge is confined to making the statement correctly present the facts *in relation to the points specified.* It is not incumbent upon him to add any specifications. He has the power to grant an application of the moving party to add at the settlement specifications in relation to matters contained in the proposed statement, and which were omitted through inadvertence.[7] He may even allow such specifications to be added by way of amendment to the statement, after it has been certified and filed,[8] and *a fortiori* he may allow it before the certificate or settlement. But it is thought that in either case the specification added must relate to matter contained in the proposed statement. No case has been found which permits the addition at the settlement, or afterward, of specifications which do not relate to anything in the statement, and which would have to be supported by the addition of entirely new matter. And it is submitted that this cannot be done. For, as has been shown,[9] if there be an entire failure to propose any statement in time, the

it was the duty of the judge to strike out all redundant and useless matter, and to make the statement truly represent the case, notwithstanding the assent of the parties to such redundant and useless matter, or to any inaccurate matter. This is almost the exact language of the section then in force, section 1173, Montana Code of Civil Procedure, which, in 1907, gave place to section 6796, Revised Codes, and was omitted therefrom. Act approved February 26, 1907, section 2.

[6] Section 659, subdivision 3, California Code of Civil Procedure. If not in proper form the judge may refuse to certify it. See People v. Getty, 49 Cal. 581; and People v. Sprague, 53 Cal. 422.

[6a] The fact that the respondent does not propose any amendments to the draft of the bill (or statement) proposed by his adversary does not preclude the judge from adding whatever matter may be needed to make it conform to the facts. Hyde v. Boyle, 89 Cal. 590, 26 Pac. 1092.

[7] See Lucas v. Marysville, 44 Cal. 210.

[8] See section 160, *post.*

[9] See section 145, *post.*

party loses his right to have a statement, and the right cannot be restored by order. And it would seem that when the party fails to specify a point, and omits to put in his proposed statement anything in relation to it, there is, as to such point, an entire failure to file any statement, and that the right to have a statement as to the point cannot be restored by order. If the rule were otherwise, the restriction of the statute as to the time within which a statement must be proposed would be impaired, and the real labor of preparing a proposed statement would be postponed to the settlement, to which the other party would come uninformed as to what was designed to be put in the statement, and unprepared with amendments, and thus unnecessary labor would be imposed upon the judge, and much of his time consumed. It is thought, therefore, that although the judge should of his own motion add any matter which may be necessary to a correct presentation of the case as to the points specified, and should allow the parties to suggest the addition of such matter at the settlement, and may grant an application of the moving party for the addition of specifications in relation to matter contained in the proposed statement, yet that he could not allow the addition of new specifications not in relation to anything in the proposed statement, and which would have to be supported by the addition of entirely new matter. But no decision has been found upon this question.

It is well settled that the prevailing party cannot, by way of amendment, add to the statement exceptions of his own, reserved by him during the trial, but not included by the moving party. The statement is the paper of the latter, and not of the successful party, and exceptions by the latter would be regarded as useless and redundant matter, since, even if they showed error, such error would be regarded as error without injury, in view of his success at the trial.[9a] There is nothing in the code to prevent the prevailing party from having a bill of exceptions of his own, but such bill of exceptions would not be regarded by the appellate court as a part of the record on appeal from a judgment in his favor.[9b] His right to a statement would depend altogether upon

[9a] See In re Gates, 90 Cal. 257, 27 Pac. 195; Klauber v. San Diego etc. Co., 98 Cal. 105, 32 Pac. 876; Riverside Water Co. v. Gage, 108 Cal. 240, 41 Pac. 299; and see Estate of Olmstead, 122 Cal. 224, 54 Pac. 745.

[9b] See Klauber v. San Diego etc. Co., 98 Cal. 105, 32 Pac. 876; Estate of Olmstead, 122 Cal. 224, 54 Pac. 745.

Exceptions reserved by the *respondent* may not be considered. Sherman v. Nason, 25 Mont. 283, 64 Pac. 768;

whether he moves for a new trial or not. A party may move for a new trial though he be successful at the trial, and when he does so he may have a statement of his own.

What occurred at the trial is supposed to be "in the breast of the judge." Thus he is presumed to know what instructions he gave to the jury, and must resort to his memory and settle the statement, even though the written instructions have been lost.[10] The judge usually refreshes his memory by the report of the official shorthand reporter, which, when written out in longhand and certified by the reporter, is *prima facie* a correct statement of the testimony and proceedings,[11] so far as the lower court is concerned.[12] But such report is not conclusive upon the judge. Thus where it appeared that the reporter was incompetent, and could neither take down the proceedings correctly, nor read what he had taken down, it was held that the judge was justified in disregarding the report altogether.[13] But the action of the judge in settling the statement may be reviewed on application to prove an exception as shown in the next section.

At the settlement of the statement is the proper time to present objections which go not only to its correctness, but which affect the right of the moving party to have a statement at all. If the respondent has any reasons to offer why there should be an amendment of the instrument, he should present them to the judge when the statement is presented for settlement, and the time comes to dispose of the same. And this applies with equal force to any objection which the respondent may desire to offer against the right of his adversary to have a statement at all. Failure to offer such objections is a waiver thereof, and cannot be considered or reviewed afterward. If such objections are overruled, this fact will appear in the statement, and the action of

and see Beach v. Spokane etc. Co., 25 Mont. 367, 65 Pac. 106.

[10] Visher v. Webster, 13 Cal. 58.

[11] Section 273, California Code of Civil Procedure.

[12] The supreme court cannot look at the report. See People v. Woods, 43 Cal. 176.

[13] Sais v. Sais, 49 Cal. 263.

In Kowalsky v. Kerrigan, 134 Cal. 590, 66 Pac. 850, where there was a question of fact as to whether a bill of exceptions was presented to the clerk for the judge or not, although the supreme court appears to have taken testimony, which was conflicting, it held that it was the province of the trial judge, in the first instance, to determine all such questions of fact, and that his determination will not be disturbed by the appellate court except upon a clear showing of error, mistake, or abuse of discretion.

And see People v. Cox, 76 Cal. 281, 18 Pac. 332. As to effect of certificate, see section 157, *post*, notes 27, 28 and 29.

the trial court in overruling them will then be reviewed on appeal from the new trial motion.

Not only must such objections be presented at the settlement of the statement, but it seems to be essential that the respondent should offer some explanation or reason along with the objection itself, and be prepared to add proof to such statements of facts as may be presented. The mere interposition of an objection in general terms that a notice of intention was not served in time, or a statement prepared and presented in time, would avail nothing unless accompanied with an explanation of the grounds of the objection. The point must not only be made, but it must be elucidated and presented to the trial judge in such fashion that a record of the proceeding will disclose to the court which hears the motion, and to the reviewing court which considers the appeal therefrom, the entire proposition in its fundamental elements.

As the supreme court suggests, it is neither fair to the judge nor to the opposite party for the objecting party to content himself with a bare objection without pointing out the basis thereof.[14]

Matters relating to the service, signing and settling of a case-made may be shown by evidence outside that paper.[15] Doubtless this rule would apply to statements and bills of exceptions.

§ 155. Compelling the Judge to Settle the Statement—Proving Exceptions.—If the judge refuse to settle any statement whatever, and the refusal is without sufficient cause, a settlement one way or the other may be compelled by *mandamus*. If he is willing to settle a statement, but declines to settle it in accordance with what the party claims are the facts, application should be made to the supreme court for leave to prove the exception. These remedies will be considered separately.

1. *Mandamus to Compel the Settlement.*—Under the old Practice Act, as stated in the preceding section, the parties could, if in accord, take the settlement of the statement out of the hands of the judge and settle and certify it themselves; but if they were not in accord it was the duty of the judge to settle it. And under the Code of Civil Procedure, as shown in the preceding section, it is the duty of the judge to settle and certify the statement (if

[14] See Cole v. Wilcox, 99 Cal. 549, 34 Pac. 114, and Perry v. Noonan Loan Co., 1 Cal. App. 609, 82 Pac. 623.

[15] Burnett v. Davis, 27 Okl. 124, 111 Pac. 191.

properly made up and presented) in all cases, whether agreed to by the parties or not. If he refuse to perform this duty, its performance may be compelled by *mandamus*. The first instance of the issuance of the writ to compel the settlement of a statement or bill of exceptions is to be found in People v. Lee.[1] In that case, which was a criminal one, the bill of exceptions was not presented within the time granted for that purpose, and upon that ground the judge refused to settle it. The supreme court held that the limitation of time for the presentation of bills of exceptions in criminal cases was merely directory, and that the excuse offered in the case was sufficient, and awarded the writ "not to sign the bill filed by the defendant absolutely, but to sign the same after it has been settled." In the subsequent case of People v. Rosborough,[2] a *mandamus* was awarded to compel the settlement of a statement on motion for new trial in a proceeding in insolvency. In People v. Keyser,[3] the writ was issued to compel the settlement of a bill of exceptions in a criminal cause; and this case was approved and followed in People v. Hewell.[4] And in the case of People v. Crane,[5] the writ was issued to compel the judge to settle a document which the supreme court held to be a bill of exceptions in a civil cause, but which was entitled a "statement on appeal," for which the code makes no provision.

So in Careaga v. Fernald,[5a] a judgment of the superior court, awarding a writ of mandate compelling a referee to settle a statement, was affirmed, and in Mellor v. Crouch [5b] the supreme court issued a writ of mandate compelling the judge of the trial court to settle a statement. But the writ will not issue to compel the settlement of a statement or bill of exceptions in any particular

[1] 14 Cal. 510.
[2] 29 Cal. 415.
[3] 53 Cal. 183.
[4] 56 Cal. 117.
[5] 60 Cal. 279. See, also, Claffey v. Head, No. 8796, filed January 30, 1883 (not reported); Cummings v. Irwin, 40 Cal. 354.
[5a] 66 Cal. 351, 5 Pac. 615.
[5b] 76 Cal. 594, 18 Pac. 685. And see Pendergrass v. Cross, 73 Cal. 475, 15 Pac. 63; Landers v. Landers, 82 Cal. 480, 23 Pac. 126; Williard v. Dillard, 86 Cal. 154, 24 Pac. 940; Leach v. Pierce, 93 Cal. 614, 29 Pac. 235; Tibbetts v. Riverside Banking Co., 97 Cal. 258, 32 Pac. 174; Hicks v. Masten, 101 Cal. 651, 36 Pac. 130; Whipple v. Hopkins, 119 Cal. 349, 51 Pac. 535; Winters v. Buck, 121 Cal. 279, 53 Pac. 799; City of Santa Ana v. Ballard, 126 Cal. 677, 59 Pac. 133; Houghton v. Superior Court, 128 Cal. 352, 60 Pac. 972; Fountain Water Co. v. Dougherty, 134 Cal. 376, 66 Pac. 316; Machado v. Kinney, 135 Cal. 354, 67 Pac. 331; Murphy v. Stelling, 138 Cal. 641, 72 Pac. 176; Hartmann v. Smith, 140 Cal. 461, 74 Pac. 7; Flagg v. Puterbaugh, 101 Cal. 583, 36 Pac. 95; Cohen v. Wallace, 107 Cal. 133, 40 Pac. 101.

way.[5c] And, as in every case where a writ of *mandamus* is applied for, there must first be a demand upon the officer to perform the act sought to be compelled, and a refusal by him to do so.[5d]

Such demand must be made in the proper manner, which in the case of the settlement of a statement is by presentation for settlement upon notice.[6] If the required notice be not given, the judge is justified in refusing to settle the instrument.[6a] Or if the presentation for settlement be after the expiration of the time required by law, or if no time be prescribed, as where there are no amendments proposed to the statement, and the requirement is merely that presentation be within a reasonable time, and presentation is not made within a reasonable time, the judge will be justified in refusing to settle the bill or statement.[6b] So, if amendments are proposed, and the moving party refuses to accept the same, and fails to present his statement for settlement within the statutory time, he cannot complain if the judge refuses to settle it.[6c] And the statement must be in proper form,[6d] and

[5c] People v. Judge of the Tenth District Court, 9 Cal. 19; Churchill v. Lauer, 84 Cal. 233, 24 Pac. 107; Leach v. Pierce, 93 Cal. 614, 29 Pac. 235.

The supreme court of Montana, in the case of Montana etc. Co. v. Lindsey, 25 Mont. 24, 63 Pac. 713, held that *mandamus* would not lie to compel a judge to amend a bill of exceptions by incorporating therein particular matters. The reason was thus expressed: "The writ of mandate may issue to compel the performance of an act which the law specially enjoins as a duty resulting from an office, trust or station. It lies to coerce into activity, but not to direct the making of a particular decision or ruling upon a question involving the exercise of discretion or judgment. The duty which the writ may compel to be performed must be ministerial. State v. Smith, 23 Mont. 329, 58 Pac. 867. The performance here sought to be enforced is of a judicial duty. Raleigh v. District Court, 24 Mont. 306, 81 Am. St. Rep. 431, 61 Pac. 991."

[5d] People v. Romero, 18 Cal. 89; and see section 325, *post*.

[6] As to which see section 153, *ante*.

[6a] See cases cited in note 6e, section 153, *ante*.

[6b] In Gamache v. Budd, 129 Cal. 554, 62 Pac. 105, where presentation for settlement did not take place until months after the time provided by statute, the writ was refused. So in Kowalsky v. Kerrigan, 134 Cal. 590, 66 Pac. 850, where presentation was not made within the statutory period, the supreme court refused to issue the writ. In Stonesifer v. Armstrong, 86 Cal. 594, 25 Pac. 50, the writ was refused, the bill of exceptions not having been presented for settlement within the statutory time.

Failure to serve in time may be cured for inadvertence, etc., under section 473. See section 153, *ante*, note 6f. But whatever excuse is offered under that section must be to the trial judge, and determined by him before *mandamus* can be resorted to (Visher v. Smith, 92 Cal. 60, 28 Pac. 94), if at all, which is questionable. See section 146, *ante*.

[6c] Whipple v. Hopkins, 119 Cal. 349, 51 Pac. 535. Also Burns v. Napton, 26 Mont. 360, 68 Pac. 17.

[6d] In Landers v. Lawler, 84 Cal. 547, 24 Pac. 307, the supreme court held that where the paper purporting to be the bill of exceptions to be settled was merely indorsed, "Defendant's Bill of Exceptions," but upon its

properly constituted.[6e] So if it be not a true statement,[7] or the

face there was nothing to indicate by whom or in whose interest it was prepared, bearing a date ten days after the trial, containing no request or prayer that it be allowed or certified, and being without signature or indorsement of any kind, to fix its character, it was wholly insufficient, and *mandamus* would not lie to compel its settlement as a bill of exceptions. A mere absence in the paper of a request for settlement or allowance will not justify the refusal of the judge to settle or allow it. Flagg v. Puterbaugh, 101 Cal. 583, 36 Pac. 95.

So, if the petition for the writ itself is lacking in form or substance, it will be denied, without regard to the apparent merits of the case. In Landers v. Lawler, *supra*, not only was the proposed bill of exceptions utterly deficient in form, but the petition for the writ partook of similar deficiencies. It was without title or heading, either in the body, indorsement or elsewhere; it was not addressed or verified as a pleading not sworn to by a party in interest, not signed or indorsed by an attorney for petitioner, or any party to the cause, and was so utterly defective that the court said that only inadvertence could excuse the issuance of the preliminary process. As to the form of the petition for the writ, see below.

[6e] The moving party will not be permitted to make of his statement or bill of exceptions a mere transcript of the reporter's notes, and if he does so, and insists upon keeping it so, the trial judge will be justified in refusing to settle it. People v. Getty, 49 Cal. 581; People v. Sprague, 53 Cal. 422; Frazer v. Superior Court, 62 Cal. 49; Valleau v. Superior Court, 62 Cal. 290; January v. Superior Court, 73 Cal. 537, 15 Pac. 108; Walker v. Superior Court, 135 Cal. 369, 67 Pac. 336; and see section 151, *ante*.

So, at one time, it was regarded as equally reprehensible that the paper should be so meager, or so partial in its statement of facts, as to be merely a "skeleton" of a statement or bill. But this rule was very properly relaxed. It is manifestly the duty of the opposing attorney, under such circumstances, to propose appropriate amendments, and if he fails or neglects to do so, it then becomes the duty of the judge to incorporate whatever may be necessary to make the paper speak the truth as to the points covered thus partially and meagerly. In any event, failure to propose a statement sufficiently comprehensive to properly present his case can injure no one but the moving party (for the reviewing court will disregard such a statement or bill: Brind v. Gregory, 122 Cal. 480, 55 Pac. 250), unless it fails to do justice to the case of the opposing party, in which event, failure and neglect to propose the necessary amendments injures no one but himself.

The proposition was thus referred to by Chief Justice Beatty in his concurring opinion in Sansome v. Myres, 77 Cal. 353, 19 Pac. 577:

"In addition to what has been said by Mr. Justice Works,—in whose conclusions and views I concur,—I wish to say that, in my opinion, the fault imputed to the proposed bill of exceptions in question here—, viz., that it is too meager,—is one that is entitled to some indulgence.

"The great and crying evil is, not that such drafts are too short, but that they are generally too long, and that being allowed substantially on the scale and in the form in which they are presented, the counties are burdened with the expense of transcribing or printing masses of rubbish which serve merely to cumber the records and waste the time of this court. [This was in reference to appeals in criminal cases, but what is said is almost as applicable to civil cases.]

"We have decided that the judges of the superior court are justified in refusing to settle a bill of exceptions where the draft proposed contains a full transcript of the shorthand notes of the trial (People v. Sprague, 53 Cal. 422), and over and over again we have called attention to section 1175 of the Penal Code, which provides: 'A bill of exceptions must contain so much of the evidence only as is neces-

sary to present the questions of law upon which the exceptions are taken; and the judge must, upon the settlement of the bill, whether agreed to by the parties or not, strike out all the matters contained therein.'

" For this reason I repeat that if counsel in a particular case happens to commit the unusual error of making his draft too brief, the fault is one that merits some indulgence, especially as it cannot result in any serious inconvenience to the judge who is called upon to settle the bill of exceptions." And see S. C., 80 Cal. 483, 22 Pac. 212; Cohen v. Wallace, 107 Cal. 133, 40 Pac. 101; Winters v. Buck, 121 Cal. 279, 53 Pac. 799; Santa Ana v. Ballard, 126 Cal. 677, 59 Pac. 133.

The mere fact that something has been omitted that might with propriety have been incorporated in the paper is not a ground for refusing to settle it. Cohen v. Wallace, 107 Cal. 133, 40 Pac. 101.

Nor can the judge refuse to settle the bill on the ground that a certain account-book in evidence at the trial, brought into the bill by amendment, had been totally destroyed and could not be engrossed therein, it being admitted that the destruction of the said account-book was without appellant's fault, although such admission was made for the purpose of argument, notwithstanding the well-founded belief that such was not the case. Crooks v. Superior Court, 136 Cal. 23, 68 Pac. 96. The supreme court intimated that if the trial court had made an official investigation, and had determined judicially that the account-book had been deliberately destroyed by the appellant for the purpose of affecting the result of the review of the appeal, such determination would have, perhaps, put a different phase upon the matter.

Nor can the trial judge refuse to settle a bill or statement because of the failure of the moving party to incorporate therein a transcript of the evidence where it appeared that such transcript would cost more than a third of the total amount involved in the controversy and no necessity for such incorporation appeared. Vatcher v. Wilbur, 144 Cal. 536, 78 Pac. 14.

Nor would the trial judge be warranted in refusing to settle a statement or bill of exceptions, because of the failure of the appellant (or moving party) to copy therein certain papers the originals of which had been lost or mislaid and were not available, and the only copies of which were in the hands of the respondents, or their attorneys, who refused to permit the use thereof for the purpose of transcription. It would be the duty of the judge in such a case to make an order requiring attorneys for respondent to permit the use of their copy of said papers, and to give the appellant further time for the engrossment of the instrument. Galvin v. Hunt, 153 Cal. 103, 94 Pac. 423.

[7] As above stated, it is the duty of the trial judge to strike out of the proposed statement or bill all redundant or useless matter, and make the paper speak the truth. But it is not his business to prepare the paper. He may direct what changes shall be made. If the changes directed are made, the judge cannot refuse to settle the statement. See Visher v. Smith, 92 Cal. 60, 28 Pac. 94. If, however, the changes as directed are not made, this is a ground for refusing to settle or allow, but it would seem from Hearst v. Dennison, 72 Cal. 227, 13 Pac. 628, that if a proposed statement is a mere pretense and fraud to begin with, the court is justified in refusing settlement, out of hand, without giving the party an opportunity to prepare a proper paper. The statement was proposed in time, and was objected to as being incorrect and erroneous. The bill of exceptions made upon appeal from the order refusing to settle the statement contained nothing to indicate that appellant was "in any way prevented from making a fair or substantially truthful statement of the case," but it showed that there was a full hearing and that the court refused to settle the paper on the grounds

moving party has lost his right to a statement,[7a] or if the judge be correct in refusing to settle the statement,[8] or has already

"that said proposed statement on motion for a new trial is not a statement of the case, or of any case herein, and is grossly incorrect, and that no draft of the statement of the case, or of any case herein, or a copy of said draft, has been made or prepared, or served herein at any time." The supreme court, in affirming the order, said:

"If this document, named 'draft of his proposed statement,' is a mere pretense and fraud; if it is so grossly untrue or so foreign to the real history of the case as to come within no reasonable meaning of 'a statement of the case,' as used in the code,—then the judge of the court below was right in disregarding it. It is the duty of the judge to 'settle' a statement, not to make one. And there is nothing in the record to show that the proposed draft was not a sheer fraud. There is nothing before us upon which we can review the order. Indeed, it is doubtful if an appeal lies at all from such an order. If a judge refuses to settle a *bona fide* statement he may be compelled to settle it upon *mandamus*."

So in Pacific Land Assn. v. Hunt, 105 Cal. 202, 38 Pac. 635, the writ was refused on the ground that the bill presented was not illustrative of an attempt to present such a fair and *bona fide* statement of the case as entitled it to be considered a proper bill.

[7a] The usual way in which the moving party loses his right to have a statement is by lapse of time—as, for example, failure to give the notice of intention in time, failure to give the notice of presentation for settlement in time, failure to serve the notice or propose the statement in time, failure to give the notice of appeal in time, etc. This result may be occasioned in many ways, and it has often been held that the failure or neglect of the moving party to comply with any one of the various rules of law relative to the preliminary steps necessary to be taken to entitle him to have a statement, renders his right to such statement nugatory. Thus in Coffey v. Grand Council, 87 Cal. 367, 25 Pac. 547, the petitioner lost his right to have a statement by laches. So in Tracy v. Coffey, 153 Cal. 356, 95 Pac. 150, the writ was refused because the right of appeal had lapsed and the appellant had lost his right to have a bill of exceptions. Also State v. Court, 29 Mont. 176, 74 Pac. 414.

[8] A judge cannot refuse to settle a statement on the ground that the reporter's fees have not been paid. James v. McCann, 93 Cal. 513, 29 Pac. 49. But the rule is otherwise with regard to jury fees, and in Lukes v. Logan, 66 Cal. 33, 4 Pac. 883, it was held that the settlement of a statement or bill of exceptions was a "further proceeding," under the provisions of the act of March 28, 1868 (Stats. 1867–68, p. 436), as follows: "If, in any trial in a civil case, the jury be for any cause discharged without finding a verdict, the fees of the jury shall be paid by the plaintiff and until they are paid no further proceedings shall be allowed in the case." It was therefore held that refusal of the plaintiff to pay the jury fees was sufficient ground to justify the trial judge in refusing to settle his bill of exceptions.

But refusal is not justified when based upon the refusal of the judge's predecessor to settle the paper. Leach v. Pierce, 93 Cal. 624, 29 Pac. 238. Nor is the judge justified in refusing to settle a statement because of anything occurring prior to the filing of the findings, if the statement was properly noticed, was presented within the statutory time, and is otherwise a proper statement. Careaga v. Fernald, 66 Cal. 351, 5 Pac. 615. Nor can the judge refuse to settle a bill of exceptions on the ground that it was presented too late when presentation was made within the statutory time, and was postponed or continued by stipulation of the parties. In such a case it must be presumed that presentation within the statutory time was waived, or presentation continued by stipulation. Boyer v. Burnett, 134 Cal. 481, 66 Pac. 657. Nor can the trial judge refuse to settle a bill of exceptions on an appeal from an order in a criminal case directing entry of judgment *nunc pro tunc*, such an order being an order after judgment, affecting the substantial rights of the de-

settled a statement,[8a] or is willing to settle one.[8b] Before *mandamus* can issue to compel the settlement of a statement or a bill of exceptions in a civil case, therefore, it must appear that there was a regular presentation of a proper statement and a refusal of the judge or other official to settle the same. In other words, the moving party must have complied with all the requirements in relation to proceedings on motion for new trial, and this must be shown affirmatively on his application for the writ.[9]

fendant, and is appealable, and the defendant is entitled to a bill of exceptions thereon. Ward v. Dunne, 136 Cal. 19, 68 Pac. 105. Nor can refusal be justified on the ground that a bill of exceptions on an appeal from an *ex parte* order was not proposed in time, where there was no notice of entry, such notice being required in *ex parte* orders. Leach v. Pierce, 93 Cal. 627, 29 Pac. 239.

But *mandamus* will not lie to compel the settlement of a bill of exceptions on a motion for a new trial prepared in accordance with the provisions of section 649, California Code of Civil Procedure, after the hearing of the motion, a previous bill of exceptions having been prepared and used at the hearing (under section 650, Code of Civil Procedure), where it appears that the contents of the second bill should have either been included in the original bill or did not require to be included in any bill. Southern Pacific Co. v. Superior Court, 105 Cal. 84, 38 Pac. 627.

On the subject of the duty of the trial judge in the matter of settling and allowing statements and bills of exceptions, the supreme court in Flagg v. Puterbaugh, 101 Cal. 583, 36 Pac. 95, said: "A court should lean in favor of giving litigants every reasonable opportunity of presenting their cases on the merits, and rules of procedure should be made to serve the purpose of expediting and facilitating the disposition of causes according to their merits rather than to convert them into means of obstruction." This was quoted with approval in Gutierrez v. Hebberd, 106 Cal. 167, 39 Pac. 529, 935.

[8a] See Thornton v. Hoge, 84 Cal. 231, 23 Pac. 1112. *Mandamus* will never issue to compel the performance of some act that has already been performed. See section 328, *post;* and see San Diego School Dist. v. Supervisors, 97 Cal. 438, 32 Pac. 517; Moore v. Morrison, 130 Cal. 80, 62 Pac. 268.

But refusal cannot be justified on this ground in a case where the previously settled statement was on a motion made prematurely, as made upon a minute entry of the decision, which did not purport to be a judgment and was not signed, it appearing that there were no findings, and where a new judgment with new findings, one of which was not included in the former decision, were subsequently entered, and the statement, settlement of which was sought, was pursuant to the new trial proceedings inaugurated after the rendition and entry of the real judgment. Fountain Water Co. v. Dougherty, 134 Cal. 376, 66 Pac. 316.

[8b] See Walker v. Superior Court, 133 Cal. 369, 67 Pac. 336.

[9] As to the requirements referred to, see the preceding sections of this chapter.

A defective petition will not be demurrable and the alternative writ quashed if the answer accompanying the demurrer contains matter such as to cure the defects. Walkerley v. Green, 104 Cal. 208, 37 Pac. 890.

In Anschlag v. Superior Court, 76 Cal. 513, 18 Pac. 676, it was held that a petition would be regarded as insufficient if it failed to show presentation to the trial judge upon notice required by law to be given the district attorney. And in People v. Hill, 78 Cal. 405, 20 Pac. 862, where the record

And it has been held that the party must accompany his application with a copy of the proposed statement, so as to enable the court to determine "whether it would, if settled and signed, tend to manifest error."[10] The petition should be accompanied also with an affidavit of the truth of the matters set forth in the proposed statement.[11]

Failure to take prompt steps to obtain the application of the remedy by writ of mandate, after refusal of the trial judge to settle the statement, is ground for the denial of the writ.[11a] Laches at this juncture in the proceedings always incurs its penalty.[11b]

2. *Application to Prove Exceptions.*—The remedy by *mandamus*, as we have seen, can be invoked only when the trial court refuses to settle any statement or bill of exceptions whatever. If the court settles a statement or bill, but, in such settlement, refuses to give the moving party the benefit of exceptions which he claims to have taken at the trial, his remedy is provided by section 652 of the California Code of Civil Procedure,[11c] which reads: "If

failed to show (presumably the petition) that the proposed bill had been served on the district attorney as provided by section 1171 of the Penal Code, the petition would be denied.

In Landers v. Lawler, 84 Cal. 547, 24 Pac. 307, it was held to be fatal where the alternative writ was answered by the trial judge alleging that no proposed bill of exceptions had ever been presented to him for settlement.

[10] People v. Dickson, 46 Cal. 53; People v. Kahl, 18 Cal. 432.

[11] As to proceedings to obtain the writ, see section 325b, *post*.

[11a] McConoughey v. Torrence, 124 Cal. 330, 57 Pac. 81.

[11b] Estate of Depeaux, 118 Cal. 522, 50 Pac. 682.

[11c] Corresponding sections of other codes are as follows: Section 385, Mills' Annotated Code of Colorado; section 4432, Revised Codes of Idaho; section 6790, Revised Codes of Montana (section 1157, Code of Civil Procedure); section 3286, Cutting's Compiled Laws of Nevada (section 191, Civil Practice); section 7060, Revised Codes of North Dakota; section 298, Code of Civil Procedure of South Dakota; section 3289, Compiled Laws of Utah.

Section 1471, Revised Statutes of Arizona, provides that "Should the party be dissatisfied with the bill of exceptions filed by the judge, as provided in the preceding section, he may, upon procuring the signatures of three respectable bystanders, citizens of this territory, attesting the correctness of the bill of exceptions as presented by him, have the same filed as a part of the record of the cause, and the truth of the matter in reference thereto may be controverted and maintained by affidavits, not exceeding five in number on each side, to be filed with the papers of the cause within ten days after the filing of such bill of exceptions, and to be considered as a part of the record relating thereto."

Section 170, Lord's Oregon Laws, contains the following provision: " If an objection is made to any ruling of the court in the progress of a trial, and the truth of the statement thereof is not agreed upon between the counsel and the court, the counsel may verify his statement thereof by his own oath and that of two respectable and disinterested persons, or by his own oath, and that of the stenographer who took the same down, and file the same as an excep-

the judge in any case refuses to allow a bill of exceptions in accordance with the facts, the party desiring the bill settled may apply by petition to the supreme court to prove the same."

This section does not apply to the case of an absolute refusal of the trial court to settle any bill whatever, and in that event, the only resort of the moving party must be to a writ of mandate.[12]

As first enacted, the section applied to the case of a refusal by the judge to allow "an exception in accordance with the facts." As amended in 1907, it applies to the case of a refusal to allow "a bill of exceptions in accordance with the facts." Whatever difference there may be between the cases thus provided for, the supreme court has uniformly insisted upon a strict construction of the language employed, and declined to give the section a scope of operation not justified by its exact terms. It is the refusal to allow an exception or a bill of exceptions in accordance with the facts that the court will relieve against, but it will not interfere with the action of the trial judge in any other respect. Thus in Hyde v. Boyle[13] the petition purported to be one for leave to prove an exception, but turned out to be really a petition to remodel a bill by striking out certain things therein contained, and the court denied the petition on the ground that it was given no jurisdiction to act by section 652. A similar question arose in Vance v. Superior Court,[14] where the court, after quoting the sec-

tion to the ruling objected to." Then follows a provision as to counter-affidavits.

In Washington, in the absence of a statutory provision upon the subject, the practice is for the supreme court to order a reference to determine the controversy. Van Lehn v. Morse, 16 Wash. 219, 47 Pac. 435; Hallam v. Tillinghast, 19 Wash. 20, 52 Pac. 329.

In addition to the section from the Idaho code above quoted, section 4426 contains the following provision:

"When an exception is taken the court, judge, tribunal or judicial officer shall allow sufficient time for the reduction to writing, and settlement of the same, and in such case such time shall not be allowed, or such exception shall not be fairly settled, the facts may be shown by affidavit, and the party taking such exceptions may apply to the court, or tribunal, to which an appeal lies, in the action or proceeding, to settle the same fairly, according to the facts, and when so settled, the same shall become a part of the record in such action or proceeding."

[12] See Landers v. Landers, 82 Cal. 480, 23 Pac. 126; Tibbets v. Riverside Banking Co., 97 Cal. 258, 32 Pac. 174; Hudson v. Hudson, 129 Cal. 141, 61 Pac. 773; Hyde v. Thornton, 83 Cal. 83, 23 Pac. 126.

Also In re Plume, 23 Mont. 41, 57 Pac. 408; Harding v. McLaughlin, 23 Mont. 334, 58 Pac. 865.

[13] 86 Cal. 352, 24 Pac. 1059.

[14] 87 Cal. 390, 25 Pac. 500; and see Hyde v. Boyle, 89 Cal. 590, 26 Pac. 1092; In re Gates, 90 Cal. 257, 27 Pac. 195; Cox v. Delmas, 92 Cal. 652, 28 Pac. 687; City of Santa Barbara v. Eldred, 95 Cal. 378, 30 Pac. 562; Estate of Dolbeer, 147 Cal. 359, 81 Pac. 1098; Tibbetts v. Riverside Banking Co., 97 Cal. 258, 32 Pac. 174.

tion, said: "It seems quite apparent that the petition must be based upon the refusal of the judge to allow an exception, which is 'an objection upon a matter of law to a decision made by a court, tribunal, judge, or other judicial officer' (Code Civil Proc., sec. 646). It refers solely to a case where the judge is charged with having refused to allow an exception; that is, where a party claims that he made 'an objection upon a matter of law to a decision made' by the court, and took an exception to the decision, and the court refuses to certify, in a bill or statement, that such an exception was taken, or that such an occurrence took place. In such a case, the party may prove, if he is able, in this court, that he did take such exception, and may prove, no doubt, in that connection, sufficient surrounding facts to show what the point of the exception is."

The application must be made before the hearing of the motion for a new trial; otherwise it might happen that an appeal from a new trial order might be heard upon matters which were not in the record on which the trial court acted.[15] And it must be made within a reasonable time after the refusal of the judge to allow the exception.[16]

The section of the code provides that the application shall be by petition to the supreme court in the mode and manner, and under such regulations, as that court may prescribe. The court has not yet made any regulations on the subject, but has ruled that the petition should set forth the exceptions taken and the evidence in support thereof,[17] or, at least, a general statement of the tendency of the evidence, so that the materiality of the ruling alleged to have been excepted to may appear.[18]

The petition should also show that the petitioner has taken the proper steps to procure the settlement of a bill of exceptions, that he included in his proposed bill a statement of the particular exception which he desires to prove, and that the judge in settling the bill refused to allow that he had taken such an exception.[19]

[15] Frankel v. Deidesheimer, 83 Cal. 44, 23 Pac. 136.

[16] Estate of Dolbeer, 147 Cal. 359, 81 Pac. 1098.

[17] Estate of Hawes, 68 Cal. 413, 9 Pac. 456.

[18] People v. Bitancourt, 73 Cal. 1, 14 Pac. 372.

[19] Estate of Dolbeer, 147 Cal. 359, 81 Pac. 1098.

It would seem that the bill or statement, after being proved before a referee, must show that the refusal of the trial judge was unwarranted. This was the view adopted in Harding v. McLaughlin, 23 Mont. 334, 58 Pac. 865.

It is essential that the exceptions sought to be proved should be material, and the refusal to allow the same

No amendment of the petition will be allowed after the hearing has been commenced.[20]

Notice of the application should be given to the trial judge and the opposite attorney.[21]

While section 652 deals in terms only with bills of exception, there can be little doubt that it applies also to statements on motion for new trial. This, at least, seems to have been the understanding acted upon by the court and the bar.[22]

The benefit of the section is by its terms confined to "the party desiring the bill settled," who, in matters which concern a new trial, must be the party moving for it. This was fully recognized in Re Gates.[23]

Where, upon an application for leave to prove an exception, there is a disputed question of fact, the practice sometimes is to refer the matter to some attorney of the court to hear the matter;[24] but it is more often heard by a member of the appellate bench.[25] It is a complete answer to a petition to prove exceptions that the papers and documents which the supreme court is asked to be allowed inserted in the statement were not offered in evidence at the trial.[26] The rule as to conflict applies in the determination of questions of fact arising upon a petition to prove exceptions.[27]

The statement or bill of exceptions, when prepared in accordance with the directions of the court, whether by a referee or by the chief justice himself, as is usually the case in California, must be certified by the chief justice, and a paper prepared after a hearing before a referee not so certified will be disregarded.[27a]

prejudicial. Forrester v. Boston etc. Co., 23 Mont. 122, 58 Pac. 40; Montana O. P. Co. v. Lindsay, 25 Mont. 24, 63 Pac. 715.

Materiality cannot be made apparent without setting out the exception sought to be proved. Hence a failure in this particular is deemed fatal to the petition. Dernham v. Lieuallen, 4 Idaho, 528, 43 Pac. 74.

See, generally, Taylor v. Miller, 10 N. D. 361, 87 N. W. 597; Plano etc. Co. v. Person, 11 S. D. 539, 79 N. W. 833; Baird v. Gleckler, 3 S. D. 300, 52 N. W. 1097.

[20] Estate of Dolbeer, 147 Cal. 359, 81 Pac. 1098.

[21] Estate of Hawes and People v. Bitancourt, *supra*.

[22] See Frankel v. Deidesheimer, 83 Cal. 44, 23 Pac. 136; Crow v. Minor, 85 Cal. 214, 24 Pac. 640; Estate of Dolbeer, 147 Cal. 359, 81 Pac. 1098; Vance v. Superior Court, 87 Cal. 390, 25 Pac. 500.

[23] 90 Cal. 257, 27 Pac. 195.

[24] Estate of Hill, 62 Cal. 186.

[25] In Estate of Dolbeer, 147 Cal. 359, 81 Pac. 1098, it was heard by the chief justice.

[26] Estate of Moore, 78 Cal. 242, 20 Pac. 558; and see In re Moore, 83 Cal. 583, 23 Pac. 794.

[27] In re Howard, 108 Cal. 31, 40 Pac. 1043.

[27a] See Harding v. McLaughlin, 23 Mont. 334, 58 Pac. 865.

Section 1174 of the Penal Code contains a provision identical, or practically so, with the section under consideration here, prior to its amendment in 1907. It did not contain, as originally enacted, more than a bare direction as to the time and manner of settling bills of exceptions in criminal actions but it was amended in 1874 and 1905 so as to include the provisions found in sections 650, 652 and 653 of the Code of Civil Procedure. The cases above cited, and the rules and interpretation outlined, are therefore to be taken, in the main, as applicable to criminal procedure.

Although both section 652, Code of Civil Procedure, and section 1174, Penal Code, expressly provide that the petition must be addressed to the supreme court and certain duties are imposed upon the chief justice, it has been held that the effect of section 4, article 6, of the Constitution is to confer a like jurisdiction upon the district court of appeal and presumably upon their presiding justices. In Glass v. Lawlor,[28] the supreme court held that these sections, relative to proving exceptions, and section 1243, Penal Code, as to certificates of probable cause, were merely incidental to appeals, and together with all other code provisions relating to the mode of presenting appeals, were properly cognizable in the district court of appeals having jurisdiction under the Constitution of the particular appeal to which such proceedings were incident.

§ 156. Engrossment of the Statement.—There never has been an express provision of the statute requiring the engrossment of the statement.[1] The requirement is a rule of practice resulting from the necessity of the case. In settling the statement the judge frequently orders much of the proposed matter to be stricken out and other matter to be inserted in its place, allowing some of the amendments and disallowing others. In order to render intelligible the heterogeneous mass resulting from this process, and to identify the parts designated by the judge, it is necessary

[28] 152 Cal. 602, 93 Pac. 490; People v. Lapique, 154 Cal. 518, 98 Pac. 257.

[1] No such provision appears in the old Practice Act either with reference to statements on motion for new trial (see Laws of 1851, p. 81, sec. 195; Laws of 1861, p. 590; Laws of 1863, p. 643; Laws of 1863–64, p. 246; Laws of 1865–66, p. 845), nor with reference to statements on appeal. See Laws of 1851, p. 105, secs. 338, 339; Laws of 1855, p. 303; Laws of 1863, p. 644. Nor is there any express provision in regard to engrossement of the statement in the California Code of Civil Procedure. See section 659, subdivision 3.

that such parts should be arranged in proper order and copied out into one connected whole. The identification of the parts is essential; for without it, it would not be possible to determine what constituted the record. The proper arrangement is also essential, and if not attended to will be ground for disregarding the statement. Thus in Marlow v. Marsh [2] the amendments were agreed to, and there does not appear to have been any dispute about the identity of the different parts of the statement; but the supreme court disregarded the statement because not engrossed, and Field, J., delivering the opinion, said: "The papers purporting to be a statement embodied in the transcript consist of a draft prepared by the appellants and the amendments proposed by the respondents as they were originally served. The amendments agreed to by counsel should have been inserted in their proper place in the draft, and a fair copy of the whole made. In their separate form the draft and amendments do not constitute such a statement as we will look into on appeal." This case was approved and followed in subsequent ones.[3] If, in addition to the fact that the various parts of the statement are not inserted in their proper places, they be not susceptible of identification, that is an additional reason for disregarding the statement.[4] The rule, therefore, that

[2] 9 Cal. 259.

[3] People v. Edwards, 9 Cal. 286; Skillman v. Riley, 10 Cal. 300; Baldwin v. Ferre, 23 Cal. 461; Kimball v. Semple, 31 Cal. 657; Fritsch v. Stampfli, 117 Cal. 441, 49 Pac. 559; Vierra v. Fontes, 135 Cal. 126, 66 Pac. 241.

[4] Smith v. Davis, 55 Cal. 26. In this case there was a certificate of the judge in the following language: "The foregoing amendments proposed by defendant are allowed, and the further proposed amendment by plaintiff is also allowed; and said statement of plaintiff as amended is hereby settled as correct. W. T. McNealey, district judge." But there being no engrossment the amendments, etc., could not be identified. The supreme court said: "In this cause there is no statement on motion for new trial which this court is authorized to consider. It appears that the proposed statement and amendments were allowed by the judge of the court below, but the statements and amendments were never engrossed and authenticated by the signature of the judge. Such documents not engrossed into one, and attested by the signature of the judge, have never been regarded as the statement required by law, and have never been considered by this court on appeal. Baldwin v. Ferre, 23 Cal. 461. The order denying the motion for a new trial must therefore be affirmed."

The same rule obtains elsewhere. Thus in Doust v. Telephone Co., 14 Idaho, 677, 95 Pac. 209, the court said: "This court has repeatedly held that, where numerous amendments have been offered to a proposed statement on motion for new trial, the amendments as allowed in connection with the proposed statement must be engrossed before it is settled as a complete record. Pence v. Lemp, 4 Idaho, 526, 43 Pac. 75; Hattabaugh v. Vollmer, 5 Idaho, 23, 46 Pac. 831; Crowley v. Croesus etc. Co., 12 Idaho, 530, 86 Pac. 536."

Where proposed amendments, after being allowed, were not incorporated in the bill as engrossed, but were merely made to appear in the tran-

the statement should be engrossed rests upon sound reasons and is well settled. It sometimes happens, however, that the statement is settled so nearly as proposed that it is possible, without danger of illegibility, to interline the amendments or to write them upon the margin of the proposed statement; and when this is the case it is permissible to take such a course, provided the adverse party consents to it,[5] or the judge does not disapprove. And if the parties sign a stipulation which waives the engrossment, and identifies the various parts of the statements, and the whole is sufficiently intelligible, the successful party cannot afterward object to the want of engrossment.[6] The stipulation in such case takes the place of the engrossment. But there must be either an engrossment or something which answers its purpose.

In engrossing the statement it is not always necessary to actually write out all the various documents constituting a part of it. In certain cases such documents may be made a part of the statement by reference—at least so far as the court below is concerned.[7] The old Practice Act expressly provided for such a course. Section 195, as enacted in 1851,[8] provided that "the statement shall contain so much of the evidence *or reference thereto* as may be necessary to explain the grounds taken. On the argument, reference may also be made to the pleadings, depositions and documentary evidence on file, and to the minutes of the court." The above provision was reproduced in the amendment of 1861,[9] with the addition of the following: "To identify any depositions or minutes of the court read or referred to on the hearing, it shall be sufficient that the judge designate them in his certificate as having been thus read or referred to." The subsequent amendments[10] of section 195 contained provisions similar to the ones

script, they cannot be considered as a part of the record on appeal. Yellowstone National Bank v. Gagnon, 25 Mont. 268, 64 Pac. 664. The amendments must be engrossed along with the bill or statement, as allowed; but, if they comprise additional and independent matter, it is not improper to insert them in a paragraph at the end of the original paper. Wulf v. Manuel, 9 Mont. 276, 23 Pac. 723; Penn etc. Min. Co. v. Schreiner, 14 Mont. 121, 35 Pac. 878. Otherwise, where the amendments should be made by inserting words and matter at different places, it is insufficient to insert them at the end, with reference to pages and lines. Gallatin Canal Co. v. Lay, 10 Mont. 528, 26 Pac. 1001.

[5] For instance see McCreery v. Everding, 44 Cal. 246.

[6] Thompson v. Connolly, 43 Cal. 636.

[7] The documents referred to must be printed in the transcript. See subdivision 2, section 265, *post*.

[8] Laws of 1851, p. 81.

[9] Laws of 1861, p. 590.

[10] Laws of 1863, p. 643; Laws of 1863–64, p. 246; Laws of 1865–66, p. 545.

above quoted. Such provisions clearly permitted documents on file to be made part of statements on motion for new trial by mere reference.[11] There was no such provision with relation to statements on appeal, however.[12] This difference between the two kinds of statements was pointed out by Burnett, J., in Dickinson v. Van Horn.[13] But the distinction seems to have been overlooked in subsequent cases. For it afterward became well settled that documents on file could be made a part of statements on appeal by mere reference.[14] But it has always been necessary either to copy out the documents, or to have a sufficient reference to them. A document neither set out nor referred to is not a part of the statement, and cannot be considered.[15]

The Code of Civil Procedure has no provision like the one above quoted in the section in relation to statements on motion for new trial. But section 648, as amended in 1876, provides that "documents on file in the action or proceeding may be copied, or the substance thereof stated, *or a reference thereto,* sufficient to identify them may be made." This provision is in the chapter in relation to exceptions; but it unquestionably applies to exceptions presented by means of statements as well as to exceptions presented by means of bills of exceptions. And under the code the term "exception" has an extended signification—there being exceptions on the ground of the insufficiency of the evidence as well as exceptions on the ground of error in law.[16]

The provision permitting documents on file to be made a part of the engrossed statement by mere reference is not at all inconsistent with the rule that the statement must be engrossed. The provision was in force at the time the above decisions as to the necessity of engrossment were made. It applies only to documentary, and not to oral, evidence,[16a] which constitutes so large a portion of every statement. The reference is merely an abbreviation of the process of engrossment.

[11] See Hess v. Winder, 30 Cal. 349, 12 Morr. Min. Rep. 217.

[12] See Laws of 1851, p. 105, secs. 338, 339; Laws of 1855, p. 303; Laws of 1863, p. 644.

[13] 9 Cal. 207.

[14] See Darst v. Rush, 14 Cal. 81; Connor v. Morris, 23 Cal. 447; Kirstein v. Madden, 38 Cal. 158; Wheeler v. Farmer, 38 Cal. 203.

[15] Wheeler v. Farmer, 38 Cal. 203. The paper disregarded in this case was an undertaking on attachment. In addition to the fact that it was not set out or referred to in the statement, there was no specification in regard to it.

[16] See sections 646–648, California Code of Civil Procedure.

[16a] Frazer v. Superior Court, No. 8534.

Whenever a document is intended to be made a part of the engrossed statement by reference, there are several things which must be borne in mind.

1. The provision permitting the reference applies only to documents on *file*.[16b] The language of the code is clear as to this. There is no warrant for the practice of making documents not on file a part of the statement by mere reference. If the adverse party should consent to the adoption of such a course, and the documents should be producible at the hearing of the motion in the court below, and be printed in the transcript, no difficulty would arise. But if the adverse party should not consent, a serious difficulty would occur in making up the transcript. For it is extremely doubtful whether the clerk could be compelled to certify to the correctness of a document not in his custody,[17] and if he should voluntarily do so, whether his certificate would be of any validity as to such document. Furthermore, where documents not on file are merely referred to, there is always danger of their being mislaid or not forthcoming when wanted. The foregoing, however, applies only to *engrossed* statements. There is no absolute reason why documents not on file should not be merely referred to in a *proposed* statement, provided the adverse party has full opportunity to examine the document referred to. For the duty of the judge is to make the statement conform to the truth,[18] and he has power to order evidence inserted, whether proposed or not. And there are not many judges who would refuse to allow a document to be inserted simply because it was referred to and not set out. But where such a course is adopted, full opportunity must be afforded to the adverse party to examine the document, and a due regard should be had to clearness and certainty. The whole statement cannot be made up by reference. Where the statement did not contain any of the evidence, but simply referred to the reporter's notes, and stated that they were to be inserted in full, it was held that the judge was justified in refusing to settle the statement.[18a] And it is always better to set out the docu-

[16b] For instances, see Sharon v. Sharon, 79 Cal. 633, 22 Pac. 26, 131; Reclamation District v. Hamilton, 112 Cal. 603, 44 Pac. 1074; Lake Shore Co. v. Modoc Co., 127 Cal. 37, 59 Pac. 206.

[17] See, generally, People v. Bartlett, 40 Cal. 142; Kimball v. Semple, 31 Cal. 657.

[18] See section 154, *ante*.

[18a] Frazer v. Superior Court, 62 Cal. 49; and look at Valleau v. Halsey, 62 Cal. 290.

ments, and not to merely refer to them. For by setting them out, examination of the statement is facilitated, and the copies can be used in the engrossed statement.

2. The documents on file referred to in an engrossed statement should be producible on the hearing of the motion in the court below, and be printed in the transcript in their proper place.[18b] If they be not forthcoming upon the hearing, that is a sufficient reason for denying the motion.[19] And as a matter of course, they must be printed in the transcript. For the supreme court cannot

[18b] The place for them may be in the body of the statement, but it would seem that they may be incorporated in an appendix. In Sharon v. Sharon, 79 Cal. 633, 22 Pac. 26, 131, it was stipulated that all depositions on file might be read and referred to on the hearing of defendant's motion for a new trial as part of the statement, and, on appeal, it was held that the documents referred to were properly made a part of the statement. They were subsequently printed in the transcript, but in an appendix, and were referred to in the body of the statement as "Plaintiff's Exhibit No. ——; see end of statement." They were then set out in the appendix under the title so expressed, preceded by "The following are the exhibits offered and read in evidence on behalf of the plaintiff, and mentioned in the foregoing statement." This was held to be a sufficient identification to make the documents referred to a part of the record. This plan is seldom followed, however, without considerable danger of losing the advantage of the matter so referred to. In Reclamation District v. Hamilton, 112 Cal. 603, 44 Pac. 1074, while commending the practice of referring to documents on file at the hearing of the motion, the court said: "Such reference would, of course, not be sufficient in the engrossed statement. Such engrossed statement would be a 'skeleton statement,' as declared in People v. Bartlett, 40 Cal. 142, and Bush v. Taylor, 45 Cal. 112, cited by respondent." And see Lake Shore Co. v. Modoc Co., 127 Cal. 37, 59 Pac. 206. In any event, there must be no ambiguity in a reference of this kind. In Estate of Carpenter, 127 Cal. 582, 60 Pac. 162, where there was a bill of exceptions, so called, containing a reference to certain papers, "being the papers set forth and marked Exhibits 'A' and 'B,' in the foregoing bill of exceptions hereto attached and herewith filed," such reference was held not to sufficiently refer to exhibits so marked in a separate and unattached bill of exceptions, which is separately filed.

In Keady v. United Railways Co. (Or.), 108 Pac. 197, the exhibits were not attached physically to the transcript, but were fastened together in a separate bundle of papers. The documents contained appear to have been used in evidence, and it is intimated that they would have been considered if they had been properly identified. But the certificate of the trial judge, attached to the bound transcript, was to the effect that it, together with the exhibits attached, contained all the evidence introduced upon the trial. The court said: "They have not been made a part of the bill of exceptions by being physically attached thereto, nor are they identified in any manner by the trial judge. However, there is attached a certificate of the county clerk, to the effect that they constitute exhibits in the present case, but that is not the identification required by the statute, and is not sufficient to make them a part of the bill of exceptions. State v. Kline, 50 Or. 426, 93 Pac. 237; Multnomah County v. Willamette Towing Co., 49 Or. 204, 89 Pac. 389."

[19] Bush v. Taylor, 45 Cal. 112.

act upon a portion of the record,[20] nor can it be referred to the files of the court below.[20a]

3. The reference must be sufficient to identify the documents referred to. If not, the document will not be considered.[21] The reference should also be in the place where the document would be if it had been inserted.

It is not the clerk's duty to engross the statement.[22] That duty is upon the moving party. No time is prescribed by the statute within which the engrossment is to be made. The engrossment however, is a prerequisite to the certificate, and the certificate is required to be affixed to the statement "when settled." This evidently means that it must be done as soon as practicable. In Ecstein v. Calderwood,[23] it was held that a delay of two months and a half after the settlement was sufficient to justify the court in dismissing the motion for want of prosecution. Probably this might be regulated by a rule of court.

§ 157. Authentication of the Statement—Necessity for—By Whom to be Made—Waiver of—History of the Subject.—Under the Code of Civil Procedure, as amended in 1874, the statement must in all cases be settled by the judge, and such settlement must be evidenced by his certificate, which must be appended to the en-

[20] Kimball v. Semple, 31 Cal. 657; Hutchinson v. Bours, 13 Cal. 50; and see sections 265, 266, *post*.

[20a] In Churchill v. Flourney, 127 Cal. 355, 59 Pac. 791, where a tracing of a map used at the trial was thus referred to: "Here insert tracing of map," but no such tracing was inserted, the defect was held to have been cured by a stipulation that the engrossed statement was true and correct, etc., the presumption being that it was used at the hearing of the motion, but through an oversight was not filed, even though the record contained a certificate of the clerk that no such tracing was among the papers.

Nor is it permissible to bring up to the appellate court a paper or document set out in the transcript outside the statement or bill of exceptions, whose proper place is in such statement or bill, but which is referred to merely therein. This was decided in the Oregon case of Tatum v. Massie, 29 Or. 140, 44 Pac. 494, where a certain contract, marked "Exhibit A," was referred to in the bill of exceptions, but was copied into the transcript outside that paper. To the same effect, see Roberts v. Parrish, 17 Or. 583, 22 Pac. 136; Morrison v. Crawford, 7 Or. 472; also Fisher v. Kelly, 26 Or. 249, 38 Pac. 67.

A fortiori, it is even less permissible to bring up an amendment to a bill or statement in the transcript outside the same, without referring thereto. Yellowstone Bank v. Gagnon, 25 Mont. 268, 64 Pac. 664.

But provision is sometimes made, as in section 3284, Compiled Laws of 1907 of Utah, for bringing up documents by reference in the bill of exceptions. See Bingham etc. Co. v. McDonald (Utah), 110 Pac. 56.

[21] Canfield v. Thompson, 49 Cal. 210.

[22] People v. Bartlett, 40 Cal. 142. See note 29, section 151, *ante*.

[23] 27 Cal. 413.

grossed statement. Under the old Practice Act, both statements on motion for new trial and statements on appeal could be settled and certified by the parties without any intervention of the judge, if they could come to an agreement upon the question. But with the exception of one period the authentication, whether by the judge or by the parties, was required to be by written certificate or stipulation, appearing in the record, and could not be implied. The exception was that, at the period mentioned, the statute in relation to statements on appeal was held to permit an *implied* authentication, and its operation was by a confusion of ideas extended to statements on motion for new trial. But this statute was afterward amended and the old rule restored. And as above stated, with the exception of this period, the authentication, whether by agreement of the parties or certificate of the judge, was required to be in writing. But there was considerable confusion upon the subject, caused by the fact that there were two kinds of statements, the statutes creating which were different, and frequently amended, and the decisions in relation to which were fluctuating. In view of this confusion it will perhaps be best to verify the propositions by a somewhat detailed examination of the subject.

The provision of the statute of 1851[1] in relation to the authentication of statements on motion for new trial was as follows: "Such statement, when containing any portion of the evidence of the case, and not agreed to by the adverse party, shall be sealed by the judge upon notice." The provisions in relation to the authentication of statements on appeal were as follows:

"Sec. 339.[2] When a statement is made, and the parties shall omit within the several times above limited, the one party to propose amendments, the other to notify an appearance before the judge, they shall respectively be deemed, the former to have agreed to the statement as proposed, and the latter to have agreed to the amendments as proposed."

"Sec. 341. The statement, when settled by the judge, shall be signed by him, with his certificate that the same has been allowed and is correct; when the statement is agreed upon by the parties they or their attorneys shall sign the same with their certificate that it has been agreed upon and is correct. "

[1] Laws of 1851, p. 81, sec. 195. [2] Laws of 1851, p. 105.

Under these provisions it is clear that the authentication could be by the parties as well as by the judge. And it was held with respect to both kinds of statements that the authentication, whether by the parties or by the judge, must be by written stipulation or certificate appearing in the record, and that it could not be implied. This was held with respect to statements on motion for new trial in Linn v. Twist,[3] in which case Heydenfeldt, J., delivering the opinion, said:

"The 195th section of the Practice Act, referring to the statement to be made in support of an application for a new trial, says: 'Such statement, when containing any portion of the evidence of the case and not agreed to by the adverse party, shall be sealed by the judge upon notice.' It is now insisted that because the statement in this case is not sealed by the judge, it must be inferred that it was agreed to. To this argument I cannot assent. It is very clear that to make the statement good it must either be agreed to or it must be sealed by the judge; and one of these conditions must be shown affirmatively. That it is not sealed by the judge, instead of proving that it was agreed to by the parties, imposes on the appellant the necessity of showing that it was agreed to; and as the record does not show this the statement must be rejected. Any other practice than that here indicated would be loose and dangerous. No mode is pointed out for a party to disagree to a statement, and the burden ought to be put on the one who desires to make it perfect. A statement may be filed which would be a distortion of the case as really proved; this of course would not be agreed to, nor would the judge seal it as correct; and yet being on file as the statement of the party for the purpose of a new trial, it would be copied into the record, and sent for adjudication to this court."

The same rule was applied to statements on appeal in Vermule v. Shaw,[4] and Harley v. Young,[5] in the latter of which cases, Murray, C. J., delivering the opinion, said:

"It has heretofore been supposed that the signature of the judge was unnecessary except where the statement had been settled by him. We think that such a construction would lead to endless difficulties, if not more serious consequences. The statement should be signed in all cases by the judge, except when agreed to by the

[3] 3 Cal. 89.
[4] 4 Cal. 214.
[5] 4 Cal. 284.

parties or their attorneys. It would be impossible as well as dangerous to the rights of litigants for us to presume upon the affidavit of counsel, or other similar evidence, that a statement had been made, and in proper time served upon the opposite party, and that he had not filed any objection thereto. These facts are of record, if they exist at all, in the court below; they can be easily called to the attention of the judge, and it is his proper province to pass upon them."

So far, therefore, it is clear that it was necessary to have either a certificate of the judge, or a written stipulation of the parties in authentication of the statement, whether on motion for new trial or on appeal. And this rule rested upon sound principles. The contrary doctrine (of implied authentication) enabled the moving party to put on file an incorrect statement, and throw upon his adversary the duty of taking the proper steps to prevent its being admitted by implication. And this is simply to put a premium upon trickery. But the sound and wholesome rule laid down in Linn v. Twist did not continue in operation very long. It was changed by statute. The provision in relation to statements on motion for new trial was not changed until 1861. But in 1855[6] an amendment was made to section 339, in relation to statements on appeal. And after such amendment the provisions in relation to statements on appeal were as follows:

"Sec. 339. When a statement is made and the parties shall omit, within the several times above limited, the one party to propose amendments, the other to notify an appearance before the judge, they shall respectively be deemed, the former to have agreed to the statement as proposed, and the latter to have agreed to the amendments as proposed, *and no settlement of the statement or certificate thereto by the judge shall be required.*"

"Sec. 341. The statement, when settled by the judge, shall be signed by him with his certificate that the same has been allowed and is correct; when the statement is agreed upon by the parties, they or their attorneys shall sign the same with their certificate that it has been agreed upon by them and is correct."

This amendment introduced the doctrine of implied authentication. The construction which these provisions received was that if the record showed that a statement had been proposed, and that

[6] Laws of 1855, p. 308.

no amendments to it had been filed, the parties would be "deemed to have agreed" to the statement as proposed, and that no written certificate either by the judge or the parties was necessary;[7] and that where amendments had been filed, but no notice of appearance before the judge was shown, the amendments would be deemed to have been agreed to as proposed, and no certificate was necessary.[8] It is manifest that (assuming this construction to have been correct) the statute applied only to statements on appeal, and had nothing whatever to do with statements on motion for new trial. Nevertheless, its operation was extended to such statements. Thus in Dickinson v. Van Horn,[9] the court declined to apply the rule laid down in Linn v. Twist and Harley v. Young, above cited, and with reference to those cases said: "These decisions were made before the three hundred and thirty-ninth section of the code was amended in 1855. We are not disposed, therefore, to extend the principle of the case of Linn v. Twist to any case not strictly parallel in its substantial circumstances. It is true that the provisions of the three hundred and thirty-ninth section *apply only to statements on appeal. But they contain principles that in some measure, by parity of reasoning, would apply to statements for new trials.*" And in the subsequent case of Branger v. Chevalier [10] the rule was applied to a statement on motion for new trial, the court saying: "It is true the statement on motion for new trial was not settled by the judge. The statement was made by the attorney for defendant, and proposed amendments filed by the attorney of plaintiffs; and nothing further was done in reference to it, as appears from the record. In such a case the attorney of defendant must be held as consenting to the amendments, and both parties as agreeing to the statement as amended."

But it was manifest that the operation of a statute could not be extended "by parity of reasoning." And before any amendment of the statute was made, the cases subsequent to the ones last cited followed the rule laid down in Linn v. Twist, at least so far as statements on motion for new trial were concerned.[11] In 1861 the section in relation to such statements was amended,[12] so as to provide that ". . . . such statement, when not agreed to by the ad-

[7] Conner v. Morris, 23 Cal. 447; look at Redman v. Gulnac, 5 Cal. 148.
[8] Dickinson v. Van Horn, 9 Cal. 207; Branger v. Chevalier, 9 Cal. 353.
[9] 9 Cal. 207.
[10] 9 Cal. 353.
[11] Doyle v. Seawell, 12 Cal. 425; Fee v. Starr, 13 Cal. 170.
[12] Laws of 1861, p. 590, sec. 195.

verse party, shall be settled by the judge upon notice; when agreed to it shall be accompanied by the certificate of the parties, or their attorneys, that the same has been agreed upon and is correct; and when settled by the judge, the same shall be accompanied with his certificate that the same has been allowed by him and is correct." This provision was reproduced in subsequent amendments of this section.[13] It very clearly provided for a settlement and certificate by the parties, as well as by the judge.[14] But it did not distinctly negative the implied authentication theory, not much more distinctly, at least, than was done by the previous statute. But the subsequent cases followed the rule of Linn v. Twist, and required an express certificate either of the judge or the parties.[15] The doctrine of implied authentication, however, continued to be applied to statements on appeal[16] until the amendment of 1863. In that year section 339 was amended[17] so as to provide that:

"Sec. 339. When a statement is made, and the parties shall omit within the several times above limited, the one party to propose amendments, the other to notify an appearance before the judge, they shall respectively be deemed, the former to have agreed to the statements as prepared, the latter to have agreed to the amendments as proposed, but the judge who heard the cause shall, notwithstanding such omission or implied agreement, have power to correct any misstatement of facts, or of his rulings which such statement may contain."

Section 341 remained as above quoted, and no further amendment was made to either section. Like the provision in relation to statements on motion for new trial, these provisions provided for a settlement and certificate by the parties, without any intervention of the judge. But it distinctly negatived the implied authentication theory, by providing that the statement should be certified by the judge, notwithstanding any implied agreement to it. After this we find nothing more about implied authentication; and the subsequent decisions as to statements on appeal assert the doctrine of Linn v. Twist.[18]

[13] Laws of 1863, p. 643; Laws of 1863–64, p. 246; Laws of 1865–66, p. 845.

[14] See McCreery v. Everding, 44 Cal. 246.

[15] See McIntyre v. Willis, 20 Cal. 177; Hoadly v. Crow, 22 Cal. 265; Budd v. Drais, 50 Cal. 120.

[16] Connor v. Morris, 23 Cal. 447.

[17] Laws of 1863, p. 644.

[18] Kavanaugh v. Maus, 28 Cal. 261; Vilhac v. Biven, 28 Cal. 409; Wilson v. Dougherty, 45 Cal. 34.

The Code of Civil Procedure, as first enacted, did not provide for any statement, having substituted bills of exceptions. Such bills could be authenticated by stipulation of the parties.[19] But the amendments of 1874 restored statements on motion for new trial, and changed the pre-existing rule as to their authentication, by requiring a certificate from the judge in all cases, whether there was an agreement by the parties or not. The provision is as follows:[19a]

"Sec. 659 (subd. 3)..... If the amendments be adopted, the statement shall be amended accordingly, and then presented to

[19] Sarver v. Garcia, 49 Cal. 218; and see sections 649 and 650, Code of Civil Procedure, as first enacted. And see note 4, section 143, *ante*, as to corresponding provisions in other codes.

[19a] It has been held that authentication of the statement must be in the mode prescribed by statute, if a mode is so prescribed, otherwise it will not be considered on appeal. Jones v. Adams, 18 Nev. 60, 8 Pac. 798; Lockwood v. Marsh, 3 Nev. 138; White v. White, 6 Nev. 20; Solomon v. Fuller, 13 Nev. 276; Simpson v. Ogg, 18 Nev. 28, 1 Pac. 827.

The various statutory methods provided are as follows:

Arizona: No provision made for a statement on motion for new trial. As to "statements of facts," so called, see note 3b, section 250, *post*.

Colorado: No provision made for statement on motion for new trial. Section 218, Mills' Annotated Code, provides, "The motion for a new trial and reasons therefor, and affidavits in support thereof, when required, shall be filed," etc. Section 219 provides, "On the argument of the motion for a new trial, reference may also be made to the pleadings, depositions and evidence, and to the minutes of the court." No other record is required or prescribed at the hearing of the motion.

Idaho: Practice substantially the same as that of California. See section 4441, subdivision 3, Revised Codes.

Montana: No provision made for statement on motion for new trial. Its place is taken by a bill of exceptions. See section 142, *ante*, note 4. Settlement and certification of the bill to be used on such a motion is in the same manner as that provided for a bill for use on appeal. See note 6, section 254, *post*.

Nevada: Section 3292, Cutting's Compiled Laws (section 197, Civil Practice), provides as follows: " When the statement is agreed to it shall be accompanied with the certificate, either of the parties themselves in fact or their attorney, that the same has been agreed upon and is correct. When settled by the judge or referee, it shall be accompanied with his certificate that the same has been allowed by him and is correct. When no amendments have been filed, the statement shall be accompanied with the certificate of the clerk of that fact. "

This provision is substantially the same as that of California under the old Practice Act, and obviously, if the parties can agree, the certificate of the trial judge is not necessary; but it would seem that a certificate of the clerk that no amendments were offered is essential, if such is the fact (Borden v. Bender, 16 Nev. 49; Tull v. Anderson, 15 Nev. 426), and sufficient (State v. Cheney, 24 Nev. 222, 52 Pac. 12); since the statement becomes a part of the record by operation of law, if no amendments are offered within the time prescribed. Id.

New Mexico: No provision made for statements on motion for new trial.

North Dakota: No provision for a statement on motion for a new trial made by statute. As to statement of case, which takes its place, as well the place of the bill of exceptions and statement on appeal provided in other

the judge who tried or heard the cause, for settlement, or be delivered to the clerk of the court for the judge. If not adopted, the proposed statement and amendment, shall within ten days thereafter, be presented by the moving party to the judge, etc. If no amendments are served within the time designated, or if served are allowed, the proposed statement and amendments, if any, may be presented to the judge or referee for settlement, without notice to the adverse party. It is the duty of the judge or referee in settling the statement to strike out of it all redundant and useless matter, and to make the statement truly represent the case, notwithstanding the assent of the parties to such redundant or useless matter, or to any inaccurate statement. When settled the statement shall be signed by the judge or referee, with his certificate to the effect that the same is allowed."

Under this provision a stipulation of the parties is not a sufficient authentication of the statement. There must be in all cases a certificate of the judge.[20]

The foregoing is a history of the variations of the rule as to the authentication of statements. To make it complete it should, perhaps, be added that at one time it seems to have been supposed that by arguing the motion for new trial upon an unauthenticated statement, the defendant to the motion waived the defect. This was held in Williams v. Gregory,[21] where, so far as can be ascertained from the opinion, the court seems to have considered it a sufficient answer to the objection that the statement was not settled, that "the motion for a new trial was heard upon the statement, counter-statement, and affidavit on file." And in the subsequent case of Dickinson v. Van Horn,[22] which, however, proceeded mainly upon

systems of practice, see note 3b, section 250, *post*.

Oklahoma: The motion itself takes the place of the notice and statement provided by other systems of practice.

Oregon: The same remark applies here as to Oklahoma.

South Dakota: See section 303, Code of Civil Procedure. Practice substantially the same as that of California and other states above noted.

Utah: No statement on motion for new trial prescribed. Only affidavits and minutes of court prescribed. See note 1, section 135, *ante*.

Washington: The same remark, used with reference to the practice in Oklahoma and Oregon, applies to that of Washington, except that section 402, Rem. & Bal. Code (section 5075, Bal. Code), provides that the motion must be served upon the adverse party.

Wyoming: Same as Oklahoma.

[20] Schreiber v. Whitney, 60 Cal. 431; Smith v. Davis, 55 Cal. 26; Adams v. Dohrman, 63 Cal. 417; Sawyer v. Sargent, 65 Cal. 259, 3 Pac. 872; Beets v. Chart, 79 Cal. 185, 21 Pac. 730; Douglass v. McFarland, 92 Cal. 656, 28 Pac. 687; and see Gee v. Terrio, 55 Cal. 381.

[21] 9 Cal. 76.

[22] 9 Cal. 207.

another ground, the fact that "both parties appeared at the argument upon the motion for a new trial; and in the order granting the same, and which is signed by the judge, it is recited that the defendant moved the court to grant a new trial for the cause set forth in the statement herein filed," was adverted to as if it was considered material. It is hardly necessary to say that a waiver of the authentication cannot be inferred from the mere fact that it is shown that the successful party argued the motion for new trial. For the whole argument may have been to insist upon the want of an authenticated statement as a reason why the motion should be denied. The rule which the learned justice who wrote the opinions in the two cases last cited had in mind probably was that where a party argues a motion upon the merits, without insisting upon objections to the moving papers, he cannot afterward be permitted to maintain such objections. This rule is well settled with respect to motions in general. Ordinarily, the fact that the party argued the motion for new trial upon its merits, without urging objections to the moving papers, cannot be made to appear to the appellate court. For the record upon the motion is required to be complete before the motion is heard in the court below.[23] And being complete before the hearing, it could not show the circumstances of the hearing. If, however, the fact should appear to the appellate court in accidental or unusual manner, such as by a stipulation of the parties or by a recital in the order disposing of the motion, there seems to have been no good reason why, under the old Practice Act, the defect should not have been held to have been waived. But under the Code of Civil Procedure as is shown above, the parties cannot dispense with the judge's certificate even by an express agreement. *A fortiori* they cannot dispense with it by an implied agreement.[23a]

[23] See section 134, *ante*.

[23a] The decisions of other states support the principles here enunciated. See Hyde v. Harkness, 1 Idaho, 623; Scherrer v. Hale, 9 Mont. 63, 22 Pac. 151; Lockwood v. Marsh, 3 Nev. 138; White v. White, 6 Nev. 20; Solomon v. Fuller, 13 Nev. 276; Simpson v. Ogg, 18 Nev. 28, 1 Pac. 827; Jones v. Adams, 18 Nev. 60, 8 Pac. 798.

The necessity for certification by the judge is regarded as so essential to the validity and effectiveness of the statement, that it has been held that where amendments are tacked on in such a manner as not to be plainly and unequivocally covered by the certificate attached to the original copy, they will be disregarded. Gallatin Canal Co. v. Lay, 10 Mont. 528, 26 Pac. 1001.

Where a bill of exceptions is a mere statement of the proceedings, not signed, certified or dated by the trial judge, it cannot be accepted as a part of the record. Gumm v. Metz, 9 Colo. 580, 13 Pac. 720. It becomes a part of the record only after being duly

While settlement of a statement, or bill of exceptions, may be said to take place actually when the matter of such settlement is taken up and determined by the judge, and he shall determine what shall be included therein, it is not really settled until it is certified as correct, and this cannot be done until the paper is engrossed, if engrossment is necessary.[24] It is not to be understood from this, however, that any new matter may be added to the instrument after it is ordered to be engrossed, or when so engrossed and presented for certification. The only duty which devolves upon the court, and the only right which the parties can insist upon, is, that the statement as engrossed shall embody all that the court, at the time of the actual settlement, ordered should be incorporated in it; and it is a matter solely for the determination of the trial judge as to whether it is so correctly engrossed or not.[25]

It has been held, therefore, that the judge is justified in refusing to certify his settlement of a bill of exceptions that has been ordered engrossed and has been engrossed, if it fails to truly and fully set forth the matters directed to be inserted therein on the settlement thereof, or if it fails to set forth in a reasonably coherent manner, the amendments allowed, or if it contains, as engrossed, material errors in copying, so that it does not correctly exhibit the proceedings the bill purports to introduce into the record on appeal, or exhibits them in a manner so incoherent as to be substantially defective as such record.[26]

The certificate imports the truth of the facts set out in the statement, and is said to be the ultimate authentication of those facts. This is believed to be applicable only to that portion of the statement heretofore described as the substantive portion. For the moving party alone is responsible for the specifications of error and of particulars of the insufficiency of the evidence; and if these

signed and certified by the judge. Bowers v. Beck, 2 Nev. 139; Thompson v. Backenstos, 1 Or. 17. A paper called a "statement," neither settled nor signed, is no part of the record, and cannot be considered on appeal. Crews v. Baird, 2 Idaho, 94 (103), 6 Pac. 116.

[24] See Houghton v. Superior Court, 128 Cal. 352, 60 Pac. 972. See, also, Ryer v. Rio Land Co., 147 Cal. 462, 82 Pac. 62.

The bare act of authentication i. e., the attachment of the signature and certificate of the judge, is an act not vitally necessary at the time of the engrossment, or at any specific time. In Marks v. Culmer, 6 Utah, 339, 23 Pac. 757, the supreme court refused to strike the statement from the transcript because of the omission of the certificate, and it was allowed to be attached in the higher court.

[25] Ryer v. Rio etc. Co., 147 Cal. 462, 82 Pac. 62; Merced Bank v. Price, 152 Cal. 697, 93 Pac. 866.

[26] Galvin v. Hunt, 153 Cal. 103, 94 Pac. 423.

last are inconsistent with or are unsupported by the substantive portion of the statement, they will be disregarded.[27] So copies of instructions taken from the reporter's notes cannot be admitted to discredit copies of instructions as they appear in the bill of exceptions.[28]

Upon the same principle, it has been held that the certificate sustains the presumption that all the evidence material to the points raised is contained in the statement.[29]

§ 158. Authentication by the Judge—What Sufficient.—In the preceding section it has been shown that under the Code of Civil Procedure, as amended in 1874, it is necessary in all cases to have a certificate of the judge in authentication of the statement. It only remains to consider what certificate is sufficient.

The provision of the act of 1851 in relation to the authentication of statements on motion for new trial was as follows:[1] "Such statement, when containing any portion of the evidence of the case and not agreed to by the adverse party, *shall be sealed by the judge* upon notice." In 1861 the section was amended so as to provide that[2] "such statement when not agreed to by the adverse party shall be settled by the judge upon notice; when settled by the judge the same shall be accompanied with his certificate, *that the same has been allowed by him and is correct.*" This provision was reproduced in subsequent amendments of the section.[3] The provision of the act of 1851 in relation to the authentication by the judge of statements on appeal was as follows:[4] "The statement when settled by the judge shall be signed by him, with his certificate *that the same has been allowed and is correct.*" This provision stood from the time of its enactment in 1851 until the adoption of the Code of Civil Procedure. As the code was first enacted no statements were provided for; but by the amendments of 1874

[27] See Macadamizing Co. v. Williams, 70 Cal. 534, 12 Pac. 530, where the court said: "We do not understand that a judge who settles and certifies to the correctness of a statement on motion for a new trial thereby gives validity to the statement of fact in the specifications of error. The specification of errors is essential to a statement, but its office is to call attention to the precise ground relied upon, and not to fortify the alleged error by a statement of facts in its support." And see cases cited in notes 28 and 29.

[28] See People v. Cox, 76 Cal. 281, 18 Pac. 332; People v. Ah Lee Doon, 97 Cal. 171, 31 Pac. 933.

[29] Richardson v. Eureka, 96 Cal. 443, 31 Pac. 458.

[1] Laws of 1851, p. 81, sec. 195.

[2] Laws of 1861, p. 590, sec. 195.

[3] Laws of 1863, p. 643; Laws of 1863–64, p. 246; Laws of 1865–66, p. 845.

[4] Laws of 1851, p. 105.

statements on motion for new trial were restored, and with relation to their authentication it was provided that[5] "when settled the statement shall be signed by the judge or referee, with his certificate *to the effect that the same is allowed.*" It will be seen from the above that at no time since 1851 have the provisions in relation to the authentication of statements by certificate of the judge been essentially different, although the provision in relation to the authentication of statements on motion for new trial, as it stood between 1851 and 1861, was somewhat vague.

It is not necessary that the certificate should show that the settlement was upon notice, or that the proposed statement was served; for unless the statement itself show the contrary, it will be presumed from the certificate of the judge that the settlement was upon notice,[6] and that the proposed statement was served,[7] and in short that all the proceedings were regular.[7a] All that has at any time been necessary is that the certificate should state that the statement "has been allowed by the judge and is correct." Under the code a certificate that the statement "has been allowed" would be sufficient. And probably any equivalent language would suffice. But the prudent practitioner will always follow the language of the statute.

Whether or not a simple signature by the judge without any certificate would do seems somewhat uncertain. In the case of Kidd v. Laird,[8] decided in 1860, it was held that the simple signature of the judge to a statement on motion for new trial (under the act of 1851) was sufficient, and Cope, J., delivering the opinion, said: "No mode of authentication is pointed out by the statute, and any satisfactory evidence that the statement has been examined and approved by the judge is sufficient. This evidence must, of course, appear in the record in some legitimate and proper form." But in the subsequent case of McCartney v. Fitz Henry,[9] decided in the same year, it was held that the simple signature of the judge was insufficient. No reference was made to Kidd v. Laird, nor

[5] Section 659, subdivision 3, California Code of Civil Procedure.

[6] Battersley v. Abbott, 9 Cal. 565; Vilhac v. Biven, 28 Cal. 409.

[7] Young v. Rosenbaum, 39 Cal. 646; Sullivan v. Wallace, 73 Cal. 307, 14 Pac. 789.

Also, Murray v. Hauser, 21 Mont. 120, 53 Pac. 99; Beach v. Spokane etc. Co., 25 Mont. 367, 65 Pac. 106.

[7a] Valentine v. Stewart, 15 Cal. 387; People v. Martin, 6 Cal. 477; Bank of Orland v. Finnell, 133 Cal. 475, 65 Pac. 976.

[8] 15 Cal. 161, 76 Am. Dec. 472; 4 Morr. Min. Rep. 571.

[9] 16 Cal. 184.

does it clearly appear whether the decision was rested upon the provision in relation to the authentication of statements on appeal or the provisions in relation to the authentication of statements on motion for new trial. The court said: "We do not see any settled or agreed statement in this case on motion for new trial or on appeal. There appears the signature of a judge of the district court, but no certificate of the correctness of the statement preceding, which does not purport to be a statement on motion for new trial; nor do we see any order disposing of the motion for a new trial." The decision in Kidd v. Laird is thought to have been correct; for the statute under which it was decided simply provided that the statement should "be sealed by the judge." Probably the grounds of the decision in McCartney v. Fitz Henry were that the statement could not be regarded as a statement on motion for new trial, because it did not purport to be such; and that as a statement on appeal it was insufficient, because the statute in relation to statements on appeal required a certificate that the statement "has been allowed and is correct." It is thought that the rule of Kidd v. Laird could not apply under the code, which, as has been shown, requires "a certificate" that the statement "is allowed."[9a]

A certificate by the judge that the statement was "correct according to his recollection" was held to be insufficient, the court saying: "This is not even a substantial compliance with the statute. The certificate should show with reasonable certainty that the statement is correct."[10] Whether or not a certificate that the statement is "substantially correct" is sufficient is extremely doubtful. In Battersby v. Abbott,[11] the certificate was as follows: "I hereby certify that the foregoing statement is substantially correct. W. T. Barbour, District Court." The objections taken by counsel to this were that it did not show that the settlement was upon notice, and that it was indefinite and uncertain. The supreme court held the certificate to be sufficient, but did not notice the latter objection.

[9a] In the case of Redman v. Gulnac, 5 Cal. 148, the court said: "The certificate of the judge of the court below is a sufficient authentication of the statement. If the respondent did not think proper to file amendments, *or the judge to correct the statement, the certificate of that fact by the judge is all that is necessary.*" This decision probably had reference to the doctrine of implied authentication of the statement which prevailed at one time. See section 157, *ante*. Such "a certificate" would certainly not be sufficient under the code, which expressly makes it the duty of the judge to correct the statement. See same section.

[10] Van Pelt v. Littler, 14 Cal. 194.

[11] 9 Cal. 565.

This certificate was appended to a statement on appeal, and, as above stated, the provision of the statute in relation to statements on appeal was, between 1851 and 1873, that the judge should certify that the statement "has been allowed and is correct." This decision, therefore, would be applicable under the code. But its correctness seems questionable. The phrase "substantially correct" probably means "correct in all important particulars." This implies that in unimportant particulars the statement is not correct, or at least that as to unimportant particulars the judge does not say whether it is correct or incorrect. But how is the supreme court to know what particulars the judge considered unimportant?[12] It might be that the supreme court would have a very different opinion from that of the court below on this subject. A record should import absolute verity in every particular. In Fabian v. Callahan,[13] two of the justices seemed to be of opinion that a certificate that the statement was "correct" was insufficient, and that it ought to have been that the statement was "settled and allowed"; the third justice "assumed, without expressing any opinion on the subject," that the certificate was sufficient. In Girdner v. Beswick[13a] the following certificate was held to be in accord with the provision of the statute: "I hereby certify that the foregoing statement of the case on motion for a new trial is the statement settled and allowed by me therefor. Edwin Shearer, Superior Judge." But, as above stated, it is better to follow the language of the statute, which (as it stands at present) is that the certificate must be to the effect that the statement "is allowed."

The certificate must be appended to the engrossed statement. If it is not, there is danger that it may not identify the parts of the statement. In Smith v. Davis,[14] the certificate was as follows:

[12] When the findings of the court below were that "all the *material* allegations of the complaint were true," it was held that the supreme court could not tell what allegations the court below considered material, and that therefore the findings were insufficient. Look at section 242, *post*.

[13] 56 Cal. 159.

[13a] 69 Cal. 112, 10 Pac. 278.

A certificate "that the foregoing is the settled and engrossed statement on motion for new trial of the above-entitled cause" was held to be sufficient, and a substantial, though not a literal, compliance with the statute. Overman etc. Co. v. American etc. Co., 7 Nev. 312, 2 Morr. Min. Rep. 251.

[14] 55 Cal. 26. See section 156, *ante*, as to the necessity of engrossment. See, also, Crowley v. Croesus etc. Co., 12 Idaho, 530, 86 Pac. 536, where the following was held to be insufficient: "I have this day settled the within statement in the manner marked by me in pencil, allowing the proposed amendments where so marked, and disallowing them where so marked. Lyttleton Price, Judge." And see Hattabaugh v. Vollmer, 5 Idaho, 23,

"The foregoing amendments proposed by defendant are allowed, and the further proposed amendment by plaintiff is also allowed; and said statement of plaintiff as amended *is hereby settled as correct.* W. T. McNealy, District Judge." If this certificate had been written to an engrossed statement it would surely have been held to be sufficient; but it seems to have been written on the draft, and consequently did not identify the amendments which were allowed. The court said: "The statement and amendments were never engrossed and authenticated by the signature of the judge." A certificate written upon the inside of the cover of the transcript on appeal is insufficient.[15]

So, a certificate attached to the body of the statement, and preceding exhibits which are duly and correctly referred to in the statement, is sufficient to include such exhibits.[15a] But where there is any ambiguity as to the matter intended to be covered by the certificate, the ambiguous matter will be disregarded. Thus, in Vierra v. Fontes,[15b] the original draft of the bill of exceptions was printed in one place, and what purported to be the amendments thereto, in another. The amendments were generally preceded by cross-references, such as, "insert ——— after the word ——— in

46 Pac. 831, where it was held, "When amendments are offered and allowed to a proposed statement on a motion for a new trial, the statement as amended must be engrossed before this court will consider such statement.

In Colorado, a bill of exceptions is regarded as a pleading of the party aggrieved, and if it be in any way ambiguous or uncertain, must be construed most strongly against the party who prepared it. Martin v. Force, 3 Colo. 199; Taylor v. Randall, 3 Colo. 399; Big Kanawha etc. Co. v. Jones, 45 Colo. 381, 102 Pac. 171. The bill must be allowed, signed, and sealed, and cannot be considered on review if either step is omitted. See Big Kanawha etc. Co. v. Jones, *supra.* If the seal is omitted, the omission is fatal, and *a fortiori,* if it is not allowed, though signed and sealed. Marshall v. Kirtley, 8 Colo. 108, 5 Pac. 649; Gates v. People, 11 Colo. 292, 17 Pac. 783; Reed v. Cates, 11 Colo. 527, 19 Pac. 464; Big Kanawha etc. Co. v. Jones, *supra.* In the last-cited case, therefore, it was held that a transcript of the evidence extended in longhand, and certified by the court to be a "full, true and correct transcript of the evidence," was held not to be a bill of exceptions; but it was intimated that if the court had attached the proper certificate thereto, the ruling would have been otherwise. See, also, as to defective certificates, the following cases: Reynolds v. Campling, 21 Colo. 86, 39 Pac. 1092; Mason v. Sieglitz, 22 Colo. 320, 44 Pac. 588; Mackey v. Monahan, 13 Colo. App. 144, 56 Pac. 680; Board v. Tulley, 17 Colo. App. 113, 67 Pac. 346; Merriner v. Jeppson, 19 Colo. App. 218, 74 Pac. 341; Lavelle v. Julesburg (Colo.), 112 Pac. 774.

[15] Wilson v. Dougherty, 45 Cal. 34; and see Keller v. Lewis, 56 Cal. 466.

[15a] Sharon v. Sharon, 79 Cal. 633, 22 Pac. 26, 131. See, also, Kimball v. Semple, 31 Cal. 657; People v. Bartlett, 40 Cal. 142; Bush v. Taylor, 45 Cal. 112; Thompson v. Patterson, 54 Cal. 542, which were distinguished in the Sharon case.

[15b] 135 Cal. 126, 66 Pac. 241.

line ——," and "strike out," etc. After the transcript had been printed, the attorney for appellant had attempted, by interlineations, to make the matter more clear; but the certificate of the judge attached to the original draft, and not identifying the amendments at all, couched in the following words, "The foregoing bill of exceptions, with the amendments thereto offered by the defendant, which are allowed, is true and correct, and is hereby allowed and settled," was held wholly insufficient. The certificate is part of the record in the court below, and a copy must be included in the transcript.[16]

The act of certification of an engrossed bill of exceptions, or a statement, is an adjudication, a "proceeding" within the meaning of section 473, Code of Civil Procedure.[17]

The statement cannot be certified after appeal.[18] It is essential to the jurisdiction of the trial court that, if the motion is made upon a statement, it should have before it, at the hearing of the motion, "an agreed, allowed, or *certified* statement," which, of course, would not be the case where a statement appears in the record on appeal minus its proper certificate.[19]

§ 159. Filing of the Engrossed and Certified Statement.— After the engrossed statement is certified it must be filed with the clerk of the court. The old Practice Act expressly required that the *proposed* statement should be filed,[1] but contained no express provision as the filing of the *engrossed* statement. But inasmuch as under the decisions it was necessary to engross the statement after its settlement, which process usually resulted in the creation of a separate document,[2] it was a matter of course that such document had to be filed. For otherwise it would not be a part of the records of the court. The Code of Civil Procedure, as amended in 1874, changed the old practice by providing that the proposed statement should be *served* instead of being filed,[3] and that, "when

[16] Kimball v. Semple, 31 Cal. 657.

[17] See Fountain Water Co. v. Superior Court, 139 Cal. 648, 73 Pac. 590; Merced Bank v. Price, 152 Cal. 607, 93 Pac. 866, as to settlement. See section 145, *ante*, and see section 160, *post*.

[18] See Caples v. C. P. R. R. Co., 6 Nev. 265; Thomas v. Sullivan, 11 Nev. 280. A statement should be settled and authenticated before the motion is decided, where it is made on a statement, and if not, it is irregular and premature. Crosby v. N. B. S. M. Co., 23 Nev. 70, 42 Pac. 583.

[19] See Lamburth v. Dalton, 9 Nev. 64; and the same rule applies to the identification of affidavits, though it does not appear for the same reason. See Dean v. Pritchard, 9 Nev. 232.

[1] See section 145, *ante*.

[2] See section 156, *ante*.

[3] See section 145, *ante*.

settled the statement shall be signed by the judge, with his certificate that the same is allowed, *and shall then be filed with the clerk.*"[4] This latter is merely the distinct expression of what was implied by the provisions of the old Practice Act. The purpose of the requirement is to make the engrossed and certified statement a part of the record in the cause. Where the engrossment does not result in the creation of a separate document, and the document certified is already of record in the cause, it need not be refiled. Thus in Gately v. Irvine,[5] where the moving party combined the old with the new practice by filing as well as serving his proposed statement, and the judge interlined the amendments allowed upon the proposed statement on file, the document having been brought to him for that purpose, and then certified it and had it returned to the files, and it was simply placed among the papers in the case, without being reindorsed "filed," it was held that the objection that it was not filed after settlement was not well taken.

In the foregoing case the fact of the document being on file at the time it was certified was considered equivalent to the filing after the certificate. The evident intention of the language above quoted, however, is that the filing should be after the certificate.[6] The statute does not distinctly specify how long after the certificate the party has to file the statement. But the words "and shall *then* be filed," mean, in all probability, that it must be filed as soon after the certificate as is practicable. A too long delay would be want of prosecution of the motion. In the case of O'Neil v. Dougherty[7] (decided under the old Practice Act) the moving party failed to file his proposed statement as required by the law then in force. But on the last day of the time granted for that purpose, the parties appended to the statement a stipulation: "That the foregoing constitutes a true and correct engrossed and settled statement on the defendant's motion for new trial, hereby waiving all informalities in respect to filing and service of the same." This stipulation under the law then in force was a sufficient authentication. But instead of filing the statement as thus authenticated, the

[4] See note 2, section 145, *ante*.

[5] 51 Cal. 172. This case is the same in principle as Marble v. Fay, 49 Cal. 585, decided under the code as first enacted.

[6] Look at Keller v. Lewis, 56 Cal. 466; Adams v. Dohrman, 63 Cal. 417; and compare Wilson v. Dougherty, 45 Cal. 34.

[7] 47 Cal. 164. The opinion is not clear; but the difficulty seems to have been the long delay in filing the statement after the stipulation.

moving party kept it in his office for six months thereafter. The supreme court refused to consider the statement.

However this may be, the statement is not a part of the record, and is without value to the moving party, until it is placed on file.[7a] It certainly cannot be stricken out until it has been filed.[7b] When filed the motion is in a condition to be heard, but not before.[8] In Mills v. Dearborn,[9] the supreme court declined to consider a state-

[7a] Biagi v. Howes, 66 Cal. 469, 6 Pac. 100; and see Adams v. Dohrman, 63 Cal. 417.

The essential purpose of the act of filing is to make the paper part of the record, and it is often held that it must affirmatively appear that the bill or statement was duly filed in the trial court, and hence is properly in the record as a part thereof. Clarke Co. v. Clarke Co. Commissioners, 1 Wash. Ter. 250; Murrin v. Ullman, 1 Wyo. 36; Geer v. Murrin, 1 Wyo. 37. The paper should therefore be marked as having been filed. Moyer v. Preston, 6 Wyo. 308, 71 Am. St. Rep. 914, 44 Pac. 845.

The act of filing is the concluding act designed to complete the process of making that which would not otherwise be so a portion of the record of the court, and it is usually unnecessary to make an entry in the journal. McBride v. Union Pacific Co., 3 Wyo. 183, 18 Pac. 635.

The act of filing should not precede that of settlement, but where it does not, it is not an irregularity sufficient to cause its elimination from the record, unless prejudice results. Sell v. Graves, 14 Mont. 341, 36 Pac. 354.

The paper must be filed to make it part of the record. Eldred v. Malloy, 2 Colo. 20.

If not filed in time it will be stricken from the files. McQuillan v. Seattle, 7 Wash. 331, 35 Pac. 68; Loos v. Rondema, 10 Wash. 164, 38 Pac. 1012; Zindorf etc. Co. v. Western etc. Co., 27 Wash. 31, 67 Pac. 374; Baker v. Washington etc. Works, 11 Wash. 335, 39 Pac. 642; Tatum v. Boyd, 11 Wash. 712, 39 Pac. 639; State v. Landes, 26 Wash. 325, 67 Pac. 72; Jones v. Herrick, 33 Wash. 197, 74 Pac. 332; State v. Yandell, 34 Wash. 409, 75 Pac. 988; Driscoll v. Dufur, 45 Wash. 494, 88 Pac. 929; State v. Aschenbrenner, 45 Wash. 125, 87 Pac. 1118; Oliver v. Lewis, 9 Wash. 572, 38 Pac. 139; State v. Hinchey, 5 Wash. 326, 31 Pac. 870; State v. Picani, 5 Wash. 343, 31 Pac. 878; State v. Seaton, 26 Wash. 305, 66 Pac. 397; Driscoll v. Dufur, 45 Wash. 494, 88 Pac. 929; Williams v. Rice, 13 Nev. 234; Harrison v. Lockwood, 14 Nev. 263; Robinson v. Benson, 19 Nev. 331, 10 Pac. 441; G. F. M. Co. v. Cable etc. Co., 15 Nev. 450.

The statement must be settled and filed before the hearing of the motion. Parrott v. Hot Springs, 9 S. D. 202, 68 N. W. 329; Plano Mfg. Co. v. Jones, 8 N. D. 315, 79 N. W. 338.

It is to be noted that the statement as *proposed* and the statement as *engrossed* are two different documents. Both require to be filed. The statute *always* makes express provision for filing the proposed statement, and *sometimes* makes express provision for filing the engrossed statement within a specific time. In the above list of decisions no distinction is made between the two classes of documents. The penalty is always the same. If no specific time be provided, however (see below, note 13 et seq.), the filing must be done within a reasonable time; but, as a matter of course, the rule requiring a statement not filed in time cannot be applied, and the entire subject rests in the discretion of the court.

[7b] Biagi v. Howes, 66 Cal. 469, 6 Pac. 100.

[8] Mills v. Dearborn, 82 Cal. 51, 22 Pac. 1114; Mix v. S. D. & C. R. R. Co., 86 Cal. 235, 24 Pac. 1027; Wells v. Kreyenhagen, 117 Cal. 329, 49 Pac. 128; and see Adams v. Dohrman, 63 Cal. 417.

[9] 82 Cal. 51, 22 Pac. 1114. In the same case it was held that in the absence of an indorsement to show the date of filing, an affidavit of the clerk to the effect that it was not on file at the hearing of the motion could

ment, because there was an affirmative showing that it was not on file at the hearing of the motion.

As to what constitutes a filing with the statute, it would seem that if the paper is actually left with the clerk for the purpose of filing, before the submission of the motion, it will be sufficient, even though no indorsement of the filing appeared thereon, and no record thereof was made.[10] But proof of filing must be clear and positive, and actual delivery, either to the clerk himself or one of his deputies, must be shown, coupled with proof that such delivery was for the purpose of filing.[11] It is not sufficient to prove the actual presence of the statement in the office of the clerk, unaccompanied by a showing as to how it came there, and that its presence came about through delivery to the clerk, or one of his deputies, for the express purpose of being filed.[12]

Where the statement or bill of exceptions is required to be filed within some specific period of time, as in the case of the notice of appeal, the undertaking, and other like requirements, as is the case in some states,[13] it is, like such other requirements, usually held to be mandatory[14] and jurisdictional.[15] This time cannot be extended in the absence of a provision to that effect, and such provision must be strictly construed and applied.[16]

§ 160. Amendment of the Statement After It has Been Certified and Filed—Revocation of the Certificate.—It will conduce to

not be contradicted by the affidavit of appellant's attorney, even though supported by other testimony.

[10] Mills v. Dearborn, 82 Cal. 51, 22 Pac. 1114.

[11] Boyd v. Desmond, 79 Cal. 250, 21 Pac. 755.

[12] Boyd v. Desmond, 79 Cal. 250, 21 Pac. 755.

[13] See note 6, section 254, *post.*

[14] See State v. Seaton, 26 Wash. 305, 66 Pac. 397; and also Russell v. Mitchell, 61 Wash. 178, 112 Pac. 250.

[15] See Thomas v. Lincoln Co., 32 Wash. 317, 73 Pac. 367. The statement or bill of exceptions will be stricken out if not filed in time. See note 7a, *supra.*

[16] See State v. Seaton, *supra,* and cases there cited. Also Driscoll v. Dufur, 45 Wash. 494, 88 Pac. 929, where it was held that the order of extension could not be made outside the county. Prospector's Development Co. v. Brook, 31 Wash. 187, 71 Pac. 774; and see section 4377, Pierce's Code (Laws 1901, p. 76, c. 57). Also, McQuesten v. Morrill, 12 Wash. 335, 41 Pac. 56; Wollin v. Smith, 27 Wash. 349, 67 Pac. 561; Dodds v. Gregson, 35 Wash. 402, 77 Pac. 271; Thomas v. Lincoln, *supra;* Humes v. Hillman, 39 Wash. 107, 80 Pac. 1104; Brown v. Kinney, 48 Wash. 448, 93 Pac. 909; Owen v. Casey, 48 Wash. 673, 94 Pac. 473; Crowley v. McDonough, 30 Wash. 57, 70 Pac. 261; Hotel Co. v. Merchants' Ice Co., 41 Wash. 620, 84 Pac. 402. Also, State v. Chapman, 35 Wash. 64, 76 Pac. 525; Rice etc. Co. v. Pacific etc. Co., 35 Wash. 535, 77 Pac. 839; State v. Huston, 32 Wash. 154, 72 Pac. 1015; Hennessey v. Tacoma etc. Co., 33 Wash. 423, 74 Pac. 584; Lamona v. Cowley, 31 Wash. 297, 71 Pac. 1040.

clearness to divide this subject into three parts, and to consider separately, first, the nature and extent of the power, second, the time within which application for its exercise must be made, and third, the evidence upon which the exercise of the power must be based.

1. *As to the Existence and Extent of the Power to Amend the Statement or to Revoke the Certificate.*—When a statement or bill of exceptions has been certified and filed, the judge has no power to certify a second one, the first being in existence.[1] But he has the undoubted power, in proper cases, to amend the statement, or to cancel his certificate and direct a resettlement. This power was derived from section 68 of the old Practice Act, which provided that "any pleading *proceeding* could be amended or relieved against in furtherance of justice." The corresponding section of the Code of Civil Procedure[2] is not dissimilar so far as the question in hand is concerned. That the power exists has been several times decided. Thus in Branger v. Chevalier,[3] where the judge revoked his certificate, and "ordered that the statement should be made conformable to the settled statement," the supreme court said: "The first question presented is whether the judge can afterward set aside or revoke his certificate to the correctness of the statement. We think that he may do so during the term of the court at which the judgment was rendered." In the subsequent case of Valentine v. Stewart[4] the supreme court affirmed the action of the judge in permitting specifications to be added, "by way of amendment," to a statement on motion for new trial, such specifications relating to matter contained in the statement. This case was approved and followed in Loucks v. Edmonson;[5] and in Flynn v. Cottle,[6] where the judge canceled his certificate, the supreme court said: "Under section 68 of the Practice Act we think the court had the power to cancel the certificate on becoming satisfied that the

[1] People v. Romero, 18 Cal. 89; and see Wills v. Rhen Kong, 70 Cal. 548, 11 Pac. 780.

[2] See section 473, California Code of Civil Procedure; and see section 158, *ante*, note 17.

[3] 9 Cal. 351. The report of this case does not show how this question arose in the supreme court. The judge of the court below revoked his certificate, and some motion in regard to the matter was made in the supreme court and denied. But what the motion was or who made it does not appear. Possibly the supreme court may have considered the motion for an order of revocation to be entered *nunc pro tunc* as repeated before it, and have referred to that when it said, "the motion is denied."

[4] 15 Cal. 387.

[5] 18 Cal. 203.

[6] 47 Cal. 526.

statement as settled was erroneous, and that the certificate was made through inadvertence, provided the error was corrected as in this case, either during the term or within five months thereafter. The point seems to have been expressly decided, and we think correctly, in Branger v. Chevalier, 9 Cal. 351."

So in Low v. McCallan[6a] the action of the lower court in permitting defendant to amend his specifications at the hearing of the motion by inserting "or predecessors" after "grantors," was sustained, the court saying, "we do not see that any injury resulted to the plaintiffs." So in Alameda Macadamizing Co. v. Williams,[6b] upon the authority of the last-cited case, the supreme court held that "the specifications may be amended after the time has expired for preparing and settling the statement," though the method of doing so is not pointed out. So in Richardson v. Eureka,[6c] the moving party was allowed to amend his statement in a number of particulars, upon the authority of the two last-cited cases, the court saying: "If such matter was essential to the validity of the statement, there was no error in the ruling of the court, although the amendment was made after the time for filing the statement had expired."

In Warner v. Thomas etc. Co.,[6d] where after settlement, engrossment and filing the proceedings were all vacated, certain exhibits ordered engrossed, and after the paper was re-engrossed it was resettled, the supreme court, in approval, said:

"We see no error in the proceeding. Courts of justice are organized for the purpose of determining the controversies between litigants according to their respective rights; and rules of procedure are intended to facilitate this purpose rather than to hamper and obstruct the action of the court in determining which of the parties is entitled to a judgment. Section 659 of the Code of Civil Procedure makes it the duty of the judge in settling the statement to make it 'truly represent the case, notwithstanding the assent of the parties to any inaccurate statement.' If the judge shall become satisfied that a statement as settled by him does not truly represent the case, he is authorized, and it is his duty, to make such corrections therein as will cause it to conform to the facts."[6e]

[6a] 64 Cal. 2, 27 Pac. 787.

[6b] 70 Cal. 534, 12 Pac. 530.

[6c] 96 Cal. 443, 31 Pac. 548.

[6d] 105 Cal. 409, 38 Pac. 960.

[6e] See comment on this case and that of People v. Southern, 118 Cal. 359, 50 Pac. 545, in Fountain Water Co. v. Superior Court, 139 Cal. 648, 73 Pac. 590.

So in People v. Southern[ef] the principle was applied to criminal cases; and in Swett v. Gray,[eg] amendments were allowed under conditions similar to the Warner v. Thomas case.

In view of these decisions it seems clear that the judge has power in proper cases to allow amendments to the certified statement on file, or to order his certificate to be canceled, and a resettlement and re-engrossment to be had.[eh]

But, as a matter of course, neither party should be allowed, either upon a resettlement or by way of amendment, to add any matter not in relation to proceedings upon the trial. Evidence not introduced, or rulings not made, or exceptions not taken at the trial cannot be thus introduced into the case. And even of proceedings which occurred upon the trial, it is not everything which can be added to the statement after it has been certified and filed. The proper office of an amendment is to perfect that which is imperfectly done, but not to originate some entirely new thing. Therefore, where the statement contains a specification as to any point, but nothing in its support, the matter in its support may be added by amendment, and so where matter in support of a point was put into the statement, but the specification was omitted through inadvertence, such specification may be added. But no case has been found which allows a party to add to the certified statement on file new specifications, not in relation to anything contained in the statement, and then to support such specifications by the addition of entirely new matter. And it is believed that this cannot be done. For, as has been shown,[f] if the party omit to propose any statement in time, his right to have a statement is lost, and cannot be restored by order. And it would seem, where the party omits from his statement, not only the specification as to a point, but everything else in relation to it, that as to such point there is a total failure to file any statement, and that the right to have a statement

[ef] 118 Cal. 359, 50 Pac. 545.

[eg] 141 Cal. 63, 74 Pac. 439. The principle of these decisions was upheld in the subsequent cases of Fountain Water Co. v. Superior Court, 139 Cal. 648, 73 Pac. 590; Merced Bank v. Price, 152 Cal. 697, 93 Pac. 866; Estate of Thomas, 155 Cal. 488, 101 Pac. 798, and in Sprigg v. Barber, 118 Cal. 591, 50 Pac. 682, although the amendment was not always allowed.

[eh] In Estate of Thomas, 155 Cal. 488, 101 Pac. 798, the latest judicial expression upon the subject, it was held that where improper matter has been incorporated in a settled statement, the proper procedure is to move the court to set aside the settlement and amend the statement under the provisions of section 473, California Code of Civil Procedure, on the ground that it does not truly represent the case.

[f] See section 145, *ante*.

as to the point cannot be restored by order. But there is no decision upon his question, and many practitioners are of a contrary opinion to the one above stated.

Where the trouble is that the statement was not engrossed as settled, and the judge has certified it without discovering the fact, the matter may be set right by an order revoking the certificate and directing a re-engrossment of the statement as the same was settled. This was done by the judge in Branger v. Chevalier,[8] above cited. But where new matter is added to the statement as settled, a resettlement should be allowed if desired. For it frequently happens that one party will abstain from having matter inserted in the statement solely because of omissions by the other; and to allow such other to supply his omissions, without affording the first an opportunity to present matter in explanation, would certainly not be "in furtherance of justice."

The power to amend the statement, however, is in the lower and not in the appellate court.[8a]

2. *Time Within Which Application for Relief must be Made.*— The rule that after the adjournment of the term the court has no power to make any amendment to the record, except to correct what appears by the record to be a mere clerical error, was at one time considered to apply to proceedings on motion for new trial. This was said in Branger v. Chevalier, and held in De Castro v. Richardson.[9] But the latter case was expressly overruled in Spanagel v. Dellinger,[10] where it was held that "in the sense of the rule in hand, as to a motion for new trial under our practice, there is no term of court, or if there is, it begins and ends with the motion." The rule, therefore, restricting the power of amendment to cases where application for relief was made before the adjournment of the term, has no application to proceedings on motions for new trial.

The question then arises as to what is the limitation of time for the exercise of the power. And a general answer to the question is furnished by the section from which the power is derived, which, after granting the power, contains the following:[11] "*Provided* that

[8] 9 Cal. 351; and see Merced Bank v. Price, 152 Cal. 697, 93 Pac. 866.

[8a] See section 271, *post*.

[9] 25 Cal. 49. See, also, Wilson v. McEvoy, 25 Cal. 169.

[10] 34 Cal. 476.

[11] Section 473, California Code of Civil Procedure.

application therefor be made *within a reasonable time,* but *in no case exceeding six months* after such judgment, order, or proceeding was taken." It would seem to be clear from this that six months from the date of the certificate [12] is the extreme limit of time in which the application may be made, and that it must be made in such sooner time as is "reasonable."

The case of Merced Bank v. Price [12a] serves as a leading authority in support of the first portion of this rule. In that case the appellants moved for an order of the supreme court permitting them to file, as a part of the record on appeal, certain specifications which were not included in the bill of exceptions as certified by the trial judge. It was made to appear that such specifications were in fact allowed and settled by the judge as a part of the bill, and that when he certified the engrossed bill they were intended by him to have been included therein, and that he believed they had been so included, but by inadvertence they had been omitted. The supreme court held that the certification of the engrossed bill was an adjudication of the court,[12b] and final, and was a record that could not be corrected otherwise than under the provisions of section 473, Code of Civil Procedure; that is, upon motion, within six months after such certification, and unless so corrected it must stand as the record of the court upon which its order was made; and, finally, that the showing did not warrant the application of the rule of clerical or ministerial misprision. The following brief quotation from the opinion of the court gives a comprehensive statement of the rule:

"It is settled that an appeal from an order denying a new trial deprives the superior court of jurisdiction to set aside such order,

[12] As already shown, the motion is independent of the judgment, and therefore the six months does not run from the judgment. The making of the certificate, as heretofore stated (see section 158, *ante,* note 17), is the "proceeding" referred to. This was decided in the case of Fountain Water Co. v. Superior Court, 139 Cal. 648, 73 Pac. 590, where the court held that when a statement on motion for a new trial is settled and filed it becomes a record of the court, and is only subject to the action of that tribunal within the time limited by section 473, Code of Civil Procedure, and the superior court is without power to grant relief upon an application made after the expiration of six months from the date of the certificate of settlement. The date of the certificate of settlement is, therefore, the point of time when the six months' period begins to run, and the certificate is a "proceeding" taken against the moving party. And see Merced Bank v. Price, 152 Cal. 697, 93 Pac. 866.

[12a] 152 Cal. 697, 93 Pac. 866; and see Sprigg v. Barber, 118 Cal. 591, 50 Pac. 682; Estate of Thomas, 155 Cal. 488, 101 Pac. 798.

[12b] See section 158, *ante,* note 17; and note 12, *supra.*

that while the order is in force the record upon which it is based cannot be changed, and that this court must review the order upon the same record upon which it was made. (See Baker v. Borello, 131 Cal. 617, 63 Pac. 914.) A different rule applies where the bill of exceptions is to be used on an appeal from a decision made before the bill of exceptions was settled; the effect of an amendment in such a case being simply to enable this court to review the decision of the lower court in view of all the facts which that court had before it when it made its decision. This is shown by In re Lamb, 95 Cal. 397, [30 Pac. 568], an appeal from an order setting apart a homestead, where, after appeal taken, the judge of the superior court allowed the bill settled after the making of the order to be amended by the insertion of specifications of insufficiency of evidence. It is possible in the case at bar, if it could be made to appear that the motion for a new trial was heard and determined upon the theory that said specifications were in fact a part of the certified bill, a different rule might obtain. It is, however, unnecessary to determine this question," etc.

No doubt a different rule would control, for in that case, if the specifications were really treated as having been included in the bill, at the hearing, there can be no question but that their omission from the engrossed bill was ministerial misprision, rather than inadvertence—the error of the copyist rather than of the party himself—and it would be the duty of the court to so treat it.

Aside from the requirement that the application must in any event be made within six months after the date of certification, what constitutes a reasonable time must depend in great measure upon the circumstances of each case. But in this regard there is a distinction between cases where the record upon which the appeal is heard is made up after the rendition of the decision appealed from, and cases where the decision appealed from is made upon and with sole reference to a record previously made up, and which is sent without change to the supreme court. Thus in civil cases, statements or bills of exceptions *upon appeal* are made up after the decision appealed from is rendered; and they can be amended after appeal taken, and even after the transcript is filed. This was held with reference to statements on appeal in Flynn v. Cottle,[18] in which case the supreme court said: "The

[18] 47 Cal. 526. This case overrules the *dictum* in People v. Romero, 18 Cal. 89, to the effect that the application to amend must be made before

appellant contends that after the appeal was perfected in due form and the transcript had been filed in this court containing the settled statement duly certified, it was not in the power of the district court to invalidate the appeal by canceling his certificate to the statement. But the statement itself was settled and the certificate made after the appeal was perfected; and the fact that the transcript was filed in this court did not deprive the district court of any power which it otherwise had to amend its records." In such case the decision appealed from is made upon matter presented at the trial, which matter is afterward incorporated into a record, and the amendment being confined to matter presented at the trial, it follows that it cannot result in the supreme court having to pass upon matter which was not before the court below in making its decision.

That this is the correct principle was decided in the cases of In re Lamb,[13a] Sprigg v. Barber,[13b] and Baker v. Borello.[13c] In the first of these cases the trial court granted a motion to amend the bill of exceptions by the addition of certain specifications of particulars. The supreme court sustained this action on the ground that the bill which was amended was prepared after the decision, and its purpose was simply to enable the appellate court to review the decision "in view of all the facts which that court had before it when it made such decision." In Sprigg v. Barber, the application was made nine months after the statement was settled. The court did not determine whether the application should have been granted if it had been made within six months; but the intimation is plain that the doctrine of Flynn v. Cottle, *supra*, would control. In Baker v. Borello, the bill of exceptions which was sought to be amended was the record upon which the new trial order was based. The supreme court said:

"We have no doubt that a bill of exceptions, or statement which has been settled after appeal taken, may be corrected by a proper proceeding under section 473 of the Code of Civil Procedure, com-

the transcript is filed; and what is said in the latter case about the supreme court giving ear to controversies concerning the record is irrelevant because the amendment is to be made in the lower court, without troubling the supreme court in the premises. After the amendment is made in the court below, it is incumbent upon the supreme court, upon suggestion of diminution of record properly made, to send the transcript back, or allow an amendment thereof, in order that it be a true copy of the record in the court below.

13a 95 Cal. 379, 30 Pac. 568.

13b 118 Cal. 591, 50 Pac. 682.

13c 131 Cal. 617, 63 Pac. 914.

menced, as this was, within six months after the settlement, for in such cases the superior court is empowered to settle the bill or statement—i. e., to complete the record—after and for the purposes of the appeal. [Citing above cases.] But a bill of exceptions, prepared and settled beforehand to be used in support of a motion for a new trial, after the denial of the motion and an appeal therefrom, presents a different question. We are of the opinion that in such case the record cannot be amended, and this for reasons which, though technical, are nevertheless conclusive. The appeal deprives the superior court of jurisdiction to set aside its order denying the new trial, and while that order is in force the record upon which it is based cannot be changed, and this court must review the order upon the same record upon which it was made."

It is thus clear that a different rule governs where the record is previously prepared, as it frequently is in civil cases,[14] and the decision appealed from is the order granting or refusing the motion, which order is made upon and with sole reference to the record upon the motion.[15] Nothing which occurred upon the trial, unless it be incorporated into such record, is before the court at the hearing of the motion. And if anything be added afterward it is evident that it would result in the supreme court having to pass upon a different record from that passed upon by the court below, which is contrary to a cardinal rule of appellate practice.[16] It is submitted, therefore, that while a statement or bill of exceptions upon appeal can be amended by the court below after an appeal is taken and the transcript is filed, a statement or bill of exceptions on motion for new trial cannot be amended after the decision upon the motion in the court below,[16a] unless the decision upon the motion be first set aside. Whether or not such decision may be set aside by the court below, before appeal taken, in order

[14] In criminal cases the record upon the motion for new trial is made up after motion is decided. Lin Tai v. Hewitt, 56 Cal. 117, and note 1 to section 134. Consequently, in such case such records may be amended after appeal taken. People v. Romero, 18 Cal. 89. The same is true in civil cases of motions made upon the minutes of the court.

[15] See section 134, *ante*.

[16] See section 283; and look at Satterlee v. Bliss, 36 Cal. 489.

[16a] Where after the statement was signed and filed, and the motion for new trial denied, and an appeal was taken from the order denying the motion, the judge made an order allowing specifications to be annexed to the statement *nunc pro tunc* as of the day of the settlement, the supreme court disregarded such specifications. Preston v. Hearst, 54 Cal. 595.

to permit an amendment to the record upon the motion, has not been decided. It certainly could not be unless the order could in such case be considered as one inadvertently made within the rule examined in section 134.[16b] Probably it would be so considered. But after appeal taken the court below cannot set aside its order granting or refusing the motion for a new trial, to allow an amendment to the statement or bill of exceptions. For in such case, as above stated, if the appeal is to stand, it must be heard upon a different record from that upon which it was heard in the court below; and if the appeal is not to stand, the result would be that the lower court would have the power to invalidate an appeal taken from its own decision to the appellate court.

In certain cases the judge may direct an amendment without any application from either party; for under the code, as has been shown,[17] it is the duty of the judge to make the statement conform to the truth, notwithstanding the assent of the parties to an incorrect one. And therefore if the judge discover that he has been misled he may of his own motion direct an amendment or cancel his certificate. But it would seem that he must act within the time in which an application might have been made by the parties. And it is thought that the action of the judge in amending the statement without application of the parties would be confined to making the statement truly represent the case as to the points specified, and that he could not of his own motion add specifications of error.

Until the certificate of the judge is attached to the statement or bill of exceptions, the statutory limit of six months does not begin to run. "The proceeding had not been taken or completed in a legal sense, so as to be susceptible of having applied to it the statutory limit under section 473 of the Code of Civil Procedure."[17a] Where, in such a case, it becomes necessary to complete the settlement of the statement by attaching thereto the certificate of the judge, it is proper to incorporate an amendment,

[16b] See Baker v. Borello, 131 Cal. 617, 63 Pac. 914, where the court intimated the proper practice, where this was the case, in the following language: "It has been held, and we have no doubt correctly held, that where a new trial has been granted by an order improvidently or prematurely made before the record was properly settled and certified, this court, upon reversal of the order, may remand the cause for further and orderly proceedings."

[17] See sections 154 and 157, *ante*.

[17a] Smith v. Stockton, 73 Cal. 204, 14 Pac. 675.

such as specifications of particulars of insufficiency of the evidence.[17b]

The supreme court will not ordinarily send a case back for the mere purpose of allowing an application to be made to amend the statement.[17c]

3. *Evidence upon Which the Exercise of the Power Should be Based.*—The rule that after the adjournment of the term the record could not be amended, unless it contained something "to amend by,"[18] was by the earlier cases applied to proceedings on motion for new trial.[19] But as is shown in the preceding subdivision, that doctrine was overturned in Spanagel v. Dellinger,[20] in which case it was held that as to such proceedings "there is no term of court, or if there is it begins and ends with the motion." This decision cuts away the foundation of the application of the rule to records on motions for new trial; and consequently such records can be amended, although they contain nothing "to amend by." It would seem that the amendment may be made upon the recollection of the judge, or upon any evidence which is competent and satisfactory to him. In the case of People v. Romero,[21] however, it was said that unless the facts were undisputed the amendment could only be made upon documentary evidence. In that case the judge by some oversight signed a bill of exceptions which misstated the facts of the case. An alternative writ of *mandamus* was issued, and in response to it the judge returned a second bill of exceptions without, however, having set aside the first. The supreme court held that it could not consider the second bill, and Field, C. J., delivering the opinion, said:

"When a mistake or omission has occurred the judge may allow a resettlement, provided it is asked for before the transcript is sent to this court, and the mistake or omission is supported by documentary evidence, or is not denied by the adverse party. But where the existence of the alleged mistake or omission rests in the mere recollection of the judge or of counsel in the case, and it is admitted by the parties, a resettlement should be refused.

[17b] Smith v. Stockton, 73 Cal. 204, 14 Pac. 675.

[17c] Adams v. Dohrman, 63 Cal. 417; and look at People v. Romero, 18 Cal. 89.

[18] See Morrison v. Dapman, 3 Cal. 255.

[19] Branger v. Chevalier, 9 Cal. 351; De Castro v. Richardson, 25 Cal. 49; Willson v. McEvoy, 25 Cal. 169.

[20] 34 Cal. 476.

[21] 18 Cal. 89.

Any other rule would be productive in many instances of great injustice. After the transcript has been brought to this court it will not be sent back, in order that the statement or bill of exceptions (and these terms are used as meaning the same thing) may be changed by a resettlement, except upon like proof or admission of the mistake alleged. We cannot listen to conflicting affidavits or statements of parties as to what was admitted or proved in the course of the proceedings in the court below. The certificate of the judge, independent of the settled bill of exceptions, cannot rank higher than those affidavits. His memory is of course subject to the same imperfections as that of the parties. His recollection may be met by the different recollection of others, and thus a controversy would ensue. It would be a very singular proceeding for us to give ear to a controversy of such a character, and yet it is difficult to see how this can be avoided, if the certificate of the judge can be read at all. Errors in dates, in copies of documents, in description of premises, taken from conveyances and the like, can be corrected by a resettlement; and upon a proper showing made before argument we may send the record back to the court below for that purpose. So, too, where the errors are admitted. But to go further than this would lead to infinite mischief."

Concerning this case,[22] it may be remarked that it was perfectly proper to quash the writ issued; for as has been shown,[23] *mandamus* can only be issued to compel the judge to settle *some* statement, and not to compel him to settle any particular one, or what amounts to the same thing, to set aside the one he has settled and settle some other one. But as to the rule asserted that the court below can act upon documentary evidence only, it is thought that the assertion is open to question. Possibly the court had in mind the rule then prevailing that after the adjournment of the term the record could only be amended where it contained something to amend by. If so, what was said must fall with the rule referred to. But if that be not what was meant, and some kind of documentary evidence other than record evidence was referred to, then it is thought that the rule asserted cannot be maintained. Under the rule as to the adjournment of the term the court could, before such adjournment, make an amendment to the record upon any satisfactory evidence, or upon his mere memory; for until

[22] See note 13 to this section. [23] See section 155, *ante*.

the adjournment the case was "in the breast" of the court. And it would seem that after the abolition of the restriction the judge has the same power which he had before the adjournment, and can amend the record upon the motion upon any evidence that may be satisfactory. In the cases of Spanagel v. Dellinger and Flynn v. Cottle, above cited, it does not appear that the action of the court was based upon documentary evidence. But no other decision upon the subject has been found, and the question must therefore be regarded as not settled.

CHAPTER XXIII.

PAPERS ON WHICH THE MOTION MAY BE MADE—THE MINUTES OF THE COURT.

§ 161. When the motion may be made upon the minutes of the court.
§ 162. What are the minutes of the court.
§ 163. Record on appeal when the motion is made on the minutes of the court.

§ 161. When the Motion may be Made upon the Minutes of the Court.—The old Practice Act did not contain any provision authorizing a motion for new trial to be made upon the minutes of the court;[1] nor was such a provision contained in the Code of Civil Procedure as first enacted. But as amended in 1874 the code contains the following provisions:

"Sec. 658. When the application is made for a cause mentioned in the first, second, third and fourth subdivisions of the last section it must be made upon affidavits; for any other cause [excessive damages, insufficiency of the evidence, error in law] it may be made at the option of the moving party, either upon the minutes of the court, or a bill of exceptions, or a statement of the case, prepared as hereinafter provided."

Whenever, therefore, the motion is to be made upon the ground of excessive damages, or the insufficiency of the evidence, or error in law occurring at the trial and excepted to, the party has the option to proceed either upon a bill of exceptions, or a statement, or upon "the minutes of the court." The last has, as above stated, been in operation only since 1874, and until a period comparatively recent, has not been much resorted to by practitioners. It has not, therefore, until recently, received the exhaustive construction that has been given the provision as to statements and bills of exceptions.

§ 162. What are the Minutes of the Court.—This question was answered by section 660, which as amended in 1874 provides that " on such hearing reference may be had in all cases

1 See Laws of 1851, p. 81; Laws of 1861, p. 590; Laws of 1863, p. 643; Laws of 1863-64, p. 246; Laws of 1865-66, p. 845.

For corresponding sections of other codes, see note 1, section 135, *ante*. And see note 19a, section 157, *ante*.

to the pleadings and orders of the court on file, and when the motion is made on the minutes, reference may *also* be had to any depositions, documentary evidence, and phonographic report of the testimony on file." The papers thus referred to constitute the "minutes of the court" as the term is used in section 658, above quoted. It will be observed of section 660 that the papers designated must be *on file*. The pleadings and depositions are always on file; but this is not usually the case with regard to the exhibits introduced in evidence or the phonographic report of the testimony. And such papers unless on file would not be within the permission of the statute. But the section does not specify whether such papers are to be "on file" when the notice of intention is given or when the motion is heard. Probably it would be sufficient if they were filed at any time before the hearing of the motion. There is no decision upon the question.

It sometimes happens that no shorthand report of the court proceedings is made during the trial. This fact need not, however, prevent the losing party from making his motion on the minutes of the court. He is compelled in such case to depend upon the recollection of the judge as to such evidence and proceedings, and this is, perhaps, the reason for the code provision requiring the motion to be heard at the earliest practicable period after notice, when it is to be heard on the minutes of the court.[1]

[1] Malcolmson v. Harris, 90 Cal. 262, 27 Pac. 206.

In this case there were no phonographic notes, and the moving party, having prepared a statement containing a report of the proceedings and evidence from memory, presented the same to the judge who tried the action for settlement. Settlement was refused on the ground that no shorthand report of the testimony had been taken. The moving party thereupon asked the supreme court for a writ of mandate compelling settlement, and the same was granted. The learned chief justice (Beatty), who wrote the opinion of the court, took occasion to say: "Possibly the explanation [referring to the fact that this procedure is so seldom resorted to] is to be found in the fact that the terms of the statute leave it doubtful whether in a case like the present, where there are no written notes of the testimony capable of being placed on file, the moving party can have any advantage of the testimony actually adduced at the trial, and necessarily resting alone in the recollection of the judge. If so, it is fortunate that an occasion has arisen for removing any misconstruction on that point, for we have no doubt that a party moving on the minutes of the court may rely on all matters that could be legitimately included in a statement prepared in advance of the motion. It is true that the statute enumerates depositions, documentary evidence, and phonographic report of testimony as matters to which reference may be had on the hearing of the motion (section 660) and there is some force in the argument that such an enumeration should be regarded as exclusive; but there is much more force in the consideration that since the judge has the undoubted right to include testimony actually

§ 163. Record on Appeal Where the Motion is Made upon the Minutes of the Court.—Since no record upon the motion is made up before the hearing in cases where the motion is made upon the minutes of the court, it is necessary that one should be made afterward, if the losing party wishes to take an appeal from the order granting or refusing a new trial.[1] The provision of the code in relation to such record is as follows:[1a]

"Sec. 661. The judgment-roll, etc. shall constitute the record to be used on appeal from the order granting or refusing a new trial, unless the motion be made on the minutes of the court, and in that case the judgment-roll, and a statement to be subsequently prepared, with a copy of the order, shall constitute the record on appeal. Such subsequent statement shall be proposed by the party appealing or intending to appeal, within ten days after the entry of the order, or such further time as the court in which the action is pending, or a judge thereof may allow, and the same or a copy thereof be served upon the adverse party, who shall have ten days thereafter to prepare amendments thereto, and serve the same or a copy thereof upon the party appealing, or intending to appeal, and thereafter proceedings shall be had, and within like periods, for the settlement of the statement as provided by section 659, but the statement shall only contain the grounds argued before the court for a new trial, and so much of the evidence or other matter as may be necessary to explain them; and it shall be the duty of the judge to exclude all other evidence or matter from the statement."

The statement above provided for resembles the statement on appeal of the old Practice Act in that it is made up after the

given, though not reported, in a statement prepared in advance of the hearing, there is no reason why his recollection of the evidence should not be equally resorted to in making a statement after the hearing. The statement, at whatever time prepared, ought to be a correct presentation of so much of the testimony as is material, derived from the reporter's notes, if there are any, and if not, from the recollection of the judge, assisted by such notes as he may have taken; and the mere fact that there is no shorthand report of the trial ought not to be held to deprive the losing party of the privilege of moving for a new trial in the speediest and most convenient mode prescribed by the statute, unless its terms are such as to admit of no doubt that such was the intention of the legislature."

See, also, as to meaning of minutes of court, Distad v. Shanklin, 11 S. D. 1, 75 N. W. 205.

[1] Oakland Gas Light Co. v. Dameron, 57 Cal. 292; and see Davis v. Hurgren, 125 Cal. 48, 57 Pac. 684; also Malcolmson v. Harris, 90 Cal. 262, 27 Pac. 206.

[1a] Corresponding provisions in other codes are: Section 4443, Revised Codes of Idaho; section 6799, Revised Codes of Montana.

rendition of the decision appealed from. And this resemblance involves certain consequences elsewhere explained.[2] But the statement under consideration is to be prepared in the same manner as other statements on motion for new trial, the procedure in relation to which has been explained in the preceding chapter. It must be confined, however, to the grounds "argued before the court for a new trial." It would not be amiss if the statement should contain an express assertion that the grounds set forth in it were argued in support of the motion. But probably it would be presumed that the judge had done his duty, and excluded all the grounds not argued before him in support of the motion, and consequently that the grounds included were argued. And if such presumption were made, it would be sufficient that certain grounds of the motion appeared in the statement. The statute nowhere specifies the particularity with which these "grounds" must be set forth. And in view of this omission and of the requirement in the section above quoted, that the statement shall be prepared in the same manner as other statements on motion for new trial, it is thought that the grounds to be contained in the statement are the specifications of error and of the insufficiency of the evidence which are contained in the notice of intention,[3] or such of them as were argued in support of the motion. It is true that the statute is not express upon this point; but it is certain that the statement must show what "grounds" were argued in support of the motion. More particularity than is necessary in the specifications contained in the notice cannot reasonably be required, and less would involve much uncertainty as to what specifications had really been argued.

As elsewhere shown, the notice of intention or notice of motion, as here described, is no part of the judgment-roll.[3a] If it is desirable, therefore, to bring up the notice in the transcript, its place has been said to be in the statement or bill of exceptions. This is true whether the statement or bill is made up before or after the hearing of the motion, whether the latter is made upon a statement or bill or upon the minutes of the court.[3b]

[2] See section 160, *ante*, subdivision 2.

[3] See section 23, *ante*.

[3a] See sections 23 and 151, *ante*, and section 168, *post*. See Pico v. Cohn, 78 Cal. 384, and cases cited in note 4, section 151, *ante*.

[3b] See sections 23 and 151, *ante*, and section 168, *post*. The notice will be disregarded unless incorporated in

As also shown in another place, when the motion is made upon the minutes of the court, the notice must contain the specifications of particulars and of error upon which the party relies.[3c] A convenient practice is, therefore, to set out the notice at length in the statement. This is said to obviate the necessity of separate specifications in the statement.[3d] If the notice is not brought up, however, no presumption inimical to its sufficiency arises; on the contrary, it will be presumed that it was sufficient.[3e]

If the notice fails to specify the particulars in which the evidence is alleged to be insufficient, or the errors of law relied upon as grounds for new trial, no subsequently prepared statement or bill of exceptions is authorized or required.[3f]

The statement must be settled and certified by the judge before whom the motion was heard. The clerk of the court has no power to supply the certificate which constitutes the authentication by the judge of a statement settled by him.[3g]

Proceedings for the preparation of the statement can be commenced at the time of or before or after the taking of the appeal, but must be commenced "within ten days after the entry of the order," or within such further time as may be granted therefor.[4]

the statement or bill of exceptions, and if the specifications contained therein are relied upon, the notice must be incorporated in the statement or bill. Roberts v. Hall, 147 Cal. 434, 82 Pac. 66.

[3c] See section 659, Code of Civil Procedure, subdivision 4, and section 23, *ante*, for corresponding sections of other codes.

And see Reagan v. McKibben, 11 S. D. 270, 76 N. W. 943, 19 Morr. Min. Rep. 270; Hall v. Harris, 1 S. D. 279, 36 Am. St. Rep. 730, 46 N. W. 931; Henry v. Maher, 6 N. D. 413, 71 N. W. 127; Hermon v. Silver, 15 S. D. 476, 90 N. W. 41; Bunker v. Taylor, 10 S. D. 526, 74 N. W. 450; Regan v. Whittaker, 14 S. D. 373, 85 N. W. 863, 21 Morr. Min. Rep. 309; Narregang v. Brown Co., 14 S. D. 357, 85 N. W. 602, where it was held that the notice must specify the particulars and errors relied upon, when the motion is to be heard on the minutes.

[3d] What is here said as to incorporation of the notice in the statement refers to mere matter of convenience. If the specifications in the notice stood the test at the hearing of the motion, it is to be assumed that they would be sufficient on the appeal. See Leonard v. Shaw, 114 Cal. 69, 45 Pac. 1012; Sprigg v. Barber, 122 Cal. 573, 55 Pac. 419.

[3e] See Pico v. Cohn, 78 Cal. 384, 20 Pac. 706; Southern Pac. Co. v. Superior Court, 105 Cal. 84, 38 Pac. 726; Schneider v. Market St. Ry. Co., 134 Cal. 482, 66 Pac. 734; Roberts v. Hall, 147 Cal. 434, 82 Pac. 66; and see note 4, section 151, *ante*.

[3f] Buckley v. Althorf, 86 Cal. 643, 25 Pac. 134; and see Sprigg v. Barber, 122 Cal. 573, 55 Pac. 419; and section 23, *ante*.

[3g] Sprigg v. Barber, 122 Cal. 573, 55 Pac. 419; Kent v. Williams, 146 Cal. 3, 79 Pac. 527.

[4] See previous chapter relative to statements on motion for new trial.

CHAPTER XXIV.

THE MOTION FOR NEW TRIAL.

§ 164. The Motion—Right of Parties to be Heard upon It—Remedy for Denial of the Right.—The motion for new trial by counsel in open court is a distinct and separate step in the proceedings.[1] It should be made as soon as practicable after the completion of the moving papers, or, if the motion is made upon the minutes of the court, as soon as practicable after the notice is filed. The provision of the code in this regard is as follows:[1a]

"Sec. 660.[2] The application for new trial shall be heard at the earliest practicable period after notice of the motion, if the

[1] Jenkins v. Frink, 27 Cal. 337; Quivey v. Gambert, 32 Cal. 304; and look at Stoyell v. Cole, 19 Cal. 602; Budd v. Drais, 50 Cal. 120.

[1a] This and corresponding provisions apply to systems of practice where there is a notice of intention. Where the motion is the initial step in the proceedings, and there is no notice of intention, there is usually a specific time fixed within which the notice must be filed. See section 17, *ante*. Thus in Arizona, the motion must be made within five days after rendition of judgment or of verdict, "if the term of court shall continue so long; if not, then before the end of the term." Section 1478, Revised Statutes. If not made within that time the motion will be denied. Walker v. Blake (Ariz.), 108 Pac. 221, and cases cited.

Notice of intention is not required in Colorado, New Mexico, Oklahoma, Oregon, Washington and Wyoming. In Oklahoma and Wyoming, provision is made for a proceeding in the nature of a motion for a new trial, commenced after the adjournment of the term at which the judgment was rendered which it is sought to vacate or modify by a petition and a summons, which may be regarded as a notice, but without any of the usual characteristics of a notice of intention. See section 5829, Compiled Laws of Oklahoma, and section 4605, Compiled Statutes of Wyoming.

In most of these states written motion for new trial is expressly required, and such motion is in its contents and purpose, although not in its form, a notice of intention and a statement on motion for new trial combined. In Oklahoma provision is made for a case-made, and this is sometimes made use of at the hearing of the motion.

But whether the proceedings are initiated by a notice or by a formal motion, the principles here stated are equally applicable.

It is to be noted, however, that while the time to give the notice may be extended, it is doubtful if the time to file the motion may. In Oklahoma it has been held that the time could not be so extended. United States v. Railroad Co., 3 Okl. 404, 41 Pac. 729; Ryland v. Coyle, 7 Okl. 226, 54 Pac. 456; Joiner v. Goldsmith, 25 Okl. 840, 107 Pac. 733. So, in New Mexico (Schofield v. Slaughter, 9 N. M. 422, 54 Pac. 757), and Wyoming (Boswell v. Bliler, 9 Wyo. 277, 62 Pac. 350).

[2] The above section is as amended in 1874. As the code was first enacted the party was required to specify in his notice the time and place of the motion, and as a matter of course it had to be made at the specified time. The provision of the old Practice Act as adopted in 1851 was as follows: "Sec. 196. The application for a new trial shall be made at the earliest period practicable after filing the affidavit or statement." Laws of 1851,

motion is to be heard upon the minutes of the court, and in other cases after the affidavits, bill of exceptions, or statements, as the case may be, are filed, and may be brought to a hearing upon motion of either party. On such hearing reference may be had in all cases to the pleadings and orders of the court on file; and when the motion is made on the minutes reference may also be had to any depositions, documentary evidence, and phonographic report of the testimony on file."

The motion may be made orally, but it is certainly better practice to make it in writing, or have it appear in the minutes of the court.[2a] In any case the grounds upon which the motion is made must be given. They need not be stated at length. It is sufficient if the moving party, in making the motion, informs the court as to the grounds upon which he relies. He may do this by referring to some other paper, as, for example, the notice of intention, wherein the grounds must be set out at length. In the case of Williams v. Hawley,[2b] it was said:

p. 82. In 1863 this section was amended so as to read as follows: "Sec. 196. The application for a new trial shall be made at the earliest period practicable after filing the affidavit or statement, and the court or judge granting or refusing the new trial shall state in writing the grounds upon which the same is granted or refused." Laws of 1863, p. 361. The portion of section 660 above quoted in relation to the papers to which reference may be made on the hearing is taken from section 195 of the old Practice Act. Section 195 always contained a similar provision. See Laws of 1851, p. 81; Laws of 1861, p. 590; Laws of 1863, p. 643; Laws of 1863–64, p. 246; Laws of 1865–66, p. 845. As a matter of course, reference may be had also to the statement or bill of exceptions or affidavits.

Corresponding provisions in other codes are as follows: Section 220, Mills' Annotated Code of Colorado; section 4442, Revised Codes of Idaho; section 6797, Revised Codes of Montana; section 7067, Revised Codes of North Dakota; section 305, Code of Civil Procedure of South Dakota; section 3297, Compiled Laws of Utah.

Section 1479, Revised Statutes of Arizona (section 270, Civil Practice), requires new trial motions to be determined at the term at which the motion was made, "unless continued for good cause." Section 2685, subsection 133, Compiled Laws of New Mexico, contains a similar provision. Section 175, Lord's Oregon Laws, contains the same requirement, with the proviso that the court may continue it for want of time to hear it, or "for advisement."

[2a] Herrlich v. McDonald, 80 Cal. 472, 22 Pac. 299; Williams v. Hawley, 144 Cal. 97, 77 Pac. 762.

[2b] 144 Cal. 97, 77 Pac. 762; and see Great Western Gold Co. v. Chambers, 153 Cal. 307, 95 Pac. 151; Boin v. Spreckels, 155 Cal. 612, 102 Pac. 937. The report in this last-cited case discloses the fact that at least one *nisi prius* judge was misled by the language of the Williams v. Hawley decision. When the motion for a new trial came on for a hearing, all the parties were present, but the motion was submitted, apparently without a formal motion, at least without comment, and it was thereupon taken under advisement. A month later the court denied the motion, reciting in the order that "no oral statement whatsoever was made to the court on the grounds or particular points upon which said motion should be or was based, and that the court's attention

"He must, in some way, inform the court what are the grounds of the motion, but this may be done as well by reference to some paper on file in the action, in which the grounds are stated, as by word of mouth. It is the duty of the clerk to enter the motion and the order made thereon in the minutes of the court, and the entry should state the grounds on which the motion is based, in substance, as stated by the counsel in making it. These grounds need not in all cases be entered in the minutes in full. If counsel refers to any document in the case for a statement of the grounds of the motion, the entry may, and for the sake of brevity should, refer to the same document, and the reference will be a sufficient statement for all purposes of review by this court, provided the document referred to is a part of the record properly brought before us on the appeal from the order. Thus where the motion for a new trial is made after the settlement of a statement of the case or bill of exceptions, the motion and the

was not called to any instrument or document on file in said case as containing grounds upon which to base said motion, and that the only action taken therein by the attorneys for defendant in said matter upon the hearing of said motion being to state to the court that the same was submitted without argument."

Aside from the fact that appellant's bill of exceptions contained not only a copy of the notice of intention wherein were set out his grounds for the motion, but also a request for a new trial, along with a very full statement, and specifications of the insufficiency of the evidence, and a special direction calling the court's attention to the alleged excessive award of damages, all of which were held to bring the case well within the rule expressed in Williams v. Hawley, the higher court called attention to the rule announced in the early cases of Chabot v. Tucker, 39 Cal. 434, and Carder v. Baxter, 28 Cal. 99, where it was held that even the failure of the moving party to appear at the hearing would not be held to be an abandonment of the motion. With respect to the Williams v. Hawley decision, the court said:

"While it is true that an oral motion was made in that case, said motion merely directed the court's attention to the bill of exceptions, the notice of motion and other papers; and while the notice of motion, not being a part of the record, could not be considered by this court in determining the grounds of the motion which was made in the court below, those grounds did appear with particularity in the bill of exceptions which was a part of the record, and this court, therefore, was fully apprised of all the grounds stated in the notice of intention. If, in that case, the motion had been submitted without argument, we see no reason why the grounds of appellant's motion, appearing fully in the record as it did, could not have been as fully considered by the trial court, and reviewed by the supreme court, as they were, in view of the purely formal oral statement made by the appellant's counsel upon the submission of the motion without argument or presentation of points of law for the assistance of the court."

Again: "It is true that no oral reference was made to the bill of exceptions, but it was on file, and had been settled by the court, and contained a copy of the notice of motion specifying in full the grounds upon which the motion was based, and

entry, instead of stating the grounds at length, may refer to the specifications of errors and insufficiency of the evidence set forth in the bill or statement for the particulars. If made on the minutes of the court, reference may be made to the notice of intention for the particulars, and if made after the settlement of a bill or statement, and the notice of intention to move for a new trial has been incorporated into such bill or statement, reference may be made to that notice. In this case the entry of the motion in the minutes was as follows: 'Notice of motion for a new trial read by Mr. Dehy, after which he made the following motion: And now, upon the notice of motion, upon the pleadings and papers filed in this case, and upon a bill of exceptions heretofore filed in this court in this case, we move the court for an order granting a new trial in this case.' The notice of motion referred to in this entry, which perhaps means the notice of intention to move for a new trial, is not made a part of the bill of exceptions, and consequently, though printed in the transcript, it is no part of the record. In view of the fact that the notice of intention to move for a new trial was not set out in the bill of exceptions, but was read to the court in making the motion, the clerk, under ordinary circumstances, should have taken that document and entered in the minutes the grounds of the motion as therein particularized, and thus the grounds to which the attention of the court was called would have appeared in the record."

The notice of motion is not to be confounded with the motion itself. The notice is not a motion.[2c] A motion is, in effect, an application for an order of court. As above suggested, it should be in writing, carefully prepared, with a statement of the grounds

the statement the motion would be founded, in part, on the settled bill."

It thus appears that while it is always better practice, as suggested in the text, to present the motion in writing, such presentation may be oral, and while it is better to at least outline the grounds upon which the motion is based, at the hearing, either at length or by referring to the papers on file which contain the grounds formally set out, yet, the fact that none of this is done, and that the motion is submitted without so much even as an oral suggestion, is not ground for a denial of the motion, or even its dismissal, if the record of the motion sufficiently sets out such grounds.

[2c] Sometimes the notice has been held to stand for the formal motion. In Utah it was held in Needham v. Salt Lake City, 7 Utah, 319, 26 Pac. 920, that no formal motion was required; and in East v. Mooney, 7 Utah, 414, 27 Pac. 4, that the notice itself stood for the formal motion.

See Storer v. Heitfeld, 17 Idaho, 113, 105 Pac. 55, where it was also held that no formal motion was required.

thereof, either entered briefly or made by reference to some other document. If not so made, however, the motion should, in any event, be entered in the minutes of the court.

The right of the parties to be heard upon the motion is a substantial one, and if they be deprived of it the order granting or refusing the motion will be set aside if proper proceedings be taken. The proper proceeding is to move upon affidavits showing the facts to have the order set aside as improvidently made. Relief cannot be obtained by appealing from the order granting or refusing the new trial, because (except where the motion is made upon the minutes of the court) the only authorized record upon the motion must be made up before the hearing,[3] and being so made it cannot possibly show the circumstances attending the hearing. But the fact that the party was deprived of a hearing can be shown by affidavits upon a motion to set aside the order. That such is the proper practice appears from the case of Morris v. De Celis,[4] and De Gaze v. Lynch.[5]

In Morris v. De Celis the defendant recovered a judgment, and the plaintiff commenced proceedings to obtain a new trial. In due course the statement and amendments were submitted for settlement. After the judge had come to a conclusion as to what should constitute the statement, but before it had been engrossed, and without any submission of the motion, he made an order granting a new trial. Subsequently he made an order that the statement should be considered engrossed as of a date prior to the order granting the new trial. The defendant moved upon affidavit to have the order granting the new trial set aside, and took an appeal from the order denying his motion, also from the order granting the new trial. The supreme court did not act upon the latter appeal; but upon the other appeal it reversed the order denying the motion to set aside, and remanded the cause "for further proceedings for the orderly determination of plaintiff's motion for a new trial." And Wallace, J., delivering the opinion of the majority, said:

"I think that the court below should have sustained the motion of the defendant to set aside the order granting the new trial. Even in view of what is recited in the order of September 5th, it is clear enough that the motion for a new trial itself had never

[3] See section 134, *ante*.
[4] 41 Cal. 331.
[5] 42 Cal. 362.

been submitted to the court for decision; and even if the court had, in the meantime, not only settled the statement but had engrossed it, and certified and filed it as a correct statement, it should not have undertaken to determine the motion until that motion had first been submitted for decision, and the parties afforded an opportunity to be heard on the motion if desired. The practice here pursued operated as a complete surprise upon the defendant, and if countenanced would be utterly subversive of the rights of the parties litigant."

This case was approved and followed in De Gaze v. Lynch,[6] and the rule established by it may fairly be regarded as settled. And where after oral argument the motion for new trial was submitted on briefs to be filed, and before the briefs were in the judge signed an order granting the motion, and caused it to be filed and entered on the rough minute-book of the clerk, but on his attention being called to the matter before the order was entered on the engrossed minutes rescinded the order upon the *ex parte* motion of counsel, it was held that such action was proper; and Crockett, J., delivering the opinion of the supreme court said: "I think there was no error in vacating the order upon the facts contained in the stipulation of counsel. It was prematurely entered, evidently through the inadvertence of the judge, and before the motion was finally submitted for decision. It had not even gone into the engrossed minutes of the clerk; and it was the duty of the court, as soon as his attention was called to the fact, to vacate, of its own motion, an order prematurely made, through its own inadvertence, before the final submission of the motion."[7] But while it is the duty of the court of its own motion to vacate an order prematurely entered, yet, if the court does not take that view of the matter, it would not be safe to proceed *ex parte*, but a regular motion should be made upon notice.

But the foregoing applies only where the order granting or refusing the new trial is improvidently or inadvertently made. Where the order is regularly made, it cannot be vacated by the court below[8] upon its own motion or otherwise. The court cannot grant a new trial if the moving party abandons his motion.[9]

[6] 42 Cal. 362.

[7] Hall v. Polack, 42 Cal. 218. See section 199, *post*.

[8] See section 167, *post*.

[9] Stoyell v. Cole, 19 Cal. 602. The court may deny a new trial although both parties consent that one be granted. Phelan v. Ruiz, 15 Cal. 90.

CHAPTER XXV.

ORDER DISPOSING OF THE MOTION.

§ 165. Dismissal or denial of motion for want of prosecution.
§ 166. Granting or denying motion upon terms.
§ 167. Effect of order on motion for new trial.
§ 168. Record on appeal from order.
§ 168a. Record completed before hearing of motion is the only record upon which order may be reviewed on appeal.
§ 168b. Miscellaneous.

§ 165. Dismissing or Denying a Motion for New Trial for Want of Prosecution.—"A motion for a new trial is an independent proceeding in an action, in which the burden of acting is at all times upon the moving party. It is the moving party who is the actor in the proceeding, and who is seeking the settlement of the bill of exceptions and the determination of the motion for a new trial, and it devolves upon him to proceed with diligence.[1] " Such is the fundamental rule of law. Having traced the procedure throughout its entire course, from the notice to the presentation of the motion, it is proper at this juncture, therefore, to consider this rule and its bearing upon the ultimate disposition of the motion. In this connection it will be convenient to consider, first, what is want of prosecution of the motion, and second, what is the proper remedy for it.

1. *What is Want of Prosecution of the Motion.*—Under the later cases the failure to argue a motion when called for hearing is not want of prosecution of the motion,[1a] nor is the failure to call it up for hearing want of prosecution, for that can be done by either party.[2] The effect of the cases referred to is to restrict the application of the term "want of prosecution" to delays in the preparation of the record upon the motion. In one sense

[1] Galbreath v. Lowe, 142 Cal. 295, 75 Pac. 831 (cited in Dorcy v. Brodis, 153 Cal. 673, 96 Pac. 278).

[1a] See section 280, *post;* also Carter v. Baxter, 28 Cal, 99; Chabot v. Tucker, 39 Cal. 434; and see Boin v. Spreckels, 155 Cal. 612, 102 Pac. 937. The early cases seem to have been the other way. See Mahony v. Wilson, 15 Cal. 42; Frank v. Doane, 15 Cal. 302. See section 164, *ante,* as to necessity of oral or written motion.

[2] Griffith v. Gruner, 47 Cal. 644; and look at Chabot v. Tucker, 39 Cal. 434; Simmons v. Goin, 45 Cal. 669; Warden v. Mendocino County, 32 Cal. 655. The case of Boggs v. Clark, 37 Cal. 236, seems to be the other way.

the failure to take any of the steps required within the prescribed time is want of prosecution of the motion. In this general sense the failure to serve the proposed statement in time is want of prosecution. But the failure of the moving party to serve the proposed statement, or to give notice of intention, or to perform any act for which there is an express limitation of time operates as an absolute defeasance of the right to make the motion.[3] In such case the dismissal or denial of the motion is a matter of right and not a matter which rests in the discretion of the court. The phrase "want of prosecution" is commonly used to denote delay in taking some step for which no time is prescribed by the statute. Where such is the case the statute intends a reasonable time, and the question as to what time is, under all the circumstances, reasonable, is addressed to the discretion of the court. It is in this sense that dismissing a motion for new trial is in the discretion of the court below.[4] Each case must, as a matter of course, be governed by its own circumstances. In Eckstein v. Calderwood[5] a delay of two months and a half in the engrossment of a statement was held sufficient to warrant a dismissal of the motion. In O'Neil v. Dougherty[6] a delay of six months in filing a statement after it had been authenticated was held sufficient to warrant the denial of a motion. In Greehn v. Marker,[6a] the moving party filed his statement with the clerk on May 26, 1884. On the 4th of October following, the statement not having been settled, allowed or certified, the court, on motion,

[3] See section 145, *ante*.

[4] As to dismissals being in the discretion of the court below, see Boggs v. Clark, 37 Cal. 236; Chabot v. Tucker, 39 Cal. 434; Hopkins v. West. Pac. R. Co., 44 Cal. 389. In Galbreath v. Lowe, 142 Cal. 295, 75 Pac. 831, it was said: "The power to dismiss a motion for a new trial on the ground that the same has not been prosecuted with due diligence being conceded, the determination of the question as to whether there has been due diligence is one necessarily largely within the discretion of the trial court." This language was quoted with approval in the later case of Dorcy v. Brodis, 153 Cal. 673, 96 Pac. 278. In Curtin v. Ingle, 155 Cal. 53, 99 Pac. 480, the court said: "Whether a party has been guilty of laches in that respect [prosecution of proceedings for settlement of statement] or not, is primarily a matter for the trial court before whom the proceedings for the settlement of the statement on appeal is pending, and this court should not be called upon originally to determine on a motion to dismiss an appeal, whether an appellant has been derelict in securing with due expedition such settlement." But supreme court will reverse for abuse of discretion. See Warden v. Mendocino Co., 32 Cal. 655; Simmons v. Goin, 45 Cal. 669; Griffith v. Gruner, 47 Cal. 644.

[5] 27 Cal. 413; see People v. Center, 6 Cal. 191.

[6] 47 Cal. 164; cited in section 159, *post*.

[6a] 67 Cal. 364, 7 Pac. 783.

dismissed the new trial proceedings for failure to prosecute the same with diligence. The supreme court, on appeal from an order refusing to set aside the order of dismissal, declined to disturb the action of the lower court. The ground for this decision was, it is true, because the motion to set aside was made *ex parte;* but it is believed that had notice been given and the action of the trial court in dismissing the new trial proceedings been reviewed on its merits, the higher court would nevertheless have declined to interfere. In Lee Doon v. Tesh [6b] failure for twelve years after amendments had been proposed to prosecute the motion was held to justify dismissal.[6c] So in Galbreath v. Lowe [6d] failure for thirty-nine days to engross a small bill of exceptions was held to justify dismissal of the motion. So in Dorcy v. Brodis [6e] a delay of four months in having a proposed statement settled was held to be inexcusable.

2. *Remedy for Want of Prosecution of the Motion.*—The practice to be pursued where the moving party fails to propose his statement in time has been fully considered in section 146. It is there shown that where, after the delay complained of, the moving party goes on and completes his record, the proper course

[6b] 131 Cal. 406, 63 Pac. 764.

[6c] In this case the court made use of the following language: "Where a motion for a new trial is to be made on a statement of the case, the moving party must serve the proposed statement on the adverse party within a certain time, and if the statement is not agreed to by the adverse party, the latter must, within a certain time, serve his proposed amendments. If the amendments are adopted, the statement shall be amended accordingly, and then presented to the judge for settlement; if not adopted, the moving party must present the proposed statement and amendments to the judge and thereupon the proceedings for the settlement of the statement shall be taken by the parties as are required for the settlement of bills of exceptions by section 650. Section 660 requires an application for a new trial to be heard, after the statement is filed, at the earliest practicable period after notice of the motion and may be brought to a hearing upon motion of either party after the statement is filed. In the present case the proposed statement was served and so also were proposed amendments, and there the proceedings ended. Whether the proposed amendments were adopted or not, it was the duty of the moving party to present the statement and amendments to the judge. Defendants did all they were required to do when they presented their proposed amendments. They had no opportunity to call up the motion for a hearing, as the statement was not filed with the judge. When the first motion to dismiss the proceedings was heard and denied, it was upon evidence of which we are not advised, and it must be presumed it was sufficient. Plaintiffs may have made a counter showing, satisfactorily explaining the long delay in the matter of the motion for a new trial. At the hearing of the last motion to dismiss two years of still further delay appeared, and nothing was shown to have been done by plaintiffs in the meantime or at any time to bring forward their motion for a new trial."

[6d] 142 Cal. 295, 75 Pac. 831.

[6e] 153 Cal. 673, 96 Pac. 278.

for the successful party is to reserve his objections and present them to the judge at the settlement, and if the judge overrules them and proceeds to settle the statement, to have the objections incorporated in the statement, and renew them at the hearing of the motion in the court below, and in the supreme court on appeal from the order granting or refusing a new trial; but that where the moving party does not go on and complete his record, the only remedy of the successful party is to make a separate motion on affidavits showing the facts, to have the motion for new trial dismissed. The observations in this regard, made in the section referred to, apply to the failure to take any necessary step in the preparation of the record upon the motion, whether such step be one for the performance of which a limit of time is fixed, or one which is to be performed in a reasonable time. It is not necessary to go over the ground in this place. It is not inappropriate to add, however, that if it is desired to prosecute an appeal from an order denying a motion to dismiss a new trial proceeding for laches, such appeal must be supported by its own bill of exceptions. Such motion and order and the matter upon which the same are based cannot be incorporated in the statement or bill of exceptions which accompany the new trial order.[6f]

Where the moving party has lost his right to have a statement, or to make his motion for new trial, it is proper to "dismiss" such motion.[7] A dismissal in such case is equivalent to a "denial" of the motion.[8] Where, however, the order is made upon the motion for new trial, it is more technically correct to "deny" the motion; where it is made upon a separate motion to dismiss, it is more technically correct to "dismiss" the motion for new trial.

§ 166. Granting or Denying a New Trial upon Terms.—In most cases the court below confines itself to granting or denying the motion for new trial.[1] But it has the power to impose terms

[6f] Ryer v. Rio Land etc. Co., 147 Cal. 462, 82 Pac. 62.

[7] Chase v. Evoy, 58 Cal. 348.

[8] Voll v. Hollis, 60 Cal. 569; Chase v. Evoy, 58 Cal. 348; Warden v. Mendocino Co., 32 Cal. 655; Liquore v. Mariscano, 11 Pac. C. L. J. 56. Compare McDonald v. McConkey, 57 Cal. 325, an obscure case. See Lang v. Superior Court, 71 Cal. 492, 12 Pac. 306; Davis v. Hurgren, 125 Cal. 48, 57 Pac. 684; Credits Co. v. Superior Court, 140 Cal. 82, 73 Pac. 1009; Doon v. Tesh, 131 Cal. 406, 63 Pac. 764; Galbreath v. Lowe, 142 Cal. 295, 75 Pac. 831.

[1] It is irregular for the court below to grant a new trial, and without further hearing to render a contrary judgment. Mitchell v. Hackett, 14 Cal. 661.

as a condition of making the order. In the case of Rice v. Gashirie[2] the motion was upon the ground of errors in law occurring at the trial. The court below granted a new trial upon condition that the moving party should pay the costs. The moving party, not being satisfied with the terms, appealed from the order, but it was affirmed, and Baldwin, J., delivering the opinion of the supreme court, said: "The terms upon which a court will grant a new trial are peculiarly a matter within its discretion. This must necessarily be so; for so many reasons relating to the conduct, management, and peculiar circumstances of the trial may exist that it would be impossible to prescribe any general rules on the subject. If error at law intervenes, a party may take his exceptions, and prosecute his appeal without motion for a new trial; but if he makes his motion and relies upon that for redress against an improper verdict, he must subject himself to the equitable power of the court. The verdict may have gone against him, in some degrees, or wholly, by his own neglect or default, or even the rulings of law be chargeable to his own laches or want of diligence. In such cases it may be proper to grant him a new trial, yet only upon equitable terms. We cannot interfere with this exercise of discretion unless upon a clear showing that it has been abused, or that the terms were grossly unreasonable." But whatever may be the grounds upon which the power to impose terms rests, the existence of the power cannot be denied, at least in cases where the motion is made upon grounds which are addressed to the discretion of the court below.[3] The reports furnish many instances of the exer-

[2] 13 Cal. 53.

[3] In the case of Rice v. Gashirie, above quoted, the motion was on the ground of errors in law. That ground, as we have seen, is not addressed to the discretion of the court below. See section 100, *ante*. Query: Is the doctrine of that case sound? It was subsequently quoted with approval in Brooks v. S. F. & N. P. Ry. Co., 110 Cal. 173, 42 Pac. 570.

It is clear that if the power of the trial court to make the order on motion for new trial conditional rests upon the rule that new trial motions are addressed to the discretion of the lower court, a motion made upon the ground of errors of law, not being so addressed, must be excepted from the power. The point does not seem to have been raised in any except the two cases here cited. Nor does it appear that a conditional order has ever been made, except in Rice v. Gashirie, where the ground of the motion was error of law exclusively. In Eames v. Haver, 111 Cal. 401, 43 Pac. 1120, the supreme court reversed an order of the lower court denying a new trial on the ground of error in the instructions given which ignored the proper measure of damages, unless the respondent should remit the excess occasioned by such erroneous instructions. But this was plainly an application of the well-settled remedial jurisdiction of appel-

cise of the power. Thus in an action of ejectment it was held that an order granting a new trial upon payment by the moving party of certain costs was proper.[4] So in a similar action, where the verdict was for too much land, it was held to be proper under the circumstances to make an order that a new trial should be granted, unless the plaintiff released the excess, in which event the motion should be denied.[5] So where the action was for the recovery of the land, with damages, an order requiring the remission of a portion of the damages as a condition of the denial of the motion for new trial was affirmed.[6] So in an action for the value of the use of certain personal property, where the evidence was not sufficient to sustain the verdict found for the plaintiff, an order requiring the remission of a portion of the amount was held proper.[7] So in an action for the recovery of personal property with damages for its detention, where the jury rendered a verdict for the value of the property, and "damages for the use of the same," and also for exemplary damages, it was held to be proper for the court to require the exemplary damages, and a portion of the other damages to be remitted, as a condition of denying the motion for new trial.[8] So where the damages are in the discretion of the jury, and the motion for new trial is on the ground of excessive damages, the court may require the plaintiff to remit a portion of the damages as a condition of the denial of the motion.[9] The rule seems to be well settled.[9a]

late courts which may "affirm, reverse, or modify" decrees of the lower courts; and while the lower court usually makes the modification, the power to do so rests equally in the higher court. See section 295 et seq., *post*.

The ground upon which conditional orders are made is rarely other than excessive damages, and the requirement is usually the remission of the excess.

[4] Sherman v. Mitchell, 46 Cal. 576; and see Rice v. Gashirie, 13 Cal. 53.

[5] Gillespie v. Jones, 47 Cal. 259.

[6] Chapin v. Bourne, 8 Cal. 294.

[7] Harrison v. Peabody, 34 Cal. 178.

[8] Dreyfous v. Adams, 48 Cal. 131.

[9] Benedict v. Cozzens, 4 Cal. 381; George v. Law, 1 Cal. 363.

[9a] Cordor v. Morse, 57 Cal. 301; Gregg v. S. F. & N. P. Ry. Co., 59 Cal. 312; Clanton v. Coward, 67 Cal. 373, 7 Pac. 787; Phelps v. Cogswell, 70 Cal. 201, 11 Pac. 628; Davis v. Southern Pacific Co., 98 Cal. 19, 32 Pac. 706; Domico v. Casassa, 101 Cal. 411, 35 Pac. 1024; Garoutte v. Haley, 104 Cal. 497, 38 Pac. 194; Brown v. Cline, 109 Cal. 156, 41 Pac. 862; Brooks v. S. F. & N. P. Ry. Co., 110 Cal. 173, 42 Pac. 570; Etchas v. Orena, 121 Cal. 270, 53 Pac. 798; Anglo-Nevada Co. v. Ross, 123 Cal. 520, 56 Pac. 335; Thomas v. Gates, 126 Cal. 1, 58 Pac. 315; Holtum v. Greif, 144 Cal. 521, 78 Pac. 11; Swett v. Gray, 141 Cal. 63, 74 Pac. 439; Bentley v. Hurlburt, 153 Cal. 796, 96 Pac. 890; and in the following cases the supreme court made conditional orders on appeal from new trial orders: Phelps v. Cogswell, 70 Cal. 201, 11 Pac. 628; Durfee v. Garvey, 78 Cal. 546, 21 Pac. 302; Loveland v. Gardner, 79 Cal. 317, 21 Pac. 766; Eames v. Haver, 111 Cal.

The imposition of terms is a matter resting in the discretion of the court below. Even in a case where terms might have been imposed, the order will not be reversed merely to allow their imposition.[10] And where they have been imposed the supreme court will interfere only for an abuse of discretion.[11] But before terms can be imposed there must be some ground for granting the new trial. If the verdict be justified by the evidence, and no error or irregularity has intervened, the court cannot interfere with it by imposing terms as a condition of its being allowed to stand. The successful party has, in such case, a right to have it stand as it was rendered, and if the court require any portion of it to be released, the order will be reversed on appeal. An instance of such a reversal is to be found in the case of Patterson v. Ely.[12] In that case the plaintiff gained a verdict for the land sued for, and for a large sum as damages, the giving of which sum was based upon admissions in the pleadings. The court below made an order granting a new trial unless the damages were remitted; this order was reversed by the supreme court, and Field, C. J., delivering the opinion, said: "It is not like the case where from the want of all evidence upon the subject of damages, or from the evidence being entirely incompetent, the court may impose as a condition of allowing the verdict in other respects to stand the remitting of the damages found. Nor is it like the case where the court may differ from the jury upon the effect of the evidence, and therefore properly require a reduction of the damages recovered. It is a case upon an admission by the record. If good for anything it is good for the entire amount."

On the other hand, if the verdict be not justified, it ought not to be allowed to stand, and it would be an abuse of discretion to impose terms upon the *defeated* party as a condition of its being set aside. This was made clear in the case of Gardner v. Tatum,[12a] where the following order on motion for a new trial was made: "The motion will be denied, provided that plaintiff offer to remit the sum of eight hundred dollars from the amount of the verdict herein; provided also, *that the defendants shall agree to accept such verdict and judgment so*

401, 43 Pac. 1120; Sloane v. Southern Cal. Ry. Co., 111 Cal. 668, 44 Pac. 320, 32 L. R. A. 193.

[10] Clark v. Huber, 20 Cal. 196.

[11] Rice v. Gashirie, 13 Cal. 53.

[12] 19 Cal. 28.

[12a] 81 Cal. 370, 22 Pac. 880.

modified," etc. The defendants refused to accept the verdict and judgment as modified. Whereupon the court entered the following order: "It appearing that plaintiff has offered to remit said sum as directed, and within the time as directed, and no error appearing in the record, and the verdict as rendered being sustained by a preponderance of evidence *unless as to the amount of the verdict,* it is hereby ordered that the motion for a new trial be and the same is hereby denied."

In reversing the order the supreme court said:

"We are of the opinion that the court erred in denying the motion. If the verdict was for an excessive amount, and it is made clear by the language of both orders that the court believed it was,—and the evidence, we think, fully sustains the court in such belief,—defendants were entitled to have it reduced without the imposition of any terms upon them, and without being deprived of the right to correct any errors leading to judgment which, although supported by the evidence admitted, is nevertheless erroneous. It was not the fault of defendants that the jury found the value of plaintiff's services to be nearly double what the court thought the evidence showed it to be, and they ought not be punished because the jury erred. The court was of the opinion that no errors had been committed during the trial, but that the verdict was for eight hundred dollars in excess of what the defendants justly owed the plaintiff. Hence its order, in effect, is a penalty of eight hundred dollars against the defendants, if they fail to accept the rulings of the court, made during the trial, as just and final."

Where an order is made granting or denying a new trial upon terms, the terms must be complied with before the party can obtain the benefit of the order. If the moving party comply with the terms imposed upon him, and so obtain the benefit of the order, he cannot afterward complain of their imposition.[13] But it has been held that the acceptance of such terms by the other party does not preclude him from appealing from the order.[14] Either party feeling himself aggrieved by the order may appeal from it.

[13] Bartelle v. Connor, 6 Cal. 140.

[14] Tyson v. Wells, 1 Cal. 378. Compare Stockman v. Riverside L. & I. Co., 64 Cal. 57, 28 Pac. 116.

If the conditions are accepted the motion must be regarded as disposed of in accordance with the same; and *vice versa*, if refused.[15]

If a waiver of an excessive amount in a judgment is made pending a motion for a new trial, and before a conditional order is made, it is proper to deny the motion at once and without condition, where a conditional order based upon the amount waived would have been proper.[16]

The usual practice is, after acceptance of the condition has been filed, a conditional order having been made, to enter an absolute order at once.[17]

§ 167. Effect of the Order Granting or Refusing a New Trial.—The general rule under our practice is that where an appealable order has been regularly made, the court which made it has no power upon a subsequent change of opinion to set it aside, except in the cases provided by the statute.[1] This rule applies to orders on motion for new trial. If the order was inadvertently or improvidently made, the court which made it may vacate it on its attention being called to the matter;[2] but otherwise it is final, so far as that court is concerned.[2a] This was held in Coombs v. Hibberd.[3] In that case the court below, after

[15] See Garoutte v. Haley, 104 Cal. 497, 38 Pac. 194; Garoutte v. Williamson, 108 Cal. 135, 41 Pac. 35, 413; Brown v. Cline, 109 Cal. 156, 41 Pac. 862; Holtum v. Greif, 144 Cal. 521, 78 Pac. 11.

In Winningham v. Philbrick, 56 Wash. 38, 105 Pac. 144, the court said: "It has long since been established that when, upon ruling upon motion for a new trial, the court grants or refuses a new trial upon conditions set forth in the order, the compliance with the condition within the time fixed, or the failure to comply within the time fixed, operates as an absolute grant or denial of the new trial, and the status and rights of the parties become finally fixed and determined as of right." And see cases cited.

[16] Bentley v. Hurlburt, 153 Cal. 796, 96 Pac. 890.

[17] Bentley v. Hurlburt, 153 Cal. 796, 96 Pac. 890.

[1] See section 199, *post*, and look at section 164, *ante*.

[2] See sections 164, *ante*, and 199, *post*.

[2a] "Clerical misprisions may be corrected at any time, by an order of court, but judicial errors can be remedied only through a motion for a new trial." Egan v. Egan, 90 Cal. 15, 27 Pac. 22. And see Freeman on Judgments, sec. 70; Forquer v. Forquer, 19 Ill. 68; Aetna Ins. Co. v. McCormick, 20 Wis. 265; Thompson v. Thompson, 73 Wis. 84, 40 N. W. 671; McLean v. Stewart, 14 Hun (N. Y.), 472; San Joaquin etc. Co. v. West, 99 Cal. 345, 33 Pac. 928; Dyerville Co. v. Heller, 102 Cal. 615, 36 Pac. 928; Kaufman v. Shain, 111 Cal. 16, 52 Am. St. Rep. 139, 43 Pac. 393; People v. Curtis, 113 Cal. 68, 45 Pac. 180; Dickey v. Gibson, 113 Cal. 26, 54 Am. St. Rep. 321, 45 Pac. 15; O'Brien v. O'Brien, 124 Cal. 422, 57 Pac. 225; Canadian etc. Co. v. Clarita etc. Co., 140 Cal. 672, 74 Pac. 301.

[3] 43 Cal. 452.

denying a motion for new trial regularly made, granted a motion to vacate the order and allow the motion for new trial to be reheard. The order vacating the order denying a new trial was reversed on appeal, and Niles, J., delivering the opinion, said:

"It will hardly be contended that under our form of practice a court could entertain two successive motions for new trial in the same case upon identical grounds. The right to move for a new trial is a creature of the statute, and this statute provides for but one statement and one motion. The motion to vacate the order was equivalent in its effect upon the parties to a renewed motion for a new trial. It demanded another hearing of a question once determined, and resulted in the granting of a new trial which had been once refused. If this practice should be allowed, several consequences not contemplated by the statute would ensue. The limited time within which a motion for a new trial may be made would be practically enlarged, for there can be no good reason why the motion to set aside the order should be made within a limited number of days. The proceedings after judgment would be interminable, for the last order could be vacated upon motion for the losing party, and so *ad infinitum*. There must be some point where litigation in the lower court terminates, and the losing party is turned over to the appellate court for redress. In the case of Morris v. De Celis, 41 Cal. 331, it appeared that the motion of plaintiff for a new trial was granted by the district court upon its own motion, and before any statement had been settled or motion submitted by counsel. This court held that the order should have been set aside upon the defendant's application. There is an evident distinction between that case and the one now presented. There was no foundation in the former case for any order in the premises. There was no statement on which the court could act, and no motion for a new trial had been made. As the order stood in the way of defendant's appeal, by depriving him of the benefit of a statement, through which alone the grounds of appeal could be presented, it should have been set aside by the court that made it. The error was not that the motion for a new trial was improperly granted, but that an order was made at all. In the present case the proceedings upon plaintiff's motion for a new trial were in all respects regular. The statement had been settled and the motion heard and denied in the required order

and in due form. Every error of the court, including its supposed mistake in regard to the respective dates of the deed and lease, appeared in the statement, and could have been reviewed upon appeal from the order refusing a new trial. This was the plaintiff's proper and only redress."[4]

The rule laid down in Coombs v. Hibberd has been approved in subsequent cases.[5]

Granting a new trial has the effect of vacating the judgment as well as the verdict; for the judgment rests upon the verdict, and must fall with it.[6] And therefore an appeal cannot be taken from the judgment after a motion for new trial has been granted.[7] Unless, indeed, an appeal be taken from the order granting the motion, in which event the judgment may be said to be subsisting for the purpose of an appeal therefrom, until the order is affirmed, or until the expiration of the time for appeal.[8] But the appeal from the judgment should be dismissed upon the affirmance of the order granting a new trial;[9] for such affirmance vacates the judgment,[10] even though the latter has been already affirmed.[11]

The effect of an order granting a new trial is to place the parties in the position they held before any trial had taken place.[12]

[4] In the case of Wilson v. McEvoy, 25 Cal. 169, it was held that an order denying a motion for new trial could not be vacated by the court below, *after the adjournment of the term.* The special effect of this case was done away with by Coombs v. Hibberd, above quoted, under which an order on motion for new trial, regularly made, cannot be vacated *at any time* after it is made. Terms of court have been abolished. And look at Spanagel v. Dellinger, 34 Cal. 476.

[5] Nichols v. Dunphy, 58 Cal. 605; People v. Center, 61 Cal. 191; Dorland v. Cunningham, 66 Cal. 484, 6 Pac. 135; Odd Fellows' etc. Bank v. Deuprey, 66 Cal. 168, 4 Pac. 1173; Wiggin v. Superior Court, 68 Cal. 398, 9 Pac. 646; Greehn v. Marker, 67 Cal. 364, 7 Pac. 783; Lang v. Superior Court, 71 Cal. 491, 12 Pac. 306; Carpenter v. Superior Court, 75 Cal. 596, 19 Pac. 174; Brown v. Cline, 109 Cal. 156, 41 Pac. 862; People v. Curtis, 113 Cal. 68, 45 Pac. 180; Holtum v. Greif, 144 Cal. 521, 78 Pac. 11; Whitney v. Superior Court, 147 Cal. 536, 82 Pac. 37.

[6] Thompson v. Smith, 28 Cal. 527; Walden v. Murdock, 23 Cal. 540, 83 Am. Dec. 135; Martin v. Matfield, 49 Cal. 42; Wheeler v. Kassabaum, 76 Cal. 90, 11 Pac. 119; Kent v. Williams, 146 Cal. 3, 79 Pac. 527; Fowden v. P. C. S. S. Co., 149 Cal. 151, 86 Pac. 178. The result is the same where the order refusing a new trial is reversed. In re Kaufman, 117 Cal. 288, 59 Am. St. Rep. 179, 49 Pac. 192.

[7] Kower v. Gluck, 33 Cal. 401.

[8] Pierce v. Birkholm, 110 Cal. 669, 43 Pac. 205; Henry v. Merguire, 111 Cal. 1, 43 Pac. 387; Mountain Tunnel Co. v. Bryan, 111 Cal. 37, 43 Pac. 410; Etchas v. Orena, 121 Cal. 270, 53 Pac. 798.

[9] Bank of Savings (San Jose) v. Bank of Madera, 121 Cal. 543, 54 Pac. 85.

[10] Bell v. Staacke, 151 Cal. 544, 91 Pac. 322.

[11] Swett v. Gray, 141 Cal. 83, 74 Pac. 551.

[12] Kent v. Williams, 146 Cal. 3, 79 Pac. 527.

§ 167a. The Order Should Dispose of All the Grounds of the Motion.—Where the judge of the court below denies the motion he should, as a matter of course, examine all the grounds upon which it is made. And it is safe, in the majority of cases, to assume that this is done. But it frequently happens that where the judge grants the motion, he does so upon some one ground, leaving the others unnoticed. Perhaps it is not too much to say that this is usually what is in fact done. It is, however, a most pernicious practice, and frequently results in gross injustice. If the unnoticed grounds involve questions of law only, no practical difficulty can arise; for the supreme court examines such questions from the same point of view as the court below; and while it may be erroneous in the court below not to pass upon a question presented by the record, it is an error without injury. But if the unnoticed grounds involve questions of fact, or the exercise of discretion, very serious consequences may result. For it may turn out that the ground upon which the order was made is erroneous. In such case if the supreme court examines the other grounds at all, it must assume that they have been in fact passed upon by the court below, and in cases involving questions of fact or questions of discretion, if there be room for difference of opinion, the order must, upon well-settled principles, be affirmed. It may be, however, that if the court below had passed upon those grounds, it would have decided them differently. And in such case it is manifest that the party has lost his verdict and judgment without the merits of the question being examined by either tribunal. In view of this it seems clear that it is the duty of the court below to pass upon all the grounds upon which the motion is made, and to distinctly state in his order what disposition is made of each ground.

A correct view of the subject involves a consideration of the proper construction of the record on appeal, and the presumptions applicable thereto; and this subject is treated elsewhere.[1] It is sufficient here to say that the order on the motion should distinctly and expressly dispose of all the grounds on which it is made.

But it is not necessary that the order should be for a retrial of all of the issues. On the contrary, the trial court may prop-

[1] See section 284, *post*.

erly grant a new trial of one or any part of the issues.[1a] But, in making such an order, the court should with great certainty recite the issues which are to be retried, so that counsel and the appellate court may know exactly the questions involved within the scope of the order. If this particularity be not observed the order for a new trial will be reversed.[1b]

§ 168. Record on Appeal from an Order Granting or Refusing a New Trial.—Before 1861 there was no special provision with reference to the record on appeal from orders on motion for new trial. The matter was regulated by the provisions in reference to the record on appeal from orders in general.[1] Section 343 provided that where an order was made upon affidavits a statement on appeal was not necessary; but the affidavits should be annexed to the order.[2] And section 346 provided, among other things, that "on an appeal from an order the appellant shall furnish the court with a copy of the papers used on the hearing of the court below, such copies to be certified by the clerk to be correct."[3] Under these provisions the affidavits or statement used on the hearing in the court below could be used on appeal.

In 1861 a special provision was made with reference to motions for new trial. Section 195, as then amended,[4] provided, among other things, that "the affidavits and counter-affidavits, or the statement used, in connection with such pleadings, depositions, and minutes of the court, as read or referred to on the hearing, constitute without further statement the papers to be used on appeal from the order granting or refusing the new trial." This provision stood until the adoption of the Code of Civil Procedure. Under the provision it was plain that the papers used on the motion could be used in the supreme court without being embodied in a statement on appeal prepared after the order on the motion;[5] nor was a bill of exceptions proper.[6] All that was nec-

[1a] San Diego Land Co. v. Neale, 78 Cal. 63, 20 Pac. 372, 3 L. R. A. 83; Duff v. Duff, 101 Cal. 1, 35 Pac. 437; Directors F. I. Dist. v. Abila, 106 Cal. 365, 39 Pac. 793.

[1b] Mountain Tunnel Co. v. Bryan, 111 Cal. 36, 43 Pac. 310.

[1] As to which see section 261, *post*.

[2] Laws of 1851, p. 165; and see Laws of 1854, p. 64.

[3] Laws of 1851, p. 106; and see Laws of 1854, p. 64; and Laws of 1863–64, p. 247.

[4] Laws of 1861, p. 590.

[5] Loucks v. Edmonson, 18 Cal. 203; and see Walden v. Murdock, 23 Cal. 540, 83 Am. Dec. 135; People v. Bartlett, 40 Cal. 142; Quivey v. Gambert, 32 Cal. 304; Johnson v. Muir, 43 Cal. 542.

[6] Bodley v. Ferguson, 25 Cal. 584.

essary was that the statement or affidavits used on the motion, together with the pleadings,[7] etc., should be sent up properly certified.

The provisions of the code, as amended in 1874,[8] are as follows:

"Sec. 952. On an appeal from an order granting or refusing a new trial, the appellant must furnish the court with a copy of

[7] McQuade v. Whalley, 29 Cal. 613. The record on appeal should contain only such papers as were used or referred to at the hearing of the motion. Botsford v. Van Riper (Nev.), 106 Pac. 440.

"The transcript on an appeal from the order denying a new trial must contain all of the records and papers considered by the judge in passing upon such motion." Doust v. Telephone Co., 14 Idaho, 677, 95 Pac. 209.

[8] During the first year of the operation of the code the provision in relation to the record on appeal from an order on motion for new trial was as follows:

"Sec. 661. The court or judge deciding the motion must immediately thereafter file with the clerk of the court a statement in writing under his hand containing: (1) The name of the court and the title of the cause; (2) a reference to all pleadings, bills of exceptions, and affidavits used on the motion; (3) a statement that the pleadings, etc., so referred to are made part of the statement; (4) the decision of the court upon the motion; (5) the ground upon which the decision rests; (6) a statement that the party against whom the decision is rendered excepts to the decision. And the statement so made and filed constitutes and has all the force and effect of a bill of exceptions to the order granting or refusing the motion."

Corresponding provisions of other codes are as follows:

Arizona: No specific provision is made for a record. Section 1485, Revised Statutes (section 276), however, of general application, makes "every paper filed in a case" a part of the record therein. See note 3a, section 229, as to record in general; note 3b, section 230, as to judgment-roll; note 3b, section 250, as to statements; note 6, section 254, bills of exceptions; note 1, section 265, as to transcript on appeal.

Colorado: No specific provision for record on appeal made.

Idaho: Section 4820, Revised Codes, is identical with section 952 of the California code quoted in the text. Reference is made therein to section 4443, as the California code refers to section 661. Section 4443 is the same as section 661 of the California code, except as to the phrase, "or the records and files in the action," which is inserted after "affidavits" and before "or bill of exceptions."

Montana: The practice was formerly the same as in California, but in 1907 amendments were made (act approved February 26, 1907, section 2), which have the effect of changing it, though not materially. Section 7114, Revised Codes, is as follows: "On an appeal from an order granting or refusing a new trial, the appellant must furnish the court with a copy of the notice of appeal, a copy of the notice of intention to move for a new trial, a copy of the order appealed from, a copy of the papers designated in section 6799 (1176).

Section 6799 (1176) is as follows: "The judgment-roll, or such parts thereof as may be necessary to be considered on the appeal, and the affidavits, or bill of exceptions, used on the hearing, together with the papers designated in section 7114 (1738), constitute the record to be used on appeal from an order granting or refusing a new trial, unless the motion is made on the minutes of the court, and in that case the judgment-roll, or such parts thereof as may be necessary to the consideration of the appeal, and a statement of the case to be subsequently prepared, together with the papers designated in section 7114 (1738), constitute the record on

the notice of appeal, of the order appealed from, and of the papers designated in section six hundred and sixty-one of this code."

"Sec. 661. The judgment-roll and the affidavits, or bill of exceptions, or statement, as the case may be, used on the hearing, with a copy of the order made, shall constitute the record to be used on appeal from the order granting or refusing a new trial. "

It is to be observed of section 661, just quoted, that instead of making the record on appeal consist of "the papers used on the hearing in the court below," as was done by section 346 of the old Practice Act, and as is done by section 951 of the code in reference to other orders, it attempts to enumerate the papers which are to constitute the record on appeal. And, curiously enough, it omits the notice of intention to move for a new trial. Now since the code contains no provision other than the above in relation to the matter, it is not perceived by what authority the

appeal. Such subsequent statement of the case must be proposed by the party appealing, or intending to appeal, within ten days after notice of the entry of the order, or such further time as the court, or a judge thereof, may allow, and such statement, or a copy thereof, shall be served upon the adverse party, who shall have ten days thereafter, or such further time as the court or a judge thereof, may allow, to prepare and serve amendments thereto upon the party appealing or intending to appeal; and thereafter proceedings shall be had, and within like periods, for the settlement of the statement, as is provided by section 6796 (1173) with regard to bills of exceptions."

Nevada: See section 265, note 1, as to transcript on appeal, in general. No specific provision is made for a record on appeal from new trial orders, separate and distinct from appeals from other orders. It is to be noted, however, that no statement on appeal from such an order is necessary. Gregory v. Frothingham, 1 Nev. 253; Johnson v. Wells-Fargo & Co., 6 Nev. 224, 3 Am. Rep. 245; Bryant v. Carson etc. Co., 3 Nev. 313, 93 Am. Dec. 403. The proper record on such an appeal consists of "the statement on motion for new trial (if there is one), pleadings, depositions, documentary evidence on file, and minutes of the court." Id. Where there is a statement on motion for new trial, there need be none on appeal. O'Neale v. Cleveland, 3 Nev. 485.

North Dakota: See note 1, section 265, *post*, and note 3a, section 229, *post*.

Oklahoma: No specific provision for record on appeal.

South Dakota: Section 308, Code of Civil Procedure, provides:

"A bill of exceptions or statement of the case used upon the hearing of a motion for a new trial, or a bill of exceptions prepared as provided in section 296, or a statement of the case, prepared after judgment in the manner provided in section 303, and within the same time after judgment as is allowed for the preparation of a bill of exceptions may be used on appeal from the final judgment; such statement shall only contain the grounds argued before the court for a new trial, and so much of the evidence or other matter as may be necessary to explain them, and it shall be the duty of the judge to exclude all other evidence or matter from the statement."

Utah: No specific provision for record on appeal.

supreme court could consider the notice of intention unless embodied in a statement or bill of exceptions, and the court has so held.[9] Prior to the adoption of rule XXIX of the supreme court[9a] there was some doubt as to whether the notice could be brought up at all in cases where the motion was made upon affidavits; since, in such case, there might be no bill of exceptions in which it might be embodied. The affidavits, upon being identified by the judge, were used on appeal without being incorporated in a bill of exceptions. Rule XXIX, however, changed the practice, and there need now be no question upon this point.[10] Indeed, there seems to be no reason why there ever should have been any question upon the point, for if the notice was entitled to be embodied in a bill of exceptions at all, it was entitled to have a bill of its own.

The substitution of a different record from that designated by the statute is improper.[11]

The record on appeal from an order on motion for new trial terminates with the order, and cannot be made to embrace subsequent proceedings.[12] Affidavits, therefore, made after the disposition of the motion, must be embodied in a separate bill of exceptions, and if so embodied may be considered on the appeal.[13]

[9] See sections 14 and 151, *ante*. Note 4 of the last-numbered section.

[9a] The rule is as follows: "In all cases of appeal from the orders of the superior courts, the papers and evidence used or taken on the hearing of the motion must be authenticated by incorporating the same in a bill of exceptions, except when another mode of authentication is provided by law."

[10] See section 264, *post*, for a discussion of the rule, and the history of the practice prior to its adoption.

Section 1246 of the California Penal Code prescribes the record on appeal in criminal cases. Under this section "the notice of appeal, the record (by which it is presumed is meant the minutes of the court), and all bills of exceptions," constitute the record on appeal.

Section 1176 of the same code excepts written instructions, and such as have been taken down by the reporter from the bill of exceptions, and makes them a part of the judgment-roll by indorsement by the trial judge, but otherwise they must be incorporated in the bill of exceptions. People v. Sing Yow, 145 Cal. 1, 78 Pac. 235. It thus appears that no provision is made, as in the Code of Civil Procedure, for taking up the motion, the proceedings and the order. It has therefore been held that rule XXIX covers these matters. People v. Ruiz, 144 Cal. 251, 77 Pac. 907 (see Chief Justice Beatty's dissenting opinion); People v. Sing Yow, 145 Cal. 1, 78 Pac. 235; People v. Durand, 1 Cal. App. 71, 81 Pac. 672; People v. Frank, 2 Cal. App. 283, 83 Pac. 578; People v. Silvers, 6 Cal. App. 69, 92 Pac. 506; People v. Russo, 8 Cal. App. 636, 97 Pac. 700.

[11] Bodley v. Ferguson, 25 Cal. 584; Kelly v. Larkin, 47 Cal. 58; Caulfield v. Doe, 45 Cal. 221; People v. Doe, 45 Cal. 43; and see Thompson v. Patterson, 54 Cal. 542.

[12] Coombs v. Hibberd, 45 Cal. 174.

[13] Williams v. Harter, 121 Cal. 47, 53 Pac. 405.

§ 168a. The Record Completed Before the Motion is Heard is the Sole Record upon Which the Order can be Reviewed on Appeal.—As heretofore shown, unless the motion for a new trial is made on the minutes of the court, it is essential that a statement or bill of exceptions should be previously prepared, presented, settled, engrossed and certified, in accordance with the provisions of the Code of Civil Procedure. In the absence of such a statement or bill of exceptions, the trial court is not in a position to review its own action as to the errors of law alleged, or as to the question whether the verdict or other decision is justified by the evidence or not.[1] Nor is the appellate court in any better position with respect to such questions than the trial court was without the same record.[2] The penalty for failure or neglect of the moving party to prepare such a statement or bill of exceptions is a denial of the motion. So the penalty for the failure of the appellant to prepare the transcript on appeal in the manner prescribed in sections 952 and 661 of the Code of Civil Procedure is an affirmance of the order denying a new trial and a reversal of the order granting it; the penalty, in either event, being made to fall upon the party at fault.[3]

For it is the exclusive privilege of the losing party, as well as his duty, to prepare the record to be used upon the review of the order or the decision complained of. The successful party has no part in the preparation of this record, beyond the privilege of offering amendments. These amendments are limited to the points made on behalf of the losing party, and do not extend to the suggestion of errors to the supposed prejudice of the party who won the case. Such errors are immaterial, and cannot affect the question as to whether the party who lost should in fact have won. It matters not whether the motion is denied or granted. The record on appeal is the same, and errors to the supposed prejudice of the successful party are no more material after the motion is granted than before. If, therefore, the successful party at the trial desires to appeal from the order granting a new trial, he must do so upon the record upon which the motion is heard, just as the losing party would have had to do if

[1] See section 134, *ante*.

[2] See Strathern v. Dakin, 63 Cal. 478; Larkin v. Larkin, 76 Cal. 323, 18 Pac. 396; Pereira v. City Savings Bank, 128 Cal. 45, 60 Pac. 524.

[3] See section 134, *ante*, and see cases cited in last note.

the motion had been denied. The appellant in neither case is authorized to add to or subtract from the record which was before the court at the hearing of the motion. The appellate court is called upon to review the order granting or denying the motion for a new trial, upon the specifications contained in the statement on motion for a new trial, and not to determine whether the plaintiff is entitled to the relief sought. The sole object of the appeal is to ascertain whether the trial court erred in granting the motion (or denying it, as the case may be), on the record made up by the moving party, in respect of any or all of the grounds stated in the specifications presented by the moving party. There can be no other record on the appeal, for it is the only record presented to the trial court. And there can be no other specifications, for a like reason.[2a]

§ 168b. Miscellaneous.—The order may be amended at any time to conform to the facts, under the inherent power of the court to make its records speak the truth; and when so amended the second order takes the place of the first for all purposes, and if an appeal is taken is the order appealed from.[1] The amendment can be made only in the trial court, and never in the appellate court.[2] Aside from the power to amend the order so as to make it speak the truth, it is believed that the power of amendment does not exist.[3]

No provision is made for notice of the making of a new trial order, and it is the duty of the attorney for the moving party to ascertain the entry of such an order.[4]

[2a] See Byxbee v. Dewey, 128 Cal. 322, 60 Pac. 847.

[1] Garoutte v. Haley, 104 Cal. 497, 38 Pac. 194.

[2] Clare v. Sacramento etc. Co., 122 Cal. 504, 55 Pac. 326.

[3] See section 199, *post*.

[4] Galbreath v. Lowe, 142 Cal. 295, 75 Pac. 831; Vinson v. Los Angeles etc. Ry. Co., 147 Cal. 479, 82 Pac. 53; Bell v. Staacke, 148 Cal. 404, 83 Pac. 245.

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